

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

March 21, 2021

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

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

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

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

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

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

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

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

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

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

In this landmark judgement, the Federal Supreme Court reasoned

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

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

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

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

The Federal Supreme Court overturned the Federal Appeals and Primary Court judgments, and instead ruled that the time limit to challenge the committee decision had not been triggered until the provisions of Article 7 of the Executive Regulations of the Civil Procedures Law had been complied with and ordered that the challenge against the committee decision which was filed with the Federal Primary Court four months after the

issuance of the committee decision was valid and within the time limit given that the twenty weekday time limit was never triggered due to lack of proper and compliant notification.

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Bid Bonds and Evaluation Methods under the 2019 Tender Regulations in Qatar

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On 20 June 2019, the Qatar Cabinet issued Decision No. 16/2019 On the issuance of the Implementing Regulation to the Tenders and Bids Law (the “Regulations”).

Long-awaited, the new Regulations govern the tendering process as have been established by Law No. 24/2015 Regulating Tenders and Bids, providing detailed provisions regarding the step-by-step procedures that take place.

Below are the important takeaways for tenderers looking to bid for projects in the State of Qatar with respect to bid bonds and evaluation methods:

Bond Forms

For both bid bonds and performance bonds, the Regulations permit either submission of a cashier’s cheque, or of a bank guarantee letter issued by a local or a bank accredited by

decision of the Prime Minister after obtaining the approval of the Qatar Central Bank, whether such bank is located inside or outside the State of Qatar ("Accredited Bank").

Cheques that are drawn on foreign banks shall be accepted if they are annotated with the acceptance of a local or an Accredited Bank that the local or the Accredited Bank undertakes to pay the amount equal to the required bond and that it is bound to pay it in full upon first request to do so.

Bank guarantees for both bid bonds and performance bonds must be unconditional, unrestricted, fully payable and irrevocable.

Bid Bonds

Every bid shall be submitted with a bid bond within the conditions of the announcement or the invitation. The maximum amount that may be requested would not exceed five percent (5%) of the estimated value. The bidder who fails to submit the required bid bond shall be excluded.

Exemption from the bid bond requirement shall be possible in the following:

1. In tenders related to consultancy services.
2. In tenders related to technical, research, media, sponsorship and marketing services.
3. In tenders whose value is less than 500,000 Qatari Riyals.

In supply tenders which may be split, the amount of the bid bond may be set at not more than five per cent (5%) of the estimated value of each item separately, in which case the bidder shall submit the required bid bond for the items he wishes to bid for.

If the tenderer submits a bank guarantee as opposed to a cashier's cheque, the guarantee must be valid for no less than

one hundred twenty (120) days from the date set for the submission of the bids.

The bid bonds shall be returned to the unsuccessful bidders within a period not exceeding seven working days from the date of issuance of the decision rejecting their bids, or from the expiration of the bond without its renewal. The bid bond shall be returned to the successful bidder within a period not exceeding seven working days from the date of collecting the performance bond.

Performance Bond

The announced tender conditions shall determine the amount of the performance bond at not less than ten percent (10%) of the contract value. The full performance bond shall be kept until the final execution of the contract, including the warranty or maintenance period pursuant to the tender conditions.

Exemption from submitting the performance bond in full or in part shall be possible in tenders, bids Mumarasa* and direct agreements related to the following:

1. Consultancy services.
2. Technical, research, media, sponsorship and marketing services.
3. If the value of the process is less than 500,000 riyals.
4. Warranty and maintenance services.

*Mumarasa contracts are those that are executed for procurement, works, or services which are requested in urgent cases, or that were tendered but for which no bids were submitted, or for which bids were submitted with unacceptable prices but urgent requirements to the end that they cannot be put out to tender again.

Language of Documents

The documents of the tenders, bids and contracts shall be

drafted in Arabic, but English documents may be accepted if accompanied with an Arabic summary. However, the bidding shall be in Arabic except in certain cases where the Tenders and Bids Committee approves submissions in another language so long as they are accompanied by a summary translated into Arabic.

Evaluation by Points

In the cases where the tender requires the evaluation of bids using a points system, the tender conditions shall include the elements and the basis for evaluation as well as the details and basis for scoring points. They shall likewise specify the evaluation points and the minimum limit for the technical acceptance of the following elements:

1. The length of experience in the required field of execution.
2. The permanent technical and administrative cadres working for the bidder.
3. The projects that were successfully executed, and the value of the project executed at the highest cost.
4. The permits for exercising the technical works of specialized nature.
5. The financial capacity of the bidder shown by an audited budget.
6. The equipment, machines and devices available with the bidder, which are necessary for the completion of the requested work.
7. Any data or information that is deemed necessary.

The tender shall be awarded to the lowest bidder whose bid meets the requirements of minimum technical acceptance. The evaluation by points may be based on the calculation of the common points for joint technical and financial acceptance, in which case the contract shall be awarded to the bidder whose bid has scored the highest points in the joint evaluation provided that the price he has submitted is within the limits

of the estimated value or the limit accepted.

Tender Documents and Approvals

Tender documents shall sufficiently be delivered to whoever requests them, after the payment of the financial consideration prescribed in the announcement. The documents shall include the following:

1. The form of announcement of the tender.
2. The form of the tender (the bid).
3. The instructions and general conditions of the tender, which refer to the legal provisions to be complied with by the bidders when submitting their bids.
4. The special conditions of the tender, which refer to the technical matters that are specific to each tender according to its type.
5. The forms of the bid bond and the performance bond.
6. The accurate and detailed bills of quantities showing the particulars of the items.
7. The full detailed drawings and specifications.
8. The form of the contract.
9. The elements and basis for evaluation and the details and basis for scoring points.
10. The general conditions of contracting set by the Government Authority, after notifying the Department.
11. Any other relevant documents which the Department decides to add in coordination with the Competent Department

Samples

The Regulations require that where a tender requires the provision of samples; the weight, size or volume of the samples shall be stipulated. For items which need to be supplied inside boxes; the type, capacity, and specifications of these boxes shall be indicated. A bid that is not accompanied by said samples shall not be accepted, and samples

at the showrooms of the bidders may be inspected on-location in the cases that so require. The samples shall be returned to the unsuccessful bidders within seven working days from the date of rejecting their bids. The samples submitted by the contracted party shall be kept throughout the validity period of the contract.

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First constitutional tax case: why was it rejected and how are constitutional cases litigated in the UAE?

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

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

First Constitutional Tax Case

On 1 March 2020, Emirati news outlets published details about the rejection of a taxpayer's constitutional appeal against

the 'pay now, argue later' provision of the Tax Procedures Law.

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

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

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

The Constitutional Circuit

Constitutional cases are subject to the jurisdiction of the Constitutional Circuit of the Federal Supreme Court only, which comprises of the Chief Justice, four other judges, and one alternate judge.

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

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

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

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

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

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

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

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

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

Rejection of the Constitutional Tax Case

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

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

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

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Qatar Financial Center Tribunal Acknowledges COVID-19 as Hardship Event

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

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

The Regulatory Tribunal of the QFC follows English Common Law

and is part of the judicial system within an international financial center.

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

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

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

timescale, and was aware, or should have been aware, of the failures. Many of the concerns related to the company's place within an unusual corporate structure and how to ensure its continued solvency and capital adequacy.

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

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

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

The Tribunal was told that the policy of the QFC Regulatory Authority is that it will not (except in exceptional cases) impose a penalty that will lead to bankruptcy. This is in keeping with what the Tribunal understood to be a general principle that a regulatory penalty should not be imposed on an individual which the individual is unable to pay. Sometimes, that principle can be satisfied by allowing payments by instalments. But the commensurate principle is that an individual seeking what amounts to an exceptional

dispensation must establish financial hardship by making full and frank financial disclosure of his or her necessary outgoings, and the assets available to meet those outgoings, with copies of supporting documentation.

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

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

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

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

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

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

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

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

Managers

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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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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

March 21, 2021

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

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

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

March 21, 2021

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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