Dubai High Court denies enforcement of arbitration award against foreign party (Article III of the New York Convention)

December 2, 2022

The Dubai Cassation Court, the highest tier of court litigation in the Emirate of Dubai, recently rendered judgment rejecting enforcement of an arbitration award against a foreign award debtor on the basis that the debtor does not have a domicile in the United Arab Emirates.

Furthermore, the Dubai Cassation Court provided an interpretation of Article III of the New York Convention in finding that its purpose is that enforcement of an award should be conducted "…*in accordance with the rules of procedures applicable in the territory of enforcement with the adoption of the easiest procedures, and the exclusion of the more onerous procedures…*".

The Dubai Cassation Court did not adopt the latter part of Article III which continues to state, "*than are imposed on the recognition or enforcement of domestic arbitral awards*", developing an interpretation of Article III to consider its second sentence requiring application of easy and non-onerous procedural rules, instead of requiring application of procedural rules that are not more onerous than those that apply to the enforcement of domestic arbitration awards.

The arbitration award:

The arbitration award was issued by the London Court of International Arbitration.

The award debtor is a foreign entity and has no domicile in the United Arab Emirates.

However, the award debtor owned shares in companies established and domiciled in the United Arab Emirates.

The award creditor applied for recognition and enforcement of the award before the Dubai Courts against the shares of the United Arab Emirates companies owned by the foreign award debtor.

The enforcement judge rejected the application on the basis that the Dubai Courts have no jurisdiction to enforce an arbitration award against a foreign party.

The award creditor challenged the finding through the courts, up to and in petitioning the Dubai Cassation Court.

The Dubai Cassation Court considered the following arguments made by the award creditor:

- Pursuant to the principle of voluntary – legislative – compliance with the accession of the United Arab Emirates and the United Kingdom to the Convention on the Recognition of Foreign Arbitral Awards (New York Convention) ratified by Federal Decree No. 43/2006, the rules of jurisdiction contained in the Federal Civil Procedures Law do not apply to the enforcement of foreign arbitral awards, considering that both the United Kingdom and the United Arab Emirates have acceded to the Convention on the Recognition of Foreign Arbitral Awards of 1958 (New York Convention) and implicitly accepted their jurisdiction to consider the application for the enforcement of foreign arbitral awards and are obligated to recognize and order their enforcement in accordance with the terms contained in the Convention.

- It is evidenced within the contract in dispute and within the arbitration award that the award debtor is the owner of shares of two companies registered in the United Arab Emirates.
- The parties to the arbitration agreed to the sale and purchase of the shares owned by the award debtor in those two companies.
- The legislator deviated from the general principle of domicile jurisdiction, allowing the creditors of a shareholder in a limited liability company to execute against the shares of a debtor shareholder by selling the shares and collecting the debts from the proceeds of the sale in accordance with Article 20 of the Federal Commercial Companies Law.

The Dubai Cassation Court rejected the petition for the following reasons:

- The text of Article III of the New York Convention of 1958 indicates that enforcement takes place in accordance with the rules of procedures followed in the territory of enforcement, with the adoption of the easiest procedures and the exclusion of the more onerous procedures.
- This matter is not limited to the general procedural law, which is the Federal Civil Procedures Law and its executive regulations, but rather includes any procedural rules for litigation and the implementation of its provisions contained in any other law that regulates these procedures, and to say otherwise is allocation without provision.
- And that it is established – in the jurisprudence of the Dubai Cassation Court – that the issue of sovereign or qualitative jurisdiction is one of the issues related to public policy and is considered to exist in any litigation and always before the court, which the court must address it on its own accord, even if none of the

litigants raise the issue.

- It is also decided – in the jurisprudence of the Dubai Cassation Court – that the company of any kind – with the exception of the joint venture company – has a legal personality and a financial liability independent of the liabilities of its shareholders, and it has the capacity to sue as a plaintiff or defendant, independently of its shareholders.
- The jurisdiction of the Dubai Courts in the enforcement of the arbitration award is not affected by the request to enforce against the shares of the award debtor in the two companies domiciled in Dubai (in the United Arab Emirates) as the arbitral award required to be enforced does not include an order against the two companies, in addition to the absence of any other rulings against them, and therefore they are not considered a party to the instrument (the arbitration award) required to be enforced.
- For the competence of the enforcement judge in the Dubai Courts to recognize (apply exequatur) and enforce a foreign award, the domicile of the award debtor against whom enforcement is requested must be within the State jurisdiction of the Dubai Courts whilst in this case the award debtor is domiciled in a foreign State.

Article III of the New York Convention

The Dubai Cassation Court cited part of Article III and supplemented its quotation with an interpretive addition to the provision while omitting the application of the latter part of Article III.

Article III of the New York Convention states:

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

Article III is generally understood to require that State courts treat enforcement of foreign arbitration awards in the same manner as enforcement of domestic arbitration awards.

The Dubai Cassation Court provided an interpretation of Article III of the New York Convention in finding that its purpose is that enforcement of an award should be conducted "*…in accordance with the rules of procedures applicable in the territory of enforcement with the adoption of the easiest procedures, and the exclusion of the more onerous procedures…*".

In coming to its disposition, the Dubai Cassation Court did not adopt the latter part of Article III which continues to state, "*than are imposed on the recognition or enforcement of domestic arbitral awards*".

The travaux préparatoires are the official documents recording negotiations, drafting, and discussions during the process of creating a treaty. The travaux préparatoires can be consulted and taken into consideration when interpreting treaties.

According to the New York Convention travaux préparatoires, the rule under Article III of the Convention limits the Contracting States' discretion to determine the rules of procedure applicable to the recognition and enforcement of foreign arbitral awards in their territories.

The purpose of this limitation, which has been referred to as the "national treatment" or "non-discrimination" rule, is to prevent national courts from imposing "unduly complicated enforcement procedures" and insurmountable procedural hurdles at the recognition and enforcement stage.

The second sentence of Article III prevents Contracting States from discriminating against foreign arbitral awards, whilst nothing prevents Contracting States from imposing conditions to the recognition and enforcement of foreign arbitral awards that are less onerous than those imposed on domestic awards.

The Dubai Cassation Court did not adopt the latter part of Article III which continues to state, "*than are imposed on the recognition or enforcement of domestic arbitral awards*", developing an interpretation of Article III to consider its second sentence requiring application of easy and non-onerous procedural rules, instead of requiring application of procedural rules that are not more onerous than those that apply to the enforcement of domestic arbitration awards.

Contrastingly, awards issued in the UAE against foreign parties are enforceable by the Dubai Courts, which renders this novel interpretation of Article III a complex new paradigm for parties to consider when enforcing in the UAE.

Enforcement against shares (assets)

The award creditor relied on Article 20 of the Federal Commercial Companies Law which does indeed permit creditors to take action against shares. Quoted as follows:

"Article 20 – Execution against anything in lieu of the share

1- Personal creditors of a shareholder may not recover their rights out of the share of the debtor shareholder in the capital of the company. However, they may claim their rights from the share of the debtor in the profits of the company. If the company is terminated, the rights of the creditors shall be paid from the shares of the shareholder in the remaining assets thereof upon conclusion of the liquidation.

2- If the contribution of a shareholder in the company consists of shares, then the creditors thereof may, in addition to the rights set out in Clause 1 of the present

Article, file a lawsuit before the competent court to sell these shares and subsequently recover their debts out of the sale proceeds."

Notwithstanding, the Dubai Cassation Court found that this right under Article 20 of the Federal Commercial Companies Law does not manifest in part because the arbitral award does not include an order against the two companies, in addition to the absence of any other rulings against them, and therefore they are not considered a party to the instrument (the arbitration award) required to be enforced.

The finding by the Dubai Cassation Court raises the risk of extending to other assets as well that are not named in an arbitration award.

In the same vein, the arbitration award in this dispute related to the sale and purchase of the shares in the companies domiciled in the United Arab Emirates.

Whilst the Dubai Cassation Court relied on Article 21 of the Federal Civil Procedures Law, this Article 21 does nevertheless state that the Courts shall have jurisdiction if "*the action is concerned with an obligation concluded, executed, or its execution was conditioned in the state or related with a contract required to be authenticated therein*".

Deductively, the Dubai Cassation Court appears to apply more weight to whether in fact the award debtor is domiciled in the country or not, irrespective of the underlying agreement.

Takeaway and alternatives

The judgment creates two substantial considerations for award creditors seeking enforcement of a foreign arbitral award in the United Arab Emirates:

1. If the award debtor is not domiciled in the United Arab Emirates, the Courts may refuse recognition and

enforcement of the award.
2. If the award debtor assets are not named in the award, the Courts may refuse enforcement action against said assets.

Either of these risks may manifest independently, or in compound with each other.

Alternatively, arbitration award creditors can seek recognition and enforcement through other court systems in the United Arab Emirates that operate under different laws and regulations, those being the Abu Dhabi Global Market Courts which operate pursuant to English law, and the Dubai International Financial Courts which operate pursuant to common law, and each their respective independent rules and statutes.

The ADGM and DIFC Courts also provide parties with the ability to apply for Mareva Injunctions (i.e., worldwide freezing orders) even if the parties have no nexus with or assets in the ADGM or the DIFC in support of enforcement of foreign arbitration awards.

How we can assist

Wasel & Wasel has assisted domestic and international arbitration award debtors and creditors in the enforcement and set aside of arbitration awards before the various courts in the UAE (including the Dubai Courts and the DIFC Courts) on matters collectively exceeding USD 500,000,000. Our team has also acted on Mareva Injunction and Norwich Pharmacal Orders issued by the DIFC Courts, or issued abroad and enforced domestically in the United Arab Emirates, in relation to court judgments and arbitration awards.

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UAE Federal Court rules no tax penalties on payment delays caused by the tax authority

December 2, 2022

Brief

It was evidenced before the Federal Primary Court that the taxpayer had informed the Federal Tax Authority of an obstacle in the online tax filing portal that prevented the taxpayer from being able to file their tax returns.

The taxpayer continuously requested resolve of the issues since early 2018 until mid-2021.

The issue was finally resolved by the Tax Authority in 2021 and the taxpayer was able to file their returns and make tax payments after that date.

The Federal Tax Authority applied penalties retrospectively on the taxpayer for (i) late filing of tax returns and (ii) late payment of taxes.

Arguments

The taxpayer argued that Article 25(1)(i) permits the application of penalties in case the "…taxable person fails to settle the tax defined as the payable tax in the tax return that has been submitted or the tax assessment notified thereto

within the period set forth under the tax law”.

And since the payable tax never manifested because of the inability to file a tax return, nor by way of an audit, no tax had become payable.

The taxpayer argued that the Payment User Guide of November 2018 indicates that the filing of tax returns and payment of taxes are sequential procedures.

In that payment of the tax is a subsequent stage to accepting the tax return.

That is only after accepting the tax return, the taxpayer must pay the tax due, otherwise the Federal Tax Authority may implement penalties.

However, where the taxpayer does not have the opportunity to submit the tax return due to the fault of the Authority, without cause on the part of the taxpayer, the subsequent stage of paying the tax cannot be triggered.

In other words, the unencumbered submission of the tax return is a pre-condition for payment of the tax.

Judgment

The Federal Primary Court ruled that:

- the obligations of the taxpayer to make tax payments on time and the procedural nature of the law are undeniable,
- however, that does not produce an effect unless the way to implement the procedures is in accordance with what falls within the obligations of the Federal Tax Authority,
- and if this is prevented by the Tax Authority without cause on the part of the taxpayer, there is no liability on the taxpayer that requires the imposition of penalties.

Wasel & Wasel was counsel on this matter.

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Significant judgment by Dubai Court orders payment of damages in cryptocurrency instead of fiat currency

December 2, 2022

In a dispute over investment in Dash cryptocurrency, one of the more well-known and established altcoin cryptocurrencies, the Dubai Primary Court ordered payment to the plaintiff in Dash (as opposed to in Dirhams, US Dollars, or UK Pounds).

This is one of the first cases in the UAE where the court orders compensation in cryptocurrency as opposed to fiat currency providing substantial considerations for how disputes over cryptocurrency transactions should be managed.

Background

The plaintiff purchased 6000 Dash from the defendant for the amount of USD 540,000, on the promise that the defendant would invest the cryptocurrency for a return of 3% per week.

The defendant failed to pay the plaintiff the investment return, or the principal investment, despite multiple demands by the plaintiff.

The plaintiff sued before the Dubai Primary Court for USD 1,009,800 being the value of the Dash coins at the time plus the agreed upon returns of 3% per week.

Dubai Primary Court judgment

The Court ruled in favor of the plaintiff awarding the 6000 Dash instead of the amount of USD 1,009,800 claimed by the plaintiff.

Although the transaction agreement was evidenced and established, the Court did not award a monetary value in fiat currency on the basis that the plaintiff did not evidence the true market value of the Dash that was being claimed.

This is the first known case where a UAE court awards damages in cryptocurrency only, without identifying any fiat currency as a value to such cryptocurrency in the award.

The Court ordered in its judgment disposition:

“Obligating the defendant to return to the plaintiff an amount of (6000 Dash Cryptocurrency) to the electronic address of the plaintiff’s wallet.”

The Court based its reasoning on the Federal Commercial Transactions Law as follows:

“The meaning of the provisions of Articles 76, 77, 88, 90 of the Commercial Transactions Law is that if the debt arises from a commercial business and relates to a sum of money of known amount at the time the obligation arises and the debtor is late in paying it, then the creditor has the right to demand interest on it as compensation for delay, and this interest applies from the maturity date of this debt, and is calculated according to the price agreed upon in the contract

concluded between the two parties. If no interest rate is specified in the contract, it is calculated according to the prevailing market price at the time of dealing, provided that it does not exceed 12% annually until the full payment.

…

The contract concluded between the two parties did not include a reference to any website whereby the unit price of the [crypto] currency will be calculated and therefore the benefits resulting from it cannot be estimated due to the lack of knowledge of its price in the market as it changes daily."

Takeaway

This is a significant judgment for those engaged in the digital asset economy in the UAE to account for; (i) at the time of contracting; (ii) at the time a dispute arises; (iii) and in strategizing the most appropriate relief to seek from the courts or arbitration tribunals to maximize return.

Should parties wish to recover their cryptocurrency in fiat currency at the time of making a claim, it is crucial to:

- At the time of contracting specify how the value of cryptocurrency will be determined and based on which references.
- Post-contracting, at the time of dispute, disputants should provide an expert/technical report on the true market value of the cryptocurrency using credible reference points.

On the other hand, should a plaintiff expect the value of the cryptocurrency to rise, this judgment provides grounds to make claims and request compensation in the cryptocurrency that was traded/invested as opposed to a monetary value.

If the price of the cryptocurrency is expected to increase, it may be beneficial to request the courts to grant relief in the

form of the cryptocurrency as opposed to the monetary value.

This is because if the court awards relief in the monetary value of the cryptocurrency (as opposed to awarding the cryptocurrency itself) the value of the fiat currency in the judgment would be set at the date of the judgment and generally remain so during appeal and enforcement.

Appeals and enforcement could take months or years.

During which time the value of the cryptocurrency could increase in folds.

However, if the judgment awards a party in cryptocurrency instead of fiat currency, that cryptocurrency value would continue to increase as the parties go through appeal and enforcement procedures.

And the winning party would be able to enforce at the then-current price of the cryptocurrency (at enforcement), as opposed to the price at the time of the initial judgment.

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UAE Appeals Court invalidates cryptocurrency agreement and defines Ponzi scheme in

‘OneCoin’ transaction dispute

December 2, 2022

In a rare judgment, the Appeals Court of Ras Al-Khaimah (UAE) applies the elements of contract formation of the Federal Civil Transactions Law to invalidate a cryptocurrency transaction – finding that the object of the agreement did not fulfill the requirements of being “*possible, specified or specifiable, and negotiable*”.

Furthermore, the Appeals Court classified the transaction as a Ponzi scheme and provided a definition thereof falling within the general understanding of a Ponzi scheme, but with a wider net that requires persons engaged in the digital asset economy in the UAE to be better attuned with the recent rules and regulation surrounding digital assets.

Also notable, the transaction in dispute involved the infamous OneCoin.

Claim

The claim alleged that the defendant (Seller) sold to the plaintiff (Buyer) 40,000 units of OneCoin at a value of AED 100,000 and despite the Buyer’s payment for the exchange, the Seller did not deliver the tokens/units.

The Seller sued the Buyer before the Primary Court of Ras Al-Khaimah.

Primary Court technical analysis and judgment

The Primary Court adopted the following technical provisions/understandings:

1. An encrypted digital currency is a virtual currency or a

digital asset based on a network and is distributed across a large number of systems known as “Blockchain.” Due to this decentralized structure, an encrypted digital currency is considered not subject to the control of governments, authorities, and centralization. Bitcoin, Litecoin, and Ether are among the most popular of these currencies and in order to be converted into cash, a cryptocurrency must be traded on a special exchange.

2. To verify the actual value of that currency, a variety of sources on the internet were surveyed but no exchange trading OneCoin was found, and based on the information available on the internet, the OneCoin exchange known as “XCoinx” was closed without any notice and therefore the current and past value of this coin cannot be confirmed.

This Primary Court ruled to rescind the sale contract and obligated the Seller to return the purchase price of AED 100,000 and pay AED 10,000 in comprehensive compensation to the Buyer.

Appeals Court procedures

The Seller appealed the Primary Court judgment before the Appeals Court arguing that the sale is valid as it was conducted through a “Deal Shaker” platform, and it does not violate the law nor public policy.

The fact of the agreement – as argued by the Seller in appeal – between the two parties is that the Seller would maintain the cryptocurrency in accordance with the Seller’s terms and conditions as listed online and release it for transfer to the Buyer between certain periods of time.

The Seller argued that they had explained to the Buyer the rules of the exchange and the possibilities of profit and loss and the risks that might occur to the Buyer.

The Seller alleged that they had informed the Buyer of the

period to acquire the OneCoin units but did not receive any confirmation from the Buyer.

The Buyer refuted any communication to acquire the units during that period had occurred.

Appeals Court judgment

The Appeals Court rejected the Seller's appeal on the following reasoning.

The Court found that OneCoin (and its related companies and its founder Ruja Ignatova), as being the object of the underlying agreement, was deemed associated with fraud that tempts investors to join a Ponzi scheme.

The Court defined a Ponzi scheme as "…a form of defrauding investors by paying dividends to early investors based on money deposited by newer investors. This scheme leads its victims to believe that profits come from sales of products or other investment means and remain unaware of the fact that other investors are the source of funding without real investment in valid means."

The Court concluded that the sold currency and its circulation constitutes fraud, which makes it an invalid transaction and a violation of law and public policy.

Consequentially – the Court found – the agreement does not fulfill the necessary elements for the formation of a contract under Article 129(b) of the Civil Transactions Law that is:

"The object of the contract must be something possible, specified or specifiable, and negotiable."

Which invalidates the contract and renders it *void ab initio* and restores the contracting parties to the state prior to the coming into effect of the agreement, with the obligation on the Seller to refund the moneys paid to the Buyer.

Takeaway

The majority of cryptocurrencies derive their value and increase thereof from their supply and demand on exchanges, so within the wide-encompassing definition of the Ponzi scheme by the Appeals Court, there is a risk of cryptocurrency transactions falling afoul of Article 129(b).

In the past few years, the UAE Central Bank, the Securities and Commodities Authority, the ADGM and the DIFC have set out in regulating digital assets with instruments such as:

- Central Bank Circular No. 6/2020: Stored Value Facilities (SVF) Regulation
- Securities and Commodities Authority Decision No. 23/RM/2020: Concerning Crypto Assets Activities Regulation
- DIFC Dubai Financial Services Authority: Consultation Paper No. 143 – Regulation of Crypto Tokens
- Abu Dhabi Global Markets Guidance – Regulation of Virtual Asset Activities in ADGM (VER04.280922)

The regulations set forth, those above and others in the digital asset industry, provide for various forms of licensing depending on the activity in the digital asset economy.

Failing to operate within the confines of the rules and regulations, or license accordingly, may lead to the invalidation of digital asset transactions on the premise that they do not conform with Article 129(b) of the Civil Transactions Law, or be considered a Ponzi Scheme within the definition adopted by the Appeals Court.

And for buyers who may have suffered from questionable transactions, the Appeals Court judgment provides a sign of relief in the technical competency of the UAE courts to deduce and adjudicate digital asset disputes.

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Dubai Court rejects Bitcoin claim lacking proof of crypto-wallet ownership (and solutions for digital asset disputes in the UAE)

December 2, 2022

Dubai Court rejects claim of loss of 608 Bitcoins for lack of evidence of crypto-wallet ownership.

Dubai Primary Court rules:

"…the plaintiff had transferred the encrypted currency "Bitcoin" to the defendant…did not indicate how to prove the ownership of the account to the defendant, noting that by referring to the page shown in the advisory report taken from the "blockchain" website, it became clear to the court that they are symbols…"

In brief, the Court found that cryptocurrency claims require a plaintiff to evidence crypto-wallet ownership by the alleged debtor.

Background

The plaintiff met the defendant in Dubai, and accepted making an investment in Bitcoin in return for “fantastic financial returns”.

In January 2019, the plaintiff transferred 608 Bitcoins to the defendant.

The Bitcoins were transferred to the crypto wallet of an investment company in accordance with the terms of the agreement between the plaintiff and the defendant.

It was also agreed that after 15 February 2019, even if the project is not complete for any reason, the defendant and the company that owns the crypto wallet must return the Bitcoins to the plaintiff.

On 15 March 2019, the plaintiff demanded from the defendant and the investment company the return of the Bitcoins delivered to them.

The demand to return the Bitcoins was rejected by the defendant, and the defendant “disappeared”.

Claim and ruling

The plaintiff sued the defendant before the Dubai Primary Court claiming return of the 608 Bitcoins or their equivalent market value.

The plaintiff filed an expert report which evidenced the validity of the transfer by referring to a blockchain records website (public ledger) showing that the Bitcoins were held by a particular crypto wallet.

The Court commented that the expert report did not evidence that the crypto wallet belonged to the defendant nor the investment company as the only identification to the wallet’s ownership were “symbols”.

By “symbols” the Court is referring to the crypto wallet

identification number.

In essence, the Dubai Court set a threshold for evidence of token possession by a wrongdoer.

Proof of identity of crypto wallets is an ongoing issue in digital asset disputes.

But solutions and remedies are available for claimants.

Solutions for digital asset disputes

Digital asset disputes – particularly involving the misappropriation of tokens – have resulted in innovative solutions in different jurisdictions using common law injunctive processes.

Mareva injunctions

A Mareva injunction is a worldwide freezing and asset disclosure order.

It extends to all a defendant's assets worldwide, limiting the defendant from utilizing those assets except for regulatory purposes (i.e., paying employment salaries) unless consent is granted by the plaintiff.

And requires the defendant to disclose its worldwide assets over a certain threshold value (i.e., over USD 10,000 or USD 50,000).

The Hong Kong High Court recently granted such remedy over Bitcoins that were fraudulently misappropriated in *Nico Constantijn Antonius Samara v Stive Jean Paul Dan*, freezing up to USD 2.6 million of the defendant's assets (including any digital assets).

Norwich orders

Norwich orders – or Norwich Pharmacal orders – are injunctive orders obtained against an innocent third party in order to

identify a wrongdoer or details related to a potential wrongdoer.

A Norwich order compels an innocent third party (such as a cryptocurrency exchange) to disclose relevant information to a plaintiff/applicant.

In digital asset disputes, these orders have been used to compel exchanges to disclose details related to crypto wallets and digital assets.

The English High Court recently issued a Norwich order in *Mr Dollar Bill Limited v Persons Unknown and Others* – notably, the Norwich order was issued against cryptocurrency exchanges outside England compelling them to assist in identifying what had happened to the tokens in question.

Anton Piller orders

One increasing trend is the reliance on Anton Piller orders to access the digital assets of a defendant and investigate records that could prove the transfer of the tokens.

Anton Piller orders are a common law remedy which compels a defendant to permit a plaintiff to enter its property to search for and seize evidence and records, including electronic data and equipment.

An Anton Piller order in a cryptocurrency dispute was recently issued by the Ontario Superior Court of Justice in *Cicada 137 LLC v. Medjedovic* in relation to an alleged theft of CAD 15 million in digital assets from the plaintiff's crypto wallet.

Solutions in the UAE

The UAE has two common law court systems: the Abu Dhabi Global Market Courts (ADGM) and the Dubai International Financial Centre Courts (DIFC).

Both the ADGM and the DIFC have authority to grant Mareva

injunctions, and the DIFC has historically granted several Mareva injunctions against parties in the UAE and otherwise.

The ADGM and DIFC may also consider applications for Norwich orders to compel third parties to provide evidence in support of a dispute.

Anton Piller orders before the ADGM and DIFC courts are possible, but there are no records of execution of such orders to date.

Digital asset disputes in the UAE

According to 'The 2021 Geography of Cryptocurrency Report' by Chainalysis, the UAE hosted USD 25.5 billion worth of cryptocurrency transactions between July 2020 and June 2021.

With a significant value of cryptocurrency transactions taking place in the UAE, plaintiffs need to carefully strategize any dispute process and make use of all domestic and cross-border remedies.

Relying on archaic means of pursuing claims in an industry that is incrementally complex may not be fruitful – and instead innovative tactics and strategies must be put in place.

The UAE has six court systems – each with their own utility – and the UAE has agreements and treaties with various international dispute resolution forums and courts, that claimants need to consider when pursuing digital asset claims.

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UAE Ministry of Justice confirms enforcement of English Court judgments on principle of reciprocity

December 2, 2022

On 13 September 2022, Judge Abdul Rahman Murad Al-Blooshi, Director of International Cooperation Department of the Ministry of Justice, issued a communique to His Excellency Tarish Eid Al-Mansoori, Director General of the Dubai Courts, confirming the enforcement of judgments issued by English Courts based on the principle of reciprocity.

Extracts from the communique read as follows:

"…based on the Treaty between the United Kingdom of Great Britain and Northern Ireland and the United Arab Emirates on Judicial Assistance in Civil and Commercial Matters, and the desire to strengthen fruitful cooperation in the legal and judicial field;

Whereas, the aforementioned Treaty does not provide for enforcement of foreign judgments, and states that the judgments should be enforced according to the relevant applicable mechanism set forth in the local laws of both countries;

Whereas, Article (85) of the Executive Regulation of the Civil Procedures Law, as amended in 2020, stipulates that judgments and orders issued in a foreign country may be enforced in the State under the same conditions prescribed in the law of that country, and the legislator does not require an agreement for

judicial cooperation to enforce foreign judgments, and such judgments may be enforced in the State according to the principle of reciprocity; and

Whereas, the principle has been considered by the English Courts upon previous enforcement of a judgment issued by Dubai Courts by virtue of a final judgment issued by the High Court of the United Kingdom in *Lenkor Energy Trading DMCC v Puri* (2020) EWHC 75 (QB), which constitutes a legal precedent and a principle binding on all English Courts according to their judicial system,

Therefore, we kindly request you to take the relevant legal actions regarding any requests for enforcement of judgments and orders issued by the English Court, in accordance with the laws in force in both countries, as a confirmation of the principle of reciprocity initiated by the English Courts and assurance of its continuity between the English Courts and the UAE Courts."

Lenkor considered whether enforcement of a Dubai Court judgment would be in breach of English public policy on the argued grounds that "*it is contrary to public policy to permit the indirect enforcement (via a guarantee) of a contractual obligation that is illegal*".

The *Lenkor* court rejected that the underlying transaction must be considered as in breach of English public policy – but rather it is the judgment that must be found to breach English public policy.

The court found that there "*is no suggestion that the public policy which arises under the law of Dubai precludes the enforcement of the statutory cause of action. As the judge said, if that point was to be taken, it should have been taken in Dubai*".

And further that the "*degree of connection between the claim and the illegality must also be balanced against the strong*

public policy in favour of finality, and in favour of enforceability".

The communique by the Ministry of Justice confirming the enforcement of judgments issued by English Courts based on the principle of reciprocity provides confidence and judicial stability for creditors looking to enforce English Court judgments against debtors in the UAE.

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UAE Supreme Court orders default termination clauses only exercisable by beneficial party

December 2, 2022

Brief

In June 2022 the UAE Federal Supreme Court issued a judgment finding that default termination clauses cannot be exercised by both (or all) parties to a contract – if that termination clause inures to the benefit of one of the parties with a standing claim.

The reasoning rendered by the Supreme Court is where a

termination clause is a default termination clause yet inures to the benefit of one party but not the other and is read to intend protecting the interest of that beneficial party, then it is that beneficial party who must explicitly trigger the default termination clause otherwise the contract remains intact.

Ruling

The Federal Supreme Court ordered that:

“It is decided that if the contract does not contain an express condition, it is terminated if its elements are fulfilled.

The court is not necessarily bound to terminate the contract based on an implicit termination condition established for the benefit of the applicant in the event the other party fails to implement their mutual obligation.

The court may compel the debtor to implement their obligation immediately or within a specified time.

And the court may reject the request for termination if it appears to it from the facts of the situation that the debtor is no longer in breach of implementing their obligation, by preventing the issuance of the judgment for termination, by implementing his commitment before or during the consideration of the case and until before the issuance of the final judgment in it.

And there would be nothing in this delay that would harm the applicant requesting the termination or anyone else, and there would be no principle in this regard to the extent of the defendant’s obligation that he had not fulfilled, or the value of the obligation that the applicant fulfilled in accordance with the terms of the contract.

Rather, the principle is what will be the state of affairs

when the case is judged and until the final ruling is issued.”

Facts

In 2008, the applicant (seller) sold to the respondent (buyer) an apartment of which the buyer paid the deposit of about 15% for.

The buyer failed to pay the rest of the installments despite the completion of the apartment.

The seller requested the buyer take possession of the apartment.

The buyer rejected without justification and issued a termination notice to the seller.

The seller sued for the remaining amounts due for the development of the apartment plus interest.

The primary and appeals courts rejected the claim on the basis that the contract had been terminated.

Ultimately the seller petitioned the Federal Supreme Court for review.

References

The Supreme Court relied on Articles 267 and 272 of the Civil Transactions Law that state:

267: If a contract is valid and binding, none of the contracting parties may revoke, modify, or terminate it except by mutual consent, order of the court or a law provision.

272: (1) In bilateral contracts, if one of the parties does not perform his contractual obligations, the other party may, after serving a formal notification to the debtor, demand the performance of the contract or its termination. (2) The judge may order the debtor immediate performance of the contract or grant him specified additional time, as he may order

termination with damages, in any case, if deemed justified.

The Supreme Court deduced the penalty and termination clauses of the contract in dispute which read as follows:

Clause 5: In the event of the buyer’s failure to pay three consecutive or non-consecutive payments, a notice of default for week shall be issued. In the event that the overdue amounts are paid during this period [the week], the buyer will pay a delay fine of 10% of the overdue amounts.

Clause 6: If the buyer does not pay during the above-mentioned period, which is the week for payment of the overdue amounts, the contract is terminated without referring to the buyer, and the seller has the right to sell the apartment to another person, and the buyer deducts 30% of the total paid contract.

Reasoning

The trial courts, primary and appeals, had considered that the contract is deemed automatically terminated pursuant to clauses 5 and 6.

The Federal Supreme Court overturned the lower court judgments and found that the option of the express termination clause is in the interest of the seller and not for the buyer.

The Supreme Court found that the termination notice issued by the buyer is invalid as the termination clause is not in his interest and the buyer does not have the right to terminate the contract unilaterally.

And the seller had insisted on executing the contract of sale of the apartment and requested that the buyer be obligated to pay the rest of the price and take possession of the apartment.

The reasoning rendered by the Supreme Court is where a termination clause is a default termination clause yet inures to the benefit of one party but not the other and is read to

intend protecting the interest of that beneficial party, then it is that beneficial party who must explicitly trigger the default termination clause otherwise the contract remains intact.

And the courts may not terminate the contract without the request of the beneficial party to the termination clause – and must grant requests for performance of the contract.

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UAE Supreme Court: Commercial agency de-registration requires enforcement of foreign judgment

December 2, 2022

Brief

In July of 2022, the Supreme Court adjudicated whether a bankruptcy judgment in a foreign jurisdiction provided sufficient grounds for the Ministry of Economy in the United Arab Emirates to de-register a company from the commercial agency register.

Commercial agency registrations

Foreign companies entering the UAE market from abroad can do so through commercial agency structures.

These relationships are registered with the Ministry of Economy and are distinct from general unregistered contractual relations, distributorships, or otherwise.

Commercial agencies are governed by a specific law (Commercial Agencies Law No. 18/1981) and grant the agent protections that are to an extent safeguarded by the Ministry of Economy.

The Ministry of Economy registers commercial agencies and de-registration of agencies requires the consent of the parties (agent and principal), or court order, or a decision by a special Commercial Agencies Committee.

The legislative purpose of restricting deregistration is to protect the agent.

Ergo to ensure the efforts and investments of the agent made in developing a market for a principal are not abused by the principal through abrupt terminations.

Commercial agency litigation

Disputes between the agent and principal are generally governed by the contractual relationship between the parties.

However, disputes related to registrations or the general status of a commercial agency registration arise from decisions issued by the Ministry of Economy and are subject to the jurisdiction of the Federal Courts (as Federal administrative disputes).

Case facts

An Emirati company was registered with the Ministry of Economy as the commercial agent for three Japanese companies.

In 2019, two of the companies filed a joint request with the

Ministry of Economy to de-register the third company from the commercial agency register on the basis that the third company had been liquidated since 2005.

The Commercial Agencies Committee accepted the request and de-registered the third company.

The agent was not informed of the de-registration decision issued by the Committee.

The agent argued before the Federal Courts that it had no knowledge of the liquidation of the Japanese company since 2005 and that in 2015 the agent was informed that the apparent restructuring was due to a change of name, and the agency relationship continued between the parties.

In 2021 the agent challenged the decision of the Ministry of Economy (the Commercial Agencies Committee) before the Federal Primary Court.

The agent argued that the liquidation order of the courts of Japan has no effect on the rights of the agent (including his registration rights) because (i) the agent was not a party/litigant in the liquidation proceedings before the courts of Japan, and (ii) the agent was not informed or notified of the decision thereafter.

Supreme Court decision

The Supreme Court reasoned that:

“Article 16 of the Commercial Agencies Law No. 18 of 1981 and its amendments states that every commercial agency registration, amendment, or cancellation from the commercial agencies register must be accompanied by the documents supporting it.

The commercial agency [principal] of the appellant has been judicially liquidated by a ruling issued by one of the courts of Japan, and therefore the effects of this ruling before the

courts of the United Arab Emirates do not apply until after the competent [UAE] judge issues the order to implement [the foreign judgment] pursuant to Article 85 of the Executive Regulations of the Civil Procedures Law.

In the appealed ruling, the court ruled on the legality of the Ministry's decision to de-register the foreign company from the commercial agencies register based on a foreign judgment that was not confirmed domestically, which renders the judgment defective and must be rescinded."

Article 85 of the Civil Procedures Law Regulations

The decision by the Supreme Court is that foreign orders and judgments that may affect the status of the registration of a commercial agency in the UAE cannot be presented to the Ministry of Economy to action without first obtaining recognition by the UAE courts.

Article 85 of the Civil Procedures Law Regulations governs the procedure for enforcement of foreign judgments, orders, and bonds.

When an application to the court is filed for enforcement of a foreign judgment, such enforcement order may be appealed by any concerned persons.

In this situation, agents would have the opportunity to sound or present any reservations or contentions to foreign orders that may affect their commercial agency relationship and registration.

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UAE Cassation Court addresses whether silence deemed acceptance in arbitration agreements

December 2, 2022

Silence may be deemed consent

Article 135 of the Civil Code (Law No. 5/1985) states that (i) no statement may be attributed to a silent person. However, circumstantial silence shall constitute acceptance. And (ii) silence shall amount to acceptance namely in case of previous dealings between the contracting parties that are met by the offer made or where the offer is made to the benefit or the offeree.

The DIFC Court of First Instance addressed the meaning of Article 135 in *DAS Real Estate Owned and represented by Mussabeh Salem Mussabeh Humaid AlMuhairi v First Abu Dhabi Bank Pjsc* DIFC 002/2016 where Chief Justice Sir David Steel noted that:

"In the event of silence the secondary question arises as to whether there was a "need" to speak…Silence in the face of "need" amounts to "acceptance". Indeed Article 135(2) identifies the specific example of acceptance of an offer in the context of prior dealing between the parties. The commentary on the UAE Civil Code by James Whelan gives the example of a person who "has the right to prohibit the act by

his words is regarded as consenting to it by his deliberately abstaining from saying anything."

In brief, silence may be considered acceptance under Article 135 of the Civil Code in certain circumstances.

Silence in arbitration agreements

Arbitration agreements have a high threshold in the UAE with respect to evident acceptance by the parties, such as in relation to capacity, authority to represent a principal, arbitration agreements in separate documents to the substantive agreement, or in reference to standard forms (such as the FIDIC forms of contract).

Article 7(2)(a) of the Federal Arbitration Law (No. 6/2018) states that:

"The requirement that an Arbitration Agreement be in writing is met in the following cases…If it is contained in a document signed by the Parties or mentioned in an exchange of letters or other means of written communication or made by an electronic communication according to the applicable rules in the State regarding the electronic transactions."

Article 7(2)(a) provides room for interpretation with respect to the nuances that arise in exchanges of electronic communication to conclude an arbitration agreement.

And the UAE Federal Supreme Court has previously confirmed that an arbitration agreement can be concluded through written electronic communication or through instant messaging.

Consequently, this raises questions as to whether an offer to bind a dispute to arbitration issued by some form of manuscript or – particularly – electronic communication may fall within the parameters of Article 135 of the Civil Code where silence is deemed acceptance.

On 17 May 2022, in a matter involving a payment order and

whether the courts had jurisdiction vis-a-vis a purported arbitration agreement, the Abu Dhabi Cassation Court explicitly addressed silence in arbitration agreement offers in finding that:

"It is not permissible to derive proof of an arbitration agreement from the mere silence of one of the parties regarding the response to the arbitration offer from the other party, or the implementation of what was presented to it by this party related to the invitation to conclude a specific contract as long as it is not proven that the party to whom this offer is addressed has accepted the writing of arbitration while accepting the contract. It is also not permissible to deduce the proof of arbitration also from the mere work between the two parties to arbitrate in certain contracts that the arbitration will apply to another contract between them that did not provide for arbitration since the agreement on arbitration is not presumed and may not be implicitly drawn."

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UAE Supreme Court orders cancellation of tax penalties

for re-submission of returns

December 2, 2022

Facts

The taxpayer submitted tax returns for the prescribed tax periods as of January 2018, and these returns included supplies related to real estate owned individually to the taxpayer, as well as real estate owned in partnership with another person.

The taxpayer's partner was not added to the tax registration from the beginning due to the absence of his name as an owner in all real estate.

The taxpayer registered a new account with the partner on the directives of the Federal Tax Authority during an audit and re-filed the tax returns under the new account.

Penalties

The FTA applied late payment penalties to the taxpayer as the new account required re-submission of the returns that had been filed previously by the taxpayer under the original account.

The FTA considered that the new submissions were the correct submissions as the original submissions were not correct in form and procedure because the account did not include the partner.

The FTA applied the late payment penalties to the new submissions tracing back to January 2018.

Supreme Court order

The taxpayer challenged this up to the Federal Supreme Court.

The Supreme Court found that the reopening of the new account did not result in damages to the State funds because the taxpayer had originally submitted and paid all tax returns, including the real estate in the partnership, on the legally prescribed dates.

The procedural deficiency did not manifest a circumstance where the payments had not been made.

In reasoning, the Supreme Court stated:

"Since this argument is in order, it is decided that tax procedures are not an end in themselves, but rather a means to achieve the goal of the lawgiver in collecting the legally due tax. Allegedly, the tax returns made under the wrong procedure that were subsequently corrected were not taken into account. Rather, the FTA's right to collect the fine decided by the legislator on the wrong procedure only recedes, without this right going beyond that by imposing other fines for a tax collected on the date specified by the law, even under the aforementioned procedure."

Significance

This judgment reassures the application of justice and equity in tax dispute proceedings before the Federal Courts of the UAE. Taxpayers must seek learned and practiced counsel when faced with a tax dispute.

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