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

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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

March 21, 2021

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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First constitutional tax case: why was it rejected and how are constitutional cases

litigated in the UAE?

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Over the years, constitutional appeals have been filed before the Constitutional Circuit of the Federal Supreme Court for a plethora of matters, with the first constitutional judgement having been issued on 29 November 1973.

Most recently – in rough figures – four constitutional appeals were filed in 2019, two in 2018, one in 2017 and 2016, two in 2015, five in 2014, and twelve were filed in 2013.

First Constitutional Tax Case

On 1 March 2020, Emirati news outlets published details about the rejection of a taxpayer's constitutional appeal against the 'pay now, argue later' provision of the Tax Procedures Law.

The constitutional appeal was rejected on a procedural basis. Meaning that the process in filing the constitutional appeal lacked the requirements by law for the Constitutional Circuit of the Federal Supreme Court to accept hearing the constitutional appeal, so that it can rule on its context.

At around the same time as the tax constitutional case judgement was issued, another Constitutional Circuit judgement regarding the seizure of assets was accepted, and a judgement favourable to the person who filed the constitutional appeal was issued by the Constitutional Circuit.

Why was one rejected and another accepted? And how are constitutional lawsuits in the UAE litigated?

The Constitutional Circuit

Constitutional cases are subject to the jurisdiction of the Constitutional Circuit of the Federal Supreme Court only,

which comprises of the Chief Justice, four other judges, and one alternate judge.

The Constitutional Circuit has authority to rule on the constitutionality of federal or local laws or provisions therein, and a judgement of the Constitutional Circuit is final and binding pursuant to the powers granted to it in Article 99 and 100 of the Constitution, and Article 33 of the Federal Supreme Court Law No. 10/1973,

Filing a constitutional case directly before the Constitutional Circuit is a right restricted to the Federal and local government agencies only.

Otherwise, if a private litigant intends on challenging the constitutionality of a law or provision of law, they may only do so during an on-going substantive case.

The litigant must petition the judge, who is overseeing the substantive case, that a law or a provision in the law is unconstitutional and request leave to file a constitutional appeal before the Constitutional Circuit.

If the judge accepts the petition, the judge then stays the proceedings of the substantive case and grants the litigant leave to file a constitutional appeal before the Constitutional Circuit within a certain time period as set by Article 58 of the Federal Supreme Court Law.

Alternatively, the substantive case judge may of their own accord find that the law or provision is unconstitutional and refer it to the Constitutional Circuit for review.

In any case, the constitutional appeal would not be a subordinate case, but rather a case that is separate from the substantive case because it – the constitutional appeal – deals with a subject that differs from the merits of the substantive case.

The litigant that submits the constitutional appeal then argues their case before the Constitutional Circuit, and the law or provision of law that is being argued as unconstitutional is generally defended by the Federal Public Prosecutor or the State Disputes Department of the Ministry of Justice.

The other litigant(s) of the substantive case, are not a party in the constitutional appeal.

Rejection of the Constitutional Tax Case

According to the news outlets, the constitutional appeal was lodged to argue that the 'pay now, argue later' rule in Article 30(2) of the Tax Procedures Law was unconstitutional on the basis that it deprives taxpayers of the right to petition tax issues before the courts unless the taxes and penalties are paid.

The Federal Public Prosecutor rebutted the constitutional appeal on the basis that the judge overseeing the substantive case had not granted leave for the litigant to file the constitutional appeal.

The Constitutional Circuit accepted the Federal Public Prosecutor's rebuttal and rejected the constitutional appeal on the basis that it had been filed without evidencing permission from the substantive case judge to do so.

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Qatar Financial Center Tribunal Acknowledges COVID-19 as Hardship Event

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On 10 August 2020, the Regulatory Tribunal of the Qatar Financial Center issued a decision whereby it recognized COVID-19 as a hardship event in an appeal by a former director (and Senior Executive Function) of a regulated entity against penalties of USD 50,000 for breaches of the AML/CFT and various general regulatory contraventions.

The financial penalty was commuted on grounds of financial hardship and specifically the exceptional situation which the appellant is/was facing due to the COVID-19 pandemic.

The Regulatory Tribunal of the QFC follows English Common Law and is part of the judicial system within an international financial center.

Comparatively, the Abu Dhabi Global Market and the Dubai International Financial Center also operate English Common Law courts and tribunals, with overseeing regulatory bodies such as the ADGM's Financial Services Regulatory Authority and the DIFC's Dubai Financial Services Authority.

On 12 December 2019, the QFC Regulatory Authority issued its Decision Notice to the appellant that the appellant breached Principles 2 (acting with due skill, care and diligence) and 4 (dealing with the Regulatory Authority in an open and cooperative manner), and that the contraventions fall into two areas:

- AML/CFT contraventions: the QFC Regulatory Authority decided that the procedures were entirely inadequate to

properly identify money laundering risks. For example, its risk assessment procedures did not ensure that sources of wealth and sources of funds were properly identified. Many high-risk countries were wrongly rated as lower risk. More generally, the company had not adopted the necessary AML risk assessment and mitigation procedures as is required under the relevant regulatory provisions. Given his senior management position, these regulatory provisions required the appellant to ensure that the company's policies, procedures, systems and controls were adequate. In addition, in July 2014, he was put on notice that there were AML deficiencies. Finally, he personally authorized transactions which should have raised serious questions, and which required substantial additional due diligence.

- General regulatory contraventions: these are based on requirements imposed by the Regulatory Authority, agreed by the company but not properly implemented. The appellant was aware of the requirements and the timescale, and was aware, or should have been aware, of the failures. Many of the concerns related to the company's place within an unusual corporate structure and how to ensure its continued solvency and capital adequacy.

As to the prohibition, the appellant contended that the ban is wholly punitive, extreme and disproportionate. He argued that he had not worked in Qatar since the summer of 2015, and the ban would (effectively) preclude him from finding regulated employment in the UK for a further 3 years.

As to the financial penalty, the appellant argued that he had been unable to find a regulated job in the UK, and lost money investing in the company, so that a USD 50,000 fine is unjust. The appropriate penalty, he submits, is a private warning for his actions, with no ban, and no monetary fine.

The Tribunal found that any prohibition by a recognized financial regulator will inhibit the job prospects of the subject (potentially) anywhere, and certainly in the UK. But that cannot detract from the justification for a prohibition, if otherwise justified. Even accepting that the part which the appellant played was in some respects relatively limited, these matters involved how the firm dealt with AML and capital adequacy, both very significant matters. The Tribunal found that the prohibition imposed is proportionate and fully justified.

The Tribunal was told that the policy of the QFC Regulatory Authority is that it will not (except in exceptional cases) impose a penalty that will lead to bankruptcy. This is in keeping with what the Tribunal understood to be a general principle that a regulatory penalty should not be imposed on an individual which the individual is unable to pay. Sometimes, that principle can be satisfied by allowing payments by instalments. But the commensurate principle is that an individual seeking what amounts to an exceptional dispensation must establish financial hardship by making full and frank financial disclosure of his or her necessary outgoings, and the assets available to meet those outgoings, with copies of supporting documentation.

The Tribunal concluded that the QFC Regulatory Authority in effect accepts that the appellant is unable to pay the penalty at the present time, and found that in normal circumstances, it might be reasonable to start payments at the end of the year, with a 3 year payment period, as the QFC Regulatory Authority had suggested.

But the Tribunal considered that the present circumstances concerning the appellant are far from normal and that it is not necessary to spell out the effects of the COVID-19 pandemic.

The Tribunal took into account that it is entirely reasonable

to suppose that the appellant will find it difficult to obtain employment for the time being, particularly in the financial services industry given the prohibition, and the Tribunal also considered evidence that the appellant's wife is presently unable to obtain employment and that they have a young son.

The Tribunal considered that this is an exceptional case in which financial hardship is established – considering in particular the exceptional effect on him of the COVID-19 pandemic in that regard. The Tribunal found that any period fixed by the Tribunal for time to pay would leave this penalty hanging over the appellant and his family for an unreasonably lengthy time. In the circumstances, the Tribunal decided that the penalty should be commuted in whole.

Case: *Russell v. QFCRA [2020] QIC (RT) 2*

Please contact us for more details or assistance in this matter.

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UAE Supreme Court extends time limit to challenge decisions of the tax dispute committees

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In a precedent-setting judgment that Wasel & Wasel acted as counsel on, the UAE Federal Supreme Court ruled on provisions governing notifications of decisions taken by the tax dispute resolution committees, and their effect on the time limitation to challenge such decisions before the Federal Primary Court.

The Supreme Court found that an objection against a tax dispute resolution committee that was filed with the Federal Primary Court almost four months after its issuance, rather than within twenty weekdays, was valid because proper notification of the decision had never taken place.

In December 2020, the Federal Supreme Court issued its judgment ordering that a decision of any of the tax dispute resolution committees does not trigger the time limit to challenge the decision before the Federal Primary Court unless notification of the decision is compliant with the general civil litigation procedures – particularly, Article 7 of the Executive Regulations of the Civil Procedures Law which details how and to whom notification should be made.

The significance of this judgment is that Article 7 of the Executive Regulations of the Civil Procedures Law is located in Chapter 1 of Book 1 of the Civil Procedures Law, and Book 1 is titled “Litigation before Courts”.

As a general matter, the tax dispute resolution committees are administrative committees headed by a judge – but are not courts or judicial agencies.

Hence, for the Supreme Court to apply the provisions of the Civil Procedures Law that govern court notifications to the procedures of the tax dispute resolution committees creates much-awaited clarification as to how and when notifications of decisions by the committees are considered valid and compliant to commence the time limit of twenty weekdays to challenge the decision before the Federal Primary Court.

The Federal Supreme Court found that the time limit only commences once Article 7 of the Executive Regulations of the Civil Procedures Law is fulfilled, and not prior, even if the decision is communicated to the address on record with the tax dispute resolution committee.

Generally, any person may submit an application to the Federal Tax Authority to reconsider any of its decisions issued in connection to him or her, in whole or in part, within twenty weekdays of the aggrieved person being notified of the decision.

Subsequently, if the aggrieved person wishes to contest the FTA's decision on the reconsideration application, the next step would be to submit an objection against the FTA's decision to the tax dispute resolution committees of Abu Dhabi, Dubai or Sharjah, depending on the domicile of the objector.

If the FTA or the objector are unsatisfied with all or part of the tax dispute resolution committee decision, either of them may challenge the decision before the Federal Primary Court within twenty weekdays "*…from the date of notification of the objector thereof*" according to Article 33(1) of the Tax Procedures Law.

In this landmark judgement, the Federal Supreme Court reasoned that in light of the Tax Procedures Law and its Executive Regulations not specifying to whom the notification should be made, the provisions of Article 7 of the Executive Regulations of the Civil Procedures Law must be relied upon to confirm whether or not notification was made in a procedurally compliant manner to trigger the twenty weekdays for the challenge to be made before the Federal Primary Court.

The judgment is quite significant in light of a significant number of tax disputes being lost by the taxpayers for falling outside the time limit in the course of the following;

- prior judgments by the Federal Primary and Appeals Courts rejecting challenges against decisions of the tax dispute resolution committees for falling outside the time limit;
- rejections by the tax dispute resolution committees of objections against reconsideration decisions for falling outside the time limit; and
- rejections by the FTA of reconsideration applications against FTA decisions for falling outside the time limit.

In this landmark judgment, the challenge against the tax dispute resolution committee decision was brought before the Federal Primary Court four months after the decision had been issued – instead of within twenty weekdays – and both the Federal Primary Court and the Federal Appeals Court rejected the challenge for falling outside the time limit.

The Federal Supreme Court overturned the Federal Appeals and Primary Court judgments, and instead ruled that the time limit to challenge the committee decision had not been triggered until the provisions of Article 7 of the Executive Regulations of the Civil Procedures Law had been complied with and ordered that the challenge against the committee decision which was filed with the Federal Primary Court four months after the issuance of the committee decision was valid and within the time limit given that the twenty weekday time limit was never triggered due to lack of proper and compliant notification.

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50 Enforcement Updates Under the New UAE Civil Procedure Regulations

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

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

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

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

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

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

6. Explicitly provide for the possibility of electronic delegation.

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

8. Granting the execution judge the power to initiate

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

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

a. Order of preference among convicts.

b. Postponement of execution for any reason.

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

d. Acceptance of guarantee.

e. Travel ban.

f. Seize and arrest order.

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

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

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

judgments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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TDRCs from 2019 – 2020

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

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

After submitting a reconsideration application to the Federal Tax Authority ("FTA") requesting a review of an FTA respective

decision, the person submitting the reconsideration application may subsequently file an objection to the competent TDRC against the FTA's response to the reconsideration application, or lack thereof.

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

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

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

Trend 1: Speed of TDRC Ruling Issuance

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

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

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

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

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

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

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

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

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

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

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

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Landmark Ruling Cancels Tax Audit Penalties

March 21, 2021

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

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

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

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

Audit Penalties Process

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

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

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

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

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

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

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

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

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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