

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

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

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

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

With the Executive Order in place and the newest form of influencers attempting to deal with the impending circumstances, the question lies, what can we learn from the wording of the Executive Order and what will this mean for TikTok influencers across the globe?

The Wording of the Order

Section 1(a) of the Executive Order states:

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

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

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

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

‘Person’

The wording of the Order stipulates that *“any transaction by any person... subject to the jurisdiction of the United States”* is prohibited.

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

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

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

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

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

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

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

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

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

(2) Any person actually within the United States;

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

(4) Any corporation, partnership, association, or other organization, wherever organized or doing business, which is owned or controlled by any person or persons specified in paragraphs (a)(1) or (a)(3) of this section."

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

with ByteDance (TikTok).

‘Property’

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

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

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

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

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

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

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

The coverage of property is quite excessive as it includes money, deposits and financial instruments, evidences of title or ownership, powers of attorney, movables, intellectual property, licenses, contracts of any nature whatsoever, services, and any other property, real, personal, or mixed,

tangible or intangible, or interest or interests therein, present, future or contingent.

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

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

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

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

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

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

If the contracts can no longer be complied with, parties will also have to review their force majeure provisions, lacking any thereof the parties must seek guidance on whether foreign change in law constitutes a force majeure event.

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

Order.

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

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

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

Facts

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

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

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

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

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

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

Issues

The Abu Dhabi Cassation Court determined that the courts had jurisdiction to hear the case for two reasons; the first being that the subcontractor's signatory to the contract did not have authority to bind the subcontractor to an arbitration agreement.

The second – and more significant – reasoning by the Cassation Court was that the engagement of the parties with the court and expert procedures must be considered in deciding whether

the party challenging the jurisdiction of the court had waived their right to do so by engaging substantively in the merits of the dispute during proceedings.

In this, the Abu Dhabi Cassation Court stated that:

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

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

Deductively and arguably, the Cassation Court put forth a three-prong test to determine whether a litigant would be deemed to have waived their jurisdictional arguments that are reliant on an arbitration agreement.

The three prongs may be considered as follows:

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

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

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

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

Significance

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

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

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

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

And parties must also be diligent in how they (or their counsel) review and critique any case management session

minutes, expert hearing transcripts and reports, and hearing minutes for trial sessions before the court, to ensure that no explicit or implied jurisdictional waiver is made.

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