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

March 21, 2021

TDRCs from 2019 – 2020

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

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

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

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

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

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

Trend 1: Speed of TDRC Ruling Issuance

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

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

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

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

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

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

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

The Tax Procedures Law grants the FTA 20 working days to decide on a reconsideration application and notify the applicant within 5 working days of making its decision, but

the law is then silent on whether no response from the FTA is to be deemed a rejection or acceptance of the reconsideration application by the FTA.

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

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

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

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Landmark Ruling Cancels Tax

Audit Penalties

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

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

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

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

Audit Penalties Process

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

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

- Fixed penalty of AED 3,000 or AED 5,000 depending on

whether a violation is a first-time or repeat violation.

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

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

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

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

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

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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Affect of Recent UAE Bankruptcy Legislation on Businesses Facing Cash Flow Difficulties

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In March of 2019, an Emirati limited liability company (the "LLC") had restructured its debts under the Bankruptcy Law; Federal Decree-Law No. 9 of 2016 which was first published in the Official Gazette on 29 September 2016 and came into force on 29 December 2016.

Under Chapter 4 of the Bankruptcy Law the Bankruptcy Circuit of the Abu Dhabi Primary Court oversaw the restructuring of the LLC under which had been operating in the contracting industry since 2008 and had debts exceeding eighteen times its paid-up capital.

This new judgment reflects the utility of the options available under the Bankruptcy Law and provides a real case example on how it could assist businesses facing difficulties because of cash flow issues without prejudice to the rights of creditors, or business owners.

The Bankruptcy Law provides businesses with cash flow issues an opportunity to safeguard their business from creditors until they can get back on their feet through various avenues, explained below, which at the same time do not prejudice the rights of creditors.

As opposed to liquidation – the procedure more commonly applied in the United Arab Emirates – bankruptcy is not aimed at concluding or expiring a business, on the contrary, it is aimed at providing an opportunity for the business to be restored as a productive member of the economy and to reutilize assets for continued production; notwithstanding that bankruptcy can be treated as a double-edged sword to penalize fraudulent activity of debtors.

Moreover, businesses can utilize the bankruptcy procedures to assist with other potential financial rescue methods. For example, with the rise of litigation funding in the region, distressed businesses can also augment their revitalization process by obtaining financial assistance in pursuing their

own outstanding debts whilst in the period of restructuring or preventive composition.

Overview

The Bankruptcy Law aims at financially troubled companies and protecting the assets of creditors and shareholders, thus protecting economic activity and the investment environment in general.

In the first successful bankruptcy restructuring case, the Court referenced Article 67(1) of the Bankruptcy Law which states that:

"The procedures stated shall regulate the restructuring of the debtor, if possible, by helping the latter to implement the plan of restructuring of his business."

A bankruptcy suit may be filed by:

1. A debtor if they cease to pay their debts on maturities of more than 30 days consecutive business days as a result of his difficult financial position or in case of insolvency;

2. A creditor or a group of creditors with ordinary debt of not less than AED (100,000) one hundred thousand may apply to the Court to commence bankruptcy procedures against the debtor, if the creditor(s) had already warned the debtor in writing to settle the due debt and the latter did not settle within (30) thirty consecutive working days from the date of notification thereof; or

3. The Public Prosecution may, for public interest requirements, request the Court to commence bankruptcy procedures, provided that it proves that the debtor is insolvent.

These procedures governed by the Bankruptcy Law regulate two possible outcomes based on the financial health of the company (1) restructuring of the debtor, if possible, by assisting

implementation of the restructuring plan, or (2) declaring the debtor insolvent, by assisting in the commencement of a fair liquidation of assets to fulfill creditor obligations.

There are four methods of insolvency assistance under the Bankruptcy Law; preventive composition which permits the Court to oversee the rescue of a business; restructuring with Court oversight due to insolvency; liquidation due to insolvency; and obtaining new financing (with or without guarantee) in preventive composition or restructuring procedures.

The Bankruptcy law comprises of 231 Articles and is quite elaborate on the processes and procedures, penalties and obligations, and tasks of those that may be involved. However, business owners and managers must act with caution as Chapter 6 of the Bankruptcy Law provides for a set of scenarios in which the board of directors, managers, liquidators, guardians or experts may be imprisoned and fined if their actions cause damage creditors' rights. For example, Article 198 of the Bankruptcy Law states that a company's board members, managers, and liquidators shall be punished by imprisonment for a period not exceeding five years and a fine not exceeding AED (1,000,000) one million, if they are committed of – amongst other things – hiding, destroying, or changing the company's books with intent to prejudice creditors, or if they embezzle part of the company's assets.

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

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

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

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

The Decisions regulate the following:

- Requests for application of e-litigation procedures instead of standard brick-and-mortar litigation.
- Electronic filing and electronic signing of pleadings and applications.
- Liaising with the case management office electronically.
- Electronic summons and notifications of parties.
- Virtual attendance of litigants, their representatives, witnesses, and experts.
- Virtual hearings and electronic minutes of the hearings.
- Confirmation of agreements and consents during virtual hearings.
- Submission of evidence and validation of evidence in virtual hearings.
- Appointment and reliance on translators for litigants for e-litigation procedures.

- Electronic filing of petition order requests, and petition order e-issuance.
- Electronic issuance of writs of execution (enforcement orders).
- Digital judgments (with digital signature by the presiding judge or Head of the respective circuit).

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

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

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

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

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

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

March 21, 2021

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

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

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

With the Executive Order in place and the newest form of influencers attempting to deal with the impending

circumstances, the question lies, what can we learn from the wording of the Executive Order and what will this mean for TikTok influencers across the globe?

The Wording of the Order

Section 1(a) of the Executive Order states:

"The following actions shall be prohibited beginning 45 days after the date of this order, to the extent permitted under applicable law: any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd. (a.k.a. Zìjié Tiàodòng), Beijing, China, or its subsidiaries, in which any such company has any interest."

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

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

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

'Person'

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

States” is prohibited.

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

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

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

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

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

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

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

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

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

(2) Any person actually within the United States;

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

(4) Any corporation, partnership, association, or other organization, wherever organized or doing business, which is

owned or controlled by any person or persons specified in paragraphs (a)(1) or (a)(3) of this section.”

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

‘Property’

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

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

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

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

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

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

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

ByteDance and TikTok.

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

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

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

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

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

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

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

If the contracts can no longer be complied with, parties will

also have to review their force majeure provisions, lacking any thereof the parties must seek guidance on whether foreign change in law constitutes a force majeure event.

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

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

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

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In a recent judgment by the Abu Dhabi Cassation Court, the

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

Facts

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

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

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

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

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

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

Issues

The Abu Dhabi Cassation Court determined that the courts had jurisdiction to hear the case for two reasons; the first being

that the subcontractor's signatory to the contract did not have authority to bind the subcontractor to an arbitration agreement.

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

In this, the Abu Dhabi Cassation Court stated that:

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

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

Deductively and arguably, the Cassation Court put forth a three-prong test to determine whether a litigant would be

deemed to have waived their jurisdictional arguments that are reliant on an arbitration agreement.

The three prongs may be considered as follows:

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

2. The extent that the party challenging jurisdiction becomes engaged in the court expert procedures.

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

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

Significance

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

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

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

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

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

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Arbitration Filing in the UAE Courts: Developments and Technology

March 21, 2021

The United Arab Emirates Arbitration Law (Federal Law No. 6 of 2018) came into effect in June of 2018 after being published in the Federal Official Gazette number 630 on the 15th of May, 2018. Since then, the UAE courts have been implementing internal processes – both administrative and technological – to comply with the Arbitration Law.

In October of 2018, the Dubai Courts website was updated to include an option/button titled (on the English version of the website): “Order on petition, arbitration”. The option can be viewed in the Case Registration webpage. The term seems to be literally translated from (أمر على عريضة، تحكيم); the service is otherwise known generally as a petition/court petition.

The service is listed under the categories of services provided by the Dubai Court of Appeal. This reflects the practical application of Article 55 of the UAE Arbitration Law which states that:

A party looking to enforce an arbitral award shall submit a request for its confirmation and enforcement with the chief justice of the Court [of Appeal].

A court petition in the United Arab Emirates requires the competent judge to issue an order in a procedural sense without the parties having to go through a trial. In issuing such orders the judge acts in an administrative capacity as opposed to a judicial capacity; in Arabic, this capacity is known as “صفة ولائية”.

The order issued is both that of confirmation and enforcement simultaneously. Enforcement measures would then be followed up with the Enforcement Judge to commence enforcement procedures.

A court petition is submitted when a party requires the court to issue an order and is – as a general matter – governed by Article 140 of the Civil Procedures Law requiring a party to submit a petition with a request directed to the authorized judge or the circuit director who examines the request/petition and must issue the order the next day.

Notwithstanding Article 140 of the Civil Procedures Law, Article 56(3) of the Arbitration Law provides the competent judge with a sixty-day limit to issue the order. The UAE judiciary differentiates between what is loosely translated as a procedural time-bar (مدة تنظيمية) and an obligatory time-bar

(مـدة جزائيـة). The former can be extended, the latter cannot, which in this case poses the risk that the sixty-day limit could be extended.

To submit the court petition request through the Dubai Court web portal, the applicant must append the requisites outlined in Article 55 of the UAE Arbitration Law which are:

1. The original award or a certified copy thereof.
2. A copy of the Arbitration Agreement.
3. An Arabic translation of the arbitral award, attested by a competent authority, if the award is not issued in Arabic.
4. A copy of the minutes of deposit of the award in Court.

With respect to Article 55(4), in a practical sense, if the arbitrator was appointed by the court the minutes of deposit are obtained from the court but, as we understand, if the arbitrator was appointed by another competent body (e.g. Dubai International Arbitration Center), that body issues the respective minutes of deposit.

As a general matter, the Emirates of Dubai Courts, Abu Dhabi, and Ras Al Khaimah have independent court systems. The remainder of the Emirates; Ajman, Fujairah, Sharjah and Umm Al Quwain, utilize the Federal Court systems.

The Abu Dhabi Courts have not yet (as of March 2019) updated their electronic systems to provide for direct submission of a petition order for confirmation of arbitral awards. The current electronic e-filing system necessitate that a primary court judgement be present in the system for the user to be able to lodge a request respective of that primary court judgement with the Appeals Court (the competent court for confirmation of arbitral awards).

Currently, the Abu Dhabi Courts require the party to submit the arbitral award manually to the case management office for it to be registered as a primary court judgement in the

electronic system. Subsequently, the user can select the registered arbitral award in the electronic filing system (which would have been registered as a primary court judgement) to lodge with the Abu Dhabi Appeals Court for confirmation.

The Federal Courts have recently developed their electronic portal, but its activation is on-going. Until it becomes fully operational, parties must submit the petition order to confirm an arbitral award manually.

It is clear that he new Arbitration Law is being integrated operationally into the electronic court systems. In other words, the past obstacles of re-litigating the merits of a dispute albeit a final arbitral award has been issued are now foregone with the expediency of the various courts' online procedures and seamless process of confirming and enforcing arbitral awards.

Towards Digital Dispute Resolution

With the increase in technological advancement in arbitral proceedings and the court systems, it is not farfetched that both arbitral and court proceedings would manifest into a completely digital process soon.

For example, the Dutch Foundation for Transport and Maritime Arbitration Rotterdam-Amsterdam (previously TAMARA, now named UNUM) developed e-arbitration facilities early in 2008 and continues to develop those facilities whilst developing rules on e-arbitration;

Provision 4.2 of the UNUM arbitration rules states that:

"Unless the parties explicitly agree otherwise, the arbitration will be settled via an online platform ("e-arbitration")."

Another example is the Russian Arbitration Association Online

Rules issued on 1 October 2015 developed by the RRA which has created an online arbitration system for facilitating the resolution of commercial disputes through means of technology. The RAA administers online arbitrations under its own online arbitration rules of 2015.

On the same date on 1 October 2015, the China Guangzhou Arbitration Commission issued its first Online Arbitration Rules, which was the first set of arbitral rules in Mainland China with specific reference to how an arbitration can be run online.

Moreover, the UAE recently introduced legislation permitting e-trials.

Smart e-Trials were first introduced on 18 September 2017 when His Highness Sheikh Khalifa Bin Zayed Al Nahyan, President of the UAE, issued Federal Decree No. 10 of 2017 (the "e-Trial Law").

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

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

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

Article 334, regarding 'Appearance and Trial Procedures', states that "*All the provisions concerning the collection of fees, registry, declaration, submission of documents,*

appearance, publicity, pleading, hearing of witnesses, questioning, deliberation, issuance of judgments, submission of appeals and execution through the procedures thereof set forth under the present Law and its amendments shall be deemed valid if carried out totally or partially trough the Remote Communication Technology."

Additionally, on 27 March 2019, Ministerial Decisions 260 and 259 of 2019 were issued to regulate the e-trial procedures pursuant to e-Trial Law. Decision 260 regulates electronic proceedings in civil procedures, whilst 259 does so for criminal procedures. The Decisions regulate virtual attendance, digital sharing of files and pleadings, virtual hearings, appointment of experts via electronic communication, and digital judgements (with digital signature by the presiding judge or Head of the respective circuit).

Summary

1. The UAE courts are digitizing to the point where most (if not all) submissions pre-trial and during the course of the trial are electronic.
2. Arbitration procedures and centers are also developing to e-arbitration capacities.
3. Advocacy can now be done via distance communication through e-trial facilities.

Looking at these developments hand-in-hand, the UAE judicial system is on par and in advancement of international judicial innovations, which in turn results in expediency in arbitration matters and procedures.

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

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

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

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

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

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

penalties.

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

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

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

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

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

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

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

The Penalties in Detail

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

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

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

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

Nonetheless, there are also additional penalties that have

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

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

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

Knowledge of Tax Legislation

In a short period of time, the UAE witnessed several federal legislations (laws, legislative decrees, cabinet decisions, ministerial decrees, all of which comprise new tax legislation). This legislation is new to the community and the Emirati judiciary and came in succession rapidly. Moreover, there have been more than 20 guidelines and 10 public clarifications issued by the FTA.

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

This axiom is significant for taxable persons who see a voluntary disclosure triggered due to new guidelines or public

clarifications issued by the FTA, private clarifications provided, or errors that stem from the organizational compliance efforts that a taxable person puts in place to comply with the tax reforms.

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

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

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

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

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

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

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

Example of past cases on collective employment disputes

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

In 2002, the Federal Supreme Court rejected a claim by 18 employees on the basis that it was a joindering of 18 independent claims and did not fulfill the requirements under

Article 154 of the UAE Labor Law (Employment Law) governing collective employment disputes.

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

2018 updates; thresholds, class actions, and unionization

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

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

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

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

Force majeure and the dangers of making the argument

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

A critical example would be large enterprises (such as banks, airlines, or real estate developers) who publicly announce

annual revenues in billions of Dirhams, in which case an overseeing conciliator, arbitrator or judge would question whether adequate human resource provisions were made against potential business disruption in light of the magnitude of revenues generated.

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

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

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

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

necessitates that a company must have sufficient capital to achieve the purpose of its incorporation.

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

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

Procedure for collective employment disputes

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

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

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

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

the Center to mediate the dispute.

If mediation efforts by the Center are not accepted by the parties within ten days from the date the Center is notified of the request to mediate, the Center must then refer the dispute to the respective conciliation committee.

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

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

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

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