

Piercing the Corporate Veil in the UAE: Suing and Enforcing against LLC Shareholders, Directors and Managers

March 21, 2021

The volatile mass number of persons establishing, liquidating, or not renewing limited liability companies (LLCs) in the United Arab Emirates causes a plethora of claims being met with enforceability issues – particularly due to lack of assets.

Creditors take action against debtor LLCs to find that the latter have expired licenses, transferred assets to a new LLC, or distributed dividends leaving no assets in the creditor LLC.

The frustration that debtors face in these circumstances is agonizing – resulting from years of litigating before the courts or arbitral tribunals, only to find enforcement is to no avail.

However, the court systems are not without resolve in these circumstances.

Here we provide a brief palatable overview of when liability may not be limited, and the evidence and procedure required to trigger the courts into action.

When is liability not limited?

Most of the legislative provisions have been discussed in

various articles issued by firms in the UAE over time, but for clarity's sake, this article is segmented into a palatable breakdown of circumstances where personal liability can arise, and at the end of this article, relevant cases and provisions of the law have been provided.

Shareholders (whom one of, if not all, are usually managers or board members) are protected by the limitation of liability, i.e. the corporate veil of an LLC.

In brief; the shareholders, board members, or managers who operate the LLC, benefit from it, but as a general matter an LLC's creditor is limited to action against the LLC itself, not those operating and benefiting (unless there is a financial instrument triggering criminal liability).

There are, however, certain actions that if taken by the shareholder(s), board member(s), or manager(s) would hold them liable in their personal capacity, either jointly or severally.

Following is a brief summary of when such circumstances could be.

Shareholders can be held personally liable if they had:

- Not contributed the disclosed share capital in cash.
- Overvalued contributions of shares in-kind.
- Increased number of shareholders without notifying the authorities.
- Identified the LLC as another legal form.

Board members and/or managers can be held personally liable if they had:

- Not registered the Articles of Association or any amendments thereto with the authorities.
- Distributed fictitious profits to shareholders.
- Distributed to the shareholders or other profits or

interests in contravention with the law.

- In case the company is in bankruptcy and it was found that the company's assets are not sufficient to meet at least (20%) twenty percent of its debts.

Managers can be held personally liable if they fail to clearly disclose that the company is an LLC by name, i.e. by explicitly stating after the name of the company the expression "Limited Liability Company" or in short "LLC". In the event of a sole proprietorship, the name of the company shall be accompanied by the name of its owner and followed by the expression "sole proprietorship with limited liability".

Evidence

The more important, follow-up question, to the above analysis is to do with evidence.

Most, if not all, of the circumstances mentioned above, are either undisclosed to the public and/or require an uphill battle to prove without tangible evidence.

The UAE courts have powers to issue subpoena orders against defendants or third parties to provide witness statements and/or disclose documents that would assist in the plaintiffs' claims.

A court may issue a subpoena order for the disclosure of the documents such as general assembly minutes of the meeting, bank deposits at the time of establishment (to evidence share capital deposits), official documents (such as trade licenses, articles of association, etc.).

Bearing in mind that the evidential threshold for the court to issue a subpoena order, and such requests are usually to no avail.

Alternatively, plaintiffs may rely on experts to act as mediums in obtaining documentary evidence.

There is no explicit provision in the law that identifies an expert's permissible actions, but the courts have the authority to state the expert's duties and the urgent measures he is allowed to take.

In practice, expert duties may include investigation of documents and devices at the plaintiff's, or any other third party's location, in addition to valuation, obtaining witness statements, etc.

Moreover, the plaintiff and their counsel may accompany the expert during his investigation of the defendant's (or any other third party's) premises, documents, or devices.

Conclusively

The reality is; it is not farfetched that LLCs have issues with miscalculated profit distribution or paid-up capital, or merely not maintaining enough assets to meet at least 20% of their debts.

Any of these missteps could trigger personal liability on the shareholder, board member, or manager, piercing the corporate veil and allowing plaintiffs to find recourse for their claims/judgments/awards.

Sample Cases

Dubai Cassation Court 239/2008: It was decided that the non-availability of the substantive elements of the company would lead to its nullity – and any interested party may claim this nullity and the court would automatically consider it.

Federal Supreme Court 669/2014: Shareholders in an LLC are not personally liable for any of the debts of the company, other than for the amount already invested in the company; creditors cannot seize the shareholders' personal assets as long as the shareholder(s) was acting on behalf of the company within the limits of their authority.

Federal Supreme Court 811/2004: Creditors have the right to pursue a shareholder's personal assets and hold him personally accountable for an LLC's debts once it was proven that he has exploited the financial independence of the LLC's patrimony, limited from its shareholders' patrimony, as a mean and cover to his apparent fraudulent acts against the LLC's creditors.

Federal Supreme Court 167/2001: Non-publication of the registration documents of a limited liability company has, in terms of the corporate veil and its standing towards the shareholders, the same effect as non-registration.

Commercial Companies Law No. 2 of 2015 ("CCL")

Articles 8 and 9 of the CCL: A company is a contract under which two or more persons are committed to participating in an economic enterprise with the objective of profit realization by contributing a share in capital or work and dividing between themselves the profit or loss resulting from the enterprise. Any company which does not adopt one of the legal forms shall be considered null and void, and the persons concluding contracts in its name shall be individually and jointly liable for the obligations arising from such contracts.

Article 15 of the CCL: The managers, or directors of the company, as the case may be, shall be jointly liable to indemnify the damage suffered by the company, the shareholders or third parties due to the non-registration of the Articles of Association or any amendments thereto with the competent authority.

Article 16 of the CCL: If the invalidity of the company is ruled based on a third-party request, the company shall be deemed void ab initio as against such third party. Persons who have contracted with such third party in the name of the company shall be personally and jointly liable for the obligations arising from such Contract.

Article 30 of the CCL: No fictitious profits may be distributed to the partners or shareholders. The board of directors or any similar body shall be liable towards the partners or shareholders and the creditors of the company for such procedure.

Article 72: A Limited Liability Company shall have a name derived from its objective or from the name (s) of one or more partners, provided that name of the company shall be followed by the expression "Limited Liability Company" or in short "LLC". In the event of a sole proprietorship, the name of the company shall be accompanied with the name of its owner and followed by the expression "sole proprietorship with limited liability". If the manager (or managers) contravene the provision of this article, such manager (managers) shall be jointly liable, in their own assets, for the obligations of the company and, as applicable, for the compensations.

Article 75 of the CCL: If at any time upon the incorporation of the company, the number of the partners exceeds the maximum limit of 50, the manager or managers, as the case may be, shall notify the competent authority within thirty (30) days from the date of such increase. Other than in the event of transfer of title to the share of a partner by way of inheritance or court judgment, the company shall adjust its position within three months from the date of the notice, and the competent authority may extend such period to another period of three months, otherwise the company shall be deemed terminated. The partners shall be personally and jointly liable from their assets for the debts and obligations of the company from the date of increase of the number of the partners.

Articles 76 and 78 of the CCL: Shares may be in cash and/ or in-kind and shall be paid in full at the time of incorporation. The shares in cash shall be deposited in a bank operating in the State. The bank may not pay such shares other than to the managers of the company after providing such

evidence that the company has been registered with the competent authority and as provided by the contract appointing such managers. The partners may agree on the value of shares in kind. In such event, such value shall be approved by the competent authority. The partner providing such contribution shall be liable to third parties for the evaluation of its value in the Articles of Association.

Article 363 of the CCL: Any manager or board member who distributes to the shareholders or others profits or interests in contravention of the provisions of the CCL or the Memorandum of Association or Articles of Association of the company and any auditor who approves such distribution while being aware of such contravention shall be punished by imprisonment for a period between six months and three years and/ or a fine between AED 50,000 (fifty thousand) and AED 500,000 (five hundred thousand).

Insolvency Law No. 9 of 2016 (“IL”)

Article 144 of the IL: If it was found that the company's assets are not sufficient to meet at least (20%) twenty percent of its debts, the court that adjudicated bankruptcy may compel some or all the members of the board or the managers, jointly or severally, to pay all or some of the company's debts, in the cases where they are proved to be liable for the company's losses according to the provisions of the Commercial Companies Law.

Evidence in Civil and Commercial Transactions Law No. 10 of 1992 (“ECCL”)

Article 18 of the ECCL: A party to the litigation may request the court to compel his opponent to submit any useful written document or paper detained by him...

Article 20 of the ECCL: The court may, during the examination of the case, even before the court of appeal, give permission to force the intervention of a third party compelling him to

submit a document in his possession, in the instances and without prejudice to the provisions and the circumstances provided for in the preceding articles. It may also order – even if by itself – to involve any administrative party to give all information and documents necessary for the flow of the case.

Article 54 of the ECCL: Parties to the litigation may not be heard as witnesses in a case but the court may, however, interrogate those present in court, and each one of them may request the interrogation of his attending opponent. The court may also, on its own or upon request of his opponent order summoning a party to the case to interrogate him. The party summoned for interrogation has to attend the hearing fixed in the order.

Article 71 of the ECCL: Should the court decide to delegate an expert or more, its decision must include the following...an accurate statement of the expert's duties and the urgent measures he is allowed to take.

Translations of law and case decisions provided by LexisNexis Middle East.

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UAE Electronic Monitoring Law

(No. 53/2019)

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Electronic monitoring was introduced earlier this year [2019] via Article 355 of Federal Law No. 35/1992 (Criminal Procedures Law) via the amendments to the Criminal Procedures Law implemented by Federal Decree-Law No. 17/2018.

On 4 August 2019, the UAE Cabinet, or more commonly referred to as the Council of Ministers, issued Cabinet Decision No. 53/2019 Regulating Electronic Monitoring (the "Decision") providing further granular details on the application of electronic monitoring, and permitting collaboration with the private sector in the implementation of electronic monitoring.

Administration of electronic monitoring is overseen by the Ministry of Interior, and all local and federal police forces, with support from the Ministry of Justice in certain respects.

Electronic monitoring is defined as (loosely translated) *"the prevention of an accused or convicted person from absence outside a curfew from their domicile or location designated by the public prosecution or the competent court"*.

Electronic monitoring is defined to account for both time-based and geographical monitoring as designated by the public prosecution or competent court in respective matters.

Circumstances which could subject someone to electronic monitoring are:

1. Temporary surveillance in lieu of temporary confinement (incarceration or otherwise).
2. Temporary surveillance in lieu of half of an incarceration punishment, after half that period has been concluded.

Electronic surveillance can be executed via continuous home signaling devices, geographical tracking devices, or any other method approved by the Cabinet. All tracked data will be archived in central-local and federal archives, respectively.

Specifications of electronic monitoring methods require:

1. Avoidance of health risks to the person under surveillance.
2. Any devices used should be approved by the Emirates Authority for Standardization & Metrology.
3. Avoidance of any hindrance to the person any surveillance with respect to their occupation, education, profession, training, or medical treatment, unless otherwise ordered by the public prosecution or competent court.
4. Guarantee of privacy of the private life of the person under surveillance.
5. Guarantee of privacy of the personal data collected from the surveillance.

Those subject to electronic monitoring must comply with the following:

1. To inform the public prosecution of any changes to their occupation or their domicile.
2. To inform the public prosecution if there is intent to temporarily relocate for a period exceeding 15 days.
3. To permit visitations from those in charge of administering the electronic monitoring.
4. Safeguard the monitoring device, and not tamper with it or damage it.
5. To not travel outside the State without obtaining approval from the public prosecution or competent court and inform the public prosecution upon their return.

The Decision permits the Ministry of Interior to cooperate with the private sector, as required, to implement the

requirements of the Decision and electronic monitoring in general.

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Qatar Courts and Tax Authority take action amidst COVID-19 (Coronavirus) pandemic

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Qatar Courts Suspend Hearings for Two Weeks

The Supreme Judicial Council of Qatar announced the suspension of hearings of the Appeal Court, the Court of First Instance, labor dispute settlement committees and rental dispute settlement committees as of 15 March 2020, for a period of two weeks.

In a press statement, the Council affirmed the judges' continued work in the consideration of urgent matters and temporary matters, and the setting of new dates for the deferred sessions, bearing in mind that the Cassation Court will continue to consider its hearings at the dates specified in advance.

This action comes within the framework of the preventive efforts and measures taken by the State to limit the spread of

the Coronavirus (COVID-19), and in the interest of everyone's safety, and after coordination with the relevant authorities.

Qatar General Tax Authority Extends Tax Filing Date

The General Tax Authority issued Circular of the Chairman of the General Tax Authority No. 5 of 2020 Concerning Extending the Tax Filing Period for the Tax Year ending 31 December 2019.

Due substantial inquiries and requests by taxpayers and audit firms requesting the extension of the deadline for tax filings for the 2019 tax year and taking into considerations the exceptional circumstances amidst the Coronavirus (COVID-19), and in order to promote tax compliance by taxpayers in an adequate manner, the Circular has extended the deadline for the submission of tax returns for the tax year of 2019 for two months as of the final deadline for the submission of tax returns. The new date shall be 30 June 2020.

Please [contact us](#) for more details or assistance in this matter.

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First Inheritance Tax Disputes

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During the Summer of 2020, the first inheritance tax disputes

in the UAE made their way to the Federal Primary Court.

As the UAE tax systems develop and tax liabilities and consequences become more commonplace, business owners and high-net-worth persons begin evaluating how any liability to the Federal Tax Authorities may pass on during inheritance to their beneficiaries.

Initially, when a taxpayer passes away, the payable tax owed by them prior to their date of death shall continue to be owed to the Federal Public Treasury, and payment shall be made from the deceased's legacy prior to its distribution among the heirs or legatees.

If it appears following the distribution of the legacy that a payable tax is still outstanding, the Federal Tax Authority may take legal recourse against the heirs and legatees for the payment of such outstanding tax, unless a clearance certificate has been obtained from the Federal Tax Authority for the legacy representative or any of the heirs.

It is also important to recognize that the Federal Tax Authority's right to claim payable taxes and penalties is not time-barred; there is no time limitation on when the Federal Tax Authority may make its claim against a recorded debt.

In other words, if a person owes taxes (or penalties) and passes away, the debt will continue perpetually against the person's kin (inheritors) until the debt is paid off, or until the Federal Tax Authority enforces the debt via court actions, or waives its right against the debt.

If inheritors disagree with a particular position of the Federal Tax Authority, there are two means to grieve a decision taken by the Authority. Either through waiver and exemption request, or through a reconsideration request.

A waiver and exemption request is based on an excuse that the Authority would be convinced is justifiable. In other words,

it is not a discussion over certain interpretation of law or fact, but rather an implicit admission of liability but with a request to waive such liability on the basis of excusability.

For example, if a person subject to value-added tax falls into a coma, and during that period, they cannot submit their tax returns and have no legal representative to do so for them, they may consequently receive tax penalties for non-filing of returns or any other reason arising out of their incapacitation. If the person then passes away whilst in a coma, the tax liabilities and penalties are inherited by the legatees.

In this particular scenario, one could argue that the fact that the person was in a coma with no legal representative registered could not allow them to comply with their tax obligations, and as such – in this hypothetical – these particular sets of facts may be deemed a justified excuse by the Federal Tax Authority to waive penalties.

But the important factor here is the differentiation that the waiver and exemption request is not an argument over interpretation of law and fact, but rather a plea for exemptive treatment.

On the other hand, if the disagreement between the inheritors and the Federal Tax Authority is over interpretation of law and/or fact, the second option (other than the waiver and exemption request) is a request for reconsideration.

The request for reconsideration triggers the dispute resolution process which is generally a five stage process depending on the value of the dispute, and includes; i) the reconsideration before the Federal Tax Authority, ii) an objection before the competent tax dispute resolution committee, iii) the Federal Primary Court, iv) the Federal Appeals Court, and v) the Federal Supreme Court.

This Summer of 2020, the first tax inheritance cases made

their way to the Federal Primary Court.

As tax liabilities increase, and as family wealth is distributed further and further, high-net-worth individuals need to manage generational liabilities with care – and inheritors need to account and prepare for the fact that they will inherit tax liabilities and may be held accountable before the Federal Tax Authority.

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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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Courts Mandate Valuation of Claims by Litigants

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

Abu Dhabi Law No. 13/2017 provides that for lawsuits of

unknown value, a fixed fee applies of AED 1,500 for summary matters, and AED 4,000 for plenary matters, with the remainder of the fees to be paid once the final judgment is pronounced.

Notwithstanding, the ADJD stated that parties – both plaintiffs and defendants in their claims and counterclaims respectively – may avoid including quantum of their claims in an attempt to avoid court fees.

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

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

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

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

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

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

- Where the currency of the claim is other than Emirati Dirhams, a conversion to Emirati Dirhams would take place.
- Real estate ownership matters where valuation would be based on the real estate's value. If the value of the property is not assessed, it shall be considered to exceed one million dirhams.
- Requests for validity, nullification, or rescission of a contract shall be based on the value of the subject matter contract.
- Actions relating to the dissolution or liquidation of a company are valued based on the capital of the company at the time of filing the suit.
- Eviction suits are valued based on the annual rental value.
- Suits between creditors and debtors regarding the seizure or an auxiliary real right are valued based on the debt's value or value of the property/real right seized, whichever is less.

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

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

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(COVID-19) 1981 Government opinion on force majeure salary deductions

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

The Department established two principles in its opinion:

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

The opinion of the Department was laid out as follows:

If an employee is on an official work trip, they are not

considered to be on vacation but rather at work, and if force majeure conditions prevent the employee from returning following the end of their mandate, such cannot be considered a break from work which may be deducted from their vacation days, but rather takes the rule of force majeure that prevents the employee from carrying out their work.

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

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

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

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

However, employees and employers should account for the first principle established by the Department's opinion; that is the

intent of the employee and employer on whether the days affected by the force majeure event were to be vacation days or workdays.

If the restrictions caused by COVID-19 had occurred during days which both the employee and employer had intended on being workdays, but (in reference to the second principle noted above) a force majeure event restricted the employee from attending their place of work, it is precautionary for both employer and employee to refer to and consider the extent to which principles set forth by the Department of *Fatwa* (Legal Advice) and Legislation in its opinion in 1981 would apply in today's circumstances amidst the Coronavirus pandemic.

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

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Brief

The tax dispute resolution committees were formed pursuant to the Tax Procedures Law, its Executive Regulations, and

specifically Cabinet Decision No. 23/2018.

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

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

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

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

What happens to objections if the committee is inoperable?

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

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

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

or if the Dubai TDRC deems it necessary.

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

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

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

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

Federal Supreme Court case where an administrative committee was not formed

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

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

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

However, the Federal Supreme Court overturned the lower courts' judgments and ordered that if the Minister of Justice does not issue a decree forming the CAC for it to be

competently operable, litigants may plead their case before the Federal Primary Court directly.

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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 (مدة جزائية). 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 the 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 through 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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How the New FTA Public Clarifications Guide Affects Tax Disputes

March 21, 2021

In October – November 2019, the Federal Tax Authority issued an updated Clarifications User Guide (USEG001) replacing its

predecessor version from June 2018.

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

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

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

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

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

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

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

In March 2019, Minister of Justice Decisions Nos. 237 and 238 of 2019 established Tax Dispute Circuits in the Federal Courts. Prior to the Tax Dispute Circuits, tax cases were referred to the Administrative Circuits of the Federal Courts,

i.e. the Circuits that hear disputes where one (or all) of the parties are public / government entities.

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

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

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