

UAE Federal Supreme Court weighs in on liability of shareholders in bankruptcy proceedings

February 21, 2022

Facts and Trial

A company operating from 2001 till 2012 was in strong financial standing. After 2012, the company faced financial difficulties and lawsuits and by 2020 had encumbered debts amounting to almost AED 20 million.

The Federal trial courts (Primary and Appeal) assessed that the company was trading in a commercial business by nature, and it was declared bankrupt as a result of its failure to pay its commercial debts and the disruption of its business and lack of confidence in it in the commercial market, which indicates its troubled financial position, with which its credit position is shaken.

The creditors petitioned for the bankruptcy of the two shareholders as well.

The Federal trial courts rejected the bankruptcy of the two shareholders on the finding that the bankruptcy conditions did not apply to them according to the text of Article 142 of Federal Decree-Law No. 9/2016 on Bankruptcy.

The creditors challenged the position of the Federal trial courts before the Federal Supreme Court on the basis that Article 142 states that if there is an order for bankruptcy of

a company and liquidation of its assets, then all the joint partners of the company shall be declared bankrupt.

Supreme Court Assessment

The Supreme Court rejected the petition on the grounds that the company whose bankruptcy was declared is a free zone company that has a separate legal personality, and its financial liability is independent of the liabilities of its shareholders, and the responsibility of each of the shareholders is determined with his share in the company both in relation to each other and to third parties.

The Supreme Court clarified that shareholders could be found accountable in their personal capacity for debts within the limits of any issued personal guarantees.

If the shareholders are not joint partners nor are responsible for the company debts with their personal assets, they are not considered merchants, just as their participation in the formation of the company and their rights to profit share from the company is not considered a commercial act.

The Supreme Court confirmed that Article 142 applies to 'merchants' and/or joint partners in unlimited liability companies (or civil companies) but does not extend to shareholders in a limited liability company.

The Court clarified that Article 142 should be read in line with Article 2(4) which states the provisions of Bankruptcy Law applies to licensed civil companies of professional nature.

Although not referenced by the Court, a 'merchant' is defined in Article 11 of the Commercial Transactions Law as every person performing, in his own name and for his own account, acts of commerce, and every company exercising a commercial activity or adopting one of the forms prescribed in the Commercial Companies Law, even if such activity is a civil

activity.

Supreme Court Holding

Whereas the text of Articles 2(4) and 142 of Federal Decree-Law No. 9 of 2016 regarding bankruptcy states that its provisions apply only to the person who is approved by the description of the merchant in its legal sense, that he was conducting business in his name and in a professional and exploitative manner, and that the description of the merchant applies to a general partner in the company that conducts trade as a profession, and it was decided and based on what was done by the judiciary of this court that declaring bankruptcy is a penalty that is limited to merchants who stop paying their commercial debts as a result of their financial position insolvency, and that the description of the merchant is only valid on the person who practices trade as a professional, and the capacity of a merchant in commercial business cannot be a presumption, and the burden of proof falls on the one claiming it, and that the bankruptcy of the company entails the bankruptcy of each joint partner in it, with the effect that the joint partner in a commercial company is considered a trader that permits his bankruptcy.

Significance

The clarification by the Supreme Court on the reading of Article 142 of the Bankruptcy Law comes at a significant time on the heels of the recent Marka ruling by the Dubai Courts in adjudicating the bankruptcy of Marka Holdings PJSC.

The Dubai Primary Court had ordered that the managers and directors of Marka be found personally liable for the debts of Marka to amount of approximately AED 450 million.

The Primary Court, in the Marka case, based its finding on Article 144 of the Bankruptcy Law which permits the Court to compel any or all board members or managers to pay all or some of the debts of the company if the assets of the company are

not sufficient to meet at least twenty percent of its debts.

Article 144 reads in a sequential manner to Article 142 – with Article 142 discussing liability of partners.

It is noteworthy now the Supreme Court highlights that the reading of Article 142 must be in conjecture with Article 2(4) which applies the Bankruptcy Law to licensed civil companies and does not extend to shareholders in companies protected with limited liability provisions.

Author: [Mahmoud Abuwaseel](#)

Author: Mahmoud Abuwaseel

Title: Partner – Disputes

Email: mabuwaseel@waselandwaseel.com

Profile:

<https://waselandwaseel.com/about/mahmoud-abuwaseel/>

Lawyers and consultants.

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www.waselandwaseel.com

business@waselandwaseel.com

**High Judicial Commission
issues first UAE stare
decisis order: concept of
absolute invalidity, doctrine
of apparent circumstances,
and standard of good faith**

February 21, 2022

Brief

In December 2019, the UAE formed a high Commission to establish unifying precedents across the various judicial systems of the UAE.

The UAE has six judicial systems: Federal, Abu Dhabi, Dubai, Ras Al-Khaimah, the Dubai International Financial Centre, and the Abu Dhabi Global Market. Historically there have been conflicting positions between the judicial authorities.

The power of stare decisis has been granted to the decisions of this high Commission by law. Even where a high court of the UAE (including the Federal Supreme Court) rules in contradiction to an order of the high Commission, standing is granted to appeal against that contradictory ruling.

Whether the DIFC and/or ADGM courts are subject to the jurisdiction of the high Commission is unclear.

This high Commission issued its first decision in July of 2021 addressing a few issues. Of those issues, we discuss here, are the concept of absolute invalidity of contracts, the doctrine of apparent circumstances, and the standard of good faith.

The high Commission acknowledges that the doctrine of apparent circumstances is not stipulated in UAE legislation neither implicitly nor explicitly.

And with this acknowledgment made clear by the high Commission, it has issued what may be considered as the UAE's first stare decisis order – the first case law binding precedent in the UAE enshrining a nationwide binding doctrine that is prior non-existent in statutory nor customary law.

The Commission

The 'Commission for the Unification of Conflicting Judicial Principles' was established on 19 December 2019 by Federal Law No. 10/2019 on the Regulation of Judicial Relationships between Federal and Local Judicial Authorities.

The Commission is headed by the President of the Federal Supreme Court and paneled by judges from each of the Federal Supreme Court and the Courts of Cassation of the UAE.

Res judicata effect and stare decisis status

The decisions of the Commission have res judicata effect and stare decisis status.

All Federal and local judicial authorities must abide by the principles decided by the Commission.

Violation by any judgment of a lower trial court to any Commission principle is grounds for appeal.

If the violation is by the highest court of a respective UAE jurisdiction, that provides standing to appeal before the respective courts.

Commission Order 1 of 2020

The first petition to the Commission was filed on 4 October 2020 by the Federal Public Prosecution. The Commission issued its decision on 7 July 2021.

Concept of absolute invalidity

Brief: The Commission held that the absolute invalidity of a contract does not affect persons who relied on the contract, nor does it affect contract successors, should such persons (or successors) had relied on apparent circumstances that created an appearance of validity for the contract.

Holding of the Commission on absolute invalidity:

Applying the concept of absolute invalidity in contracts and extending the effects of invalidity to others leads to instability in transactions and conflicts with (i) the requirement to protect those who relied on what appeared to be truthful acts by the contract right holder and (ii) the good

faith presumption that applies in considering the truthfulness of apparent circumstances.

This is because the invalidation of a contract that is acted on within the apparent circumstances and cancellation of its effects from the time it was concluded will inevitably lead to turbulence and instability of transactions.

Moreover, considerations of justice and the requirements for protecting the sanctity of transactions and upholding public trust in them requires protecting good-faith actors from the consequences of the contracts of their predecessors* when entering into such contracts after they – the good-faith actors – were assured of and believed in the validity of those contracts.

Public interest requires that such protection be given for public welfare and the legitimate trust on which people depend. This protection finds its support in the fact that the absolute invalidity of a contract does not prevent considering its existence an actual reality. As the contract, despite its invalidity, creates apparent circumstances of validity on the basis of which a person acts in perceived good faith that it is a legally valid contract, as long as no error or negligence attributed to the person in this belief.

**Predecessors is meant to mean the market, historically, or in a corporate sense, not the familial predecessors of the good faith actor. In other words, the market consists of a plethora of contracts. Many are predecessors or foundational to novel transactions or successor contracts. Should absolute invalidity be accepted by default, reliance on such predecessor contracts and bodies would fade and disrupt market stability.*

Doctrine of apparent circumstances

Brief: Apparent circumstances that are deemed to have granted a contract validity must be given the same weight as the

actual circumstances whose elements had invalidated the contract.

Holding of the Commission on the doctrine of apparent circumstances:

The actual circumstances that are deemed contractually illegal in respect of an invalid contract carry the same effect vis-à-vis persons who acted on such contract in good faith in the same manner as would have manifested if the required elements to perfect the validity of the contract had been achieved.

This is based on the doctrine of apparent circumstances which justifies protection of persons in the event of wrongful disposal – that arise due to contracting with the agent of the apparent circumstances – that is contradictory to the actual circumstances, so long as good faith is evidenced on the part of the protected person.

Notwithstanding that the doctrine of apparent circumstances is not stipulated explicitly nor implicitly in the Civil Transactions Law, the doctrine can still be relied on in pursuit of the protection of justice and interests. This is particularly the case as Article 1 of the Civil Transactions Law states that the rules of justice and interests are considered foundational to the law, after considering legislation, custom, and the principles of Islamic Law.

Standard of good faith

Brief: The act conducted between the agent of the apparent circumstances and any good faith actor is effective against the right holder as the apparent right holder. If the good faith actor fails in their duty of care towards investigating the actual circumstances and any apparent contradictions, they lose the protection of the doctrine of apparent circumstances.

Holding of the Commission on the standard of good faith:

Good faith is considered prevailing if a party (i) could not possibly have come to know the actual circumstances that are contrary to the apparent circumstances and (ii) had applied the care of an ordinary person and did not fail to investigate the actual circumstances and any apparent contradictions.

If a party fails in applying such care and investigation, the presumption of good faith ceases to exist, and such party loses the protection established by the doctrine of apparent circumstances.

Hence:

The act conducted between the agent of the apparent circumstances and any good faith actor is considered effective against the right holder as the apparent right holder, as the good faith actor was prompted to contract with the agent of the apparent circumstances based on the surrounding evidence.

And in turn, this would generate the common belief among all that this appearance matches the truth. Subject to the good faith actor not committing a mistake or shortfall in investigating the truth and relying on such mistake or shortfall.

A trial court has jurisdiction to assess the evidence and understand the facts of the case as drawn from the evidence and assess the extent of the contribution of the right holder in establishing those facts and evidence, and the effort made by the party contracting with the agent of the apparent circumstances in investigating the truth of the appearances.

Significance of this Commission Order 1 of 2020

The significance of this Order will span across myriad issues.

In addition to the effects on general transactions; the position of the Commission on the concept of absolute invalidity will transpose onto regulated transactions, such as

corporate restructurings (share transfers, etc.), real estate transactions, commercial agency registrations, industry license transfers, intellectual property transactions – essentially any regulated transaction where the sanctity of registered rights may be prejudiced by a subsequently discovered invalidity of an underlying contract. The position of the Commission that the concept of absolute invalidity should not be applied by default creates grounds for parties to protect registered rights notwithstanding the latter discovered invalidity of an underlying contract.

The elaboration on the doctrine of apparent circumstances provides much-needed expansive guidance on the application of apparent authority by the UAE courts. And creates stability in its application across the judicial jurisdictions of the UAE. This is a particular issue with arbitration agreements where courts have concurrently issued contradicting positions on whether apparent authority may be relied on to uphold the validity of an arbitration agreement if an agent lacked explicit authority to bind the principal to it.

And the elaboration on the standard of good faith by the Commission creates a bipartisan onus between litigants to the effect that the concept of apparent authority would not automatically apply. But rather within the doctrine of apparent circumstances and the standards of good faith, a party relying on the agency (authority) of another has a duty of care towards confirming the actual authority of said agent. The Commission even goes so far as to clarify the role of a trial court in that it should assess the extent of the contribution of the principal and also the effort made by the party contracting with the agent in investigating the truth.

Author: Mahmoud Abuwaseel

Title: Partner – Disputes

Email: mabuwaseel@waselandwaseel.com

Profile:

<https://waselandwaseel.com/about/mahmoud-abuwaseel/>

Lawyers and consultants.

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www.waselandwaseel.com

business@waselandwaseel.com

UAE Supreme Court orders Government agency to pay company damages for license revocation

February 21, 2022

Brief

A company in Abu Dhabi providing electronic services since 2009 had its commercial license revoked by its licensing authority.

The company challenged the revocation decision for being unfounded before the Federal Courts.

The company requested from the Federal Courts:

- (1) cancellation of the license revocation decision, and
- (2) compensation of 100 million Dirhams.

The Federal Primary and Appeals Courts ordered the cancellation of the license revocation decision – but rejected granting the company any damages.

The Federal Supreme Court overturned the rulings of the lower courts and awarded the company compensation of AED 500,000 in damages for loss of profit.

Liability to compensate

In considering the liability of the government agency to compensate, the Supreme Court stated:

“And since it is established in administrative law jurisprudence and case law, and the position of this court, that when a judgment is issued to cancel a decision issued by the administration on its non-contractual actions and the judgment acquired the force of *res judicata*, the element of error in the issuing of the administrative decision and its violation of the law is established and the liability for compensation for damages manifests.”

Right to monetary damages

In addressing the right to monetary damages, the Supreme Court ruled:

“And since the damage as the second pillar of responsibility is the breach of the financial interest of the injured person, it includes the loss suffered by the injured and the loss of profit, provided that the damage is real, that it actually occurred, and it was found to be proven with certainty, or that it will inevitably occur in the future.”

Legislative basis

In quantifying the damages owed to the company, the Supreme Court relied on Article 282 of the Civil Transactions Law and accounted for a court-appointed expert report (obtained at the lower courts), and estimated damages as follows:

“Article 282 of the Civil Transactions Law states that every act that results in harm to a third party obliges the perpetrator to repair the prejudice, and since the government agency had withdrawn the company’s license with a decision that the court canceled by a judgment that had the force of *res judicata*, and this [cancelled] administrative decision was what led to the damages sustained by the company, and therefrom, compensation for damage is dependent on the extent

of the damage, and that in order to determine its elements, the court delegated an expert who ... stated in his report that the decision revoking the company's license prevented it from providing services to the public and lead to loss of the company's clients that it held since 2009 ... since the compensation is estimated for the damage incurred by the aggrieved party, and there is no provision in the law that obliges a specific criteria in estimating compensation, the court sets it at an amount of 500,000 Dirhams according to the elements of the aforementioned damage..."

Author: [Mahmoud Abuwase1](#)

Author: Mahmoud Abuwase1

Title: Partner – Disputes

Email: mabuwase1@waselandwase1.com

Profile:

<https://waselandwase1.com/about/mahmoud-abuwase1/>

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business@waselandwase1.com

New rules on retrospective tax penalty waivers, installments, tax litigation, and class actions

February 21, 2022

Brief

For the first time since the UAE tax laws came into effect in October 2017, the legislation now:

- Grants permission to pay tax penalties in installments.
- Specifies reasons that permit penalty waivers.*
- Prohibits installments or waivers if litigation is ongoing.
- Allows for a class action against tax penalties.
- Permits waiver of penalties paid during the past five years.

*Before, the legislation only stated that “*accepted justifications*” may substantiate penalty waivers, but it was unclear what would entail an accepted justification.

Importantly, taxpayers must choose between either disputing tax penalties through the tax dispute resolution committees and the Federal Courts – or filing installment applications. The new changes make it unworkable for both to occur at the same time. And because of the time limitations, a dispute may be time-barred if the taxpayer opts to file an installment application instead of contending the penalties before the tax dispute resolution committees and the Federal Courts.

Although there is no explicit similar restriction for waiver applications, it is assumed that litigation may prevent waiver applications as well.

This is a substantive consideration for taxpayers as they must weigh the risks of sacrificing litigation against the risk of receiving a rejection on an installment application (and potentially waiver applications).

Decree

Cabinet Decree number 105 of 2021 was signed into effect on 28 December 2021 and published in the official gazette in first week of January 2022.

The Decree is titled: ‘Regarding Protocols and Procedures for [Tax] Penalty Installments and Waiver’.

The Decree comes into effect on 1 March 2022.

Acceptability of tax penalty installments

Approval of requests to pay tax penalties in installments is subject to the following conditions:

- The request must be in respect of unpaid tax penalties only.
- The minimum tax penalties subject to an installment request must be at least AED 50,000.
- The penalties subject of the installment request must not be currently in dispute before the tax dispute resolution committees or the Federal Courts, or any other relevant authorities.
- That the penalties do not have any associated outstanding taxes.

Acceptability of tax penalty waivers

Approval of requests to waive tax penalties (in part or in full) is subject to the tax penalties not be associated with any crimes of tax evasion. The law is unclear on whether 'crimes' refers to mere allegations or actual convictions.

Accepted reasons to grant penalty waivers are as follows:

- Death or illness of the taxpayer if the taxpayer is a natural person or owner of an establishment.
- Death, illness, or resignation of a principal employee of the tax registrant.
- Evidence of restrictions, or precautionary or preventive measures, applied on the taxpayer by UAE government agencies.*
- Evidence of system failure in the general, payment or communication systems of the Federal Tax Authority that affects a class of persons.
- Causes relating to restrictions on liberty and freedom of a natural person taxpayer or owner of an

establishment.

- Payment of all taxes via the tax account of another registered taxpayer.
- In cases of insolvency or bankruptcy, penalties may be waived if they have been paid prior to the insolvency or bankruptcy, and if it is evident that the insolvency or bankruptcy was not for purposes of tax evasion.

*The law does not state “other” government agencies. It is unclear whether restrictions or precautionary or preventive measures, also apply to actions by the Federal Tax Authority itself.

These reasons must – of course – be evidently directly linked to the implementation of the penalties.

The committee maintains the right to waive penalties for any other reasons it deems acceptable.

Class actions: The Decree permits the Director-General to propose to the committee waiver of penalties against a class of persons to whom are collectively affected by one of the accepted reasons noted above.

As a note, the Decree refers to natural person owners of establishments. The Decree does not discuss single-person owned limited liability companies.

Procedure for either tax penalty installment or waiver applications

The applicant of either an installment or waiver application must provide the general details (tax number, penalty amounts, reasons, etc.) in their applications.

Importantly for installment requests, the taxpayer must file an undertaking that the penalties will be paid in accordance with the payment schedule that is accepted by the committee.

Importantly for waiver requests, the taxpayer must file an

undertaking that the cause of the penalties shall be rectified, and that the cause shall not occur again.

A taxpayer may not file more than one application for the same penalty[ies].

Breach of the undertakings will nullify and void the underlying application. In other words, if the taxpayer breaches an undertaking against a waiver application by repeating the problem, the waived penalties may be re-implemented by the Federal Tax Authority.

An application will be reviewed by the Federal Tax Authority within forty weekdays for compliance with all requirements, if the application is valid, it shall be referred to the committee. The committee has sixty weekdays to decide on an application (and ten days to notify the applicant thereafter). Lack of a decision is deemed a final rejection.

Committee decisions

The committee will be responsible for setting the time limit for filing waiver applications.

The committee will draw the payment procedures and schedules for installment applications.

The committee is free to decide the percentage of penalties to be waived in respect of waiver applications.

The committee may request any guarantee it sees fit to process an installment application. Presumably, the committee may request corporate, personal, or bank guarantees against an installment application.

Failing to adhere to an installment payment plan may result in either:

- A new payment plan if there is a justifiable excuse for non-compliance with the schedule, or

- Action by the Federal Tax Authority against the taxpayer to collect the penalties.

Retrospective penalty waivers

The Decree requires waiver applications to be made in respect of unpaid penalties only – but the Decree also grants the committee authority to waive paid penalties that were paid five years prior to a waiver application.

The Decree grants the committee authority to stipulate the circumstances and rules related to waiver applications in respect of paid penalties.

If paid penalties are waived retrospectively, the paid penalties subject of the waiver will be credited to the taxpayer's account with the Federal Tax Authority or refunded in cash in case the taxpayer has canceled their tax registration.

Author: [Mahmoud Abuwase1](#)

Author: Mahmoud Abuwase1

Title: Partner – Disputes

Email: mabuwase1@waselandwase1.com

Profile:

<https://waselandwase1.com/about/mahmoud-abuwase1/>

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www.waselandwase1.com

business@waselandwase1.com

UAE Cassation Court rules amended memorandum of association not subject to

the arbitration agreement in the original memorandum

February 21, 2022

In a recent judgment by the Abu Dhabi Cassation Court, the Court looked into whether an amended memorandum of association binds the shareholders to the arbitration agreement in the original memorandum.

Case

The shareholders of a limited liability company included an arbitration agreement in the memorandum of association at the time of incorporation of the company. The memorandum was duly attested by the public notary and registered with the commercial registrar. The arbitration agreement between that parties stated that:

“In the event that any dispute arises regarding the interpretation, implementation, or application of the agreement [the memorandum of association] provisions or for any other reason, it shall be resolved by amicable means agreed upon between the parties. If this is not agreed upon, the dispute shall be referred to an arbitration tribunal composed of three arbitrators.”

Subsequently, one of the shareholders sold their shares in totality to the other shareholder, and the amended memorandum of association reflecting the new share ownership was duly attested by a public notary and registered with the commercial registrar.

The amended memorandum expressly stated in its sixth clause that with the exception of the amendments stated therein, the

rest of the terms of the original memorandum of association remain in effect.

The amended memorandum did not include an arbitration agreement.

The shareholders disputed and the case was brought before the Abu Dhabi Courts.

The Courts applied their jurisdiction to adjudicate the dispute on the reasoning that the amended memorandum of association did not include its own respective arbitration agreement, and that the parties were not bound by the arbitration agreement in the original memorandum of association.

Cassation Court reasoning

The Cassation Court found that the referral to the original memorandum of association contained in the sixth clause of the amended memorandum did not imply the express consent of the parties to the arbitration agreement in the original memorandum and that it was not to be deemed clear and express reference to the arbitration agreement in the original memorandum.

The Court's position was that the reference to the original memorandum of association was just a general reference to its texts without specifying the arbitration agreement to evidence the parties' knowledge of its presence in the original memorandum, and hence the general referral to the provisions of the original memorandum of association does not extend to the arbitration agreement therein.

The Cassation Court reasoned as follows:

"The provisions of Articles 4, 5 and 6 of Federal Law No. 6 of 2018 on Arbitration states that arbitration is an express agreement of the parties on the jurisdiction of the arbitrator

excluding the courts to settle a dispute between them, and whether the agreement on arbitration is in the form of terms or conditions, it must be established in writing, whether the writing is in writing signed by the parties or what the parties exchanged in letters, telegrams or other written means of communication, and is considered an agreement on arbitration every reference in the substantive agreement to the document that includes the arbitration clause if the referral is clear and explicit in approving this clause. The effect of referral is achieved only if it specifies the arbitration agreement contained in the document to which it is referred.

If the reference to the substantive agreement is just a general reference to the texts of this agreement without specifying the arbitration agreement evidencing that the parties know of its presence in the referred to substantive agreement, then the referral does not extend to the arbitration agreement and the arbitration is not to be considered agreed upon between the contracting parties, just as if there are annexes or schedules to the substantive agreement, it is not required that the parties sign and stipulate that these schedules and appendices are considered an integral part thereof, given that these annexes and schedules are nothing more than a detailed statement of the essential issues agreed upon by the parties, except that if those annexes include an exceptional condition such as the arbitration agreement, in which case the arbitration agreement does not apply to the parties unless they sign that annex.”

(The translation of the judgment is for informational purposes only and is not a substitute for the official judgment. The original version of the judgment is the only definitive and official version.)

Takeaway

In this judgment, the Abu Dhabi Cassation Court sheds light on

the judicial approach with respect to Article 7(2)(b) of the Federal Arbitration Law which permits incorporating arbitration clauses by reference to any model contract, international agreement, or any other document containing an arbitration clause.

And particularly does so in the sense of corporate constitutional documents.

For shareholders with arbitration agreements in their memoranda of association, this judgment provides guidance on the position of the courts if any amendments are made to the original memorandum without an explicit arbitration agreement governing that amendment.

Revisiting amendments to memoranda of association, or registered share transfer deeds, to ensure they reflect express consent to the arbitration agreement in the original memorandum would be a cautionary step to take to ensure the validity of the arbitration agreement.

Author: [Mahmoud Abuwase1](#)

Author: Mahmoud Abuwase1

Title: Partner – Disputes

Email: mabuwase1@waselandwase1.com

Profile:

<https://waselandwase1.com/about/mahmoud-abuwase1/>

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www.waselandwase1.com

business@waselandwase1.com

UAE Supreme Court acquits warehouse operator in tobacco

tax evasion case

February 21, 2022

Brief

The Public Prosecution took action against two entities; a tobacco trader (first accused) and a warehouse operator (second accused) on tax evasion charges for possessing cigarette goods that lack the requisite distinctive marks (tax stamps).

On 27 May 2020, the warehouse operated by the second accused was inspected by the Public Prosecution where eighty thousand cartons of cigarettes were found lacking distinctive marks.

The cigarettes were owned by the first accused and sent for storage with the second accused on the basis of being subsequently exported to Pakistan.

The first accused acknowledged knowing that the goods did not have the required tax stamps and that no evidence was provided from the selling party validating the entry of the goods into the UAE. The first accused's defenses relied on whether the provisions of law relied on by the Prosecution were valid at the time of charge by the Public Prosecution.

The second accused, however, argued mainly that the storage service was conducted pursuant to its permitted commercial activities, that it had no interest nor benefit in evading the tax, and that none of the criminal elements were evidenced against it.

The Federal Supreme Court upheld the conviction by the Federal Appeals Court against the first accused.

However, the Supreme Court quashed (set aside / voided) the

judgment of the Appeals Court on the finding that the mere presence of the goods in the second accused's warehouse is not sufficient to convict the second accused of participating in tax evasion with the first accused.

Arguments – first accused

The first accused confirmed that:

- They sent the tobacco goods to be stored in the warehouse of the second accused in preparation for shipment to Pakistan.
- They knew that the goods did not have the distinctive marks (tax stamps) as they were intended for export outside the country.
- They did not obtain documents from the party that sold the cigarettes proving their entry into the country through customs.

The first accused argued – however – that the Federal Primary and Appeals Courts applied a repealed law, because the date of arrest was on 27 May 2020, and the provisions in force at that time were that of Law No. 2/2019 on Implementing the Marking Tobacco and Tobacco Products Scheme.

Prior to Law No. 2/2019, the proceeding law was Law No. 3/2018 – also on Implementing the Marking Tobacco and Tobacco Products Scheme.

Article 1 of Law No. 2/2019 set the starting date for certain prohibitions:

- Prohibition on importing designated excise goods without the tax stamps as of 1 March 2020.
- Prohibition on supplying, transferring, storing, or possessing designated excise goods without the tax stamps as of 1 June 2020.

Article 1 of the canceled Law No. 3/2018 provided similar

prohibitions against importing and supplying.

The Federal Courts reasoned that these amendments between the repealed Law No. 3/2018 and the applicable Law No. 2/2019 were nothing but a renewal of this prohibition and do not justify storing excise goods without the requisite marks.

Arguments – second accused

The second accused did not dispute that the goods were seized in its warehouse, but insisted that;

- the criminal elements for conviction were missing;
- its actions were in good faith;
- the goods were being stored for the benefit of others as permitted by its commercial license;
- that it had stored the seized goods belonging to the first accused without knowing that they do not bear the distinguishing marks (tax stamps) that would prevent their possession or storage;
- that the first accused requested to store them to send them outside the country;
- and that the second accused had no interest in evading the tax imposed and due on the goods.

The principal argument of the second accused (the storer) was that it was convicted despite the absence of the elements of the crime and the absence of criminal intent, and that it evidenced the presence of good faith and that it had no knowledge that the cartons stored do not bear the distinctive marks (tax stamps) and that it has no interest in not paying the tax and that it did not violate the company's permitted commercial activity in its license and that the tax law did not provide for the criminalization of storage work for others, and the seized goods were in the possession of its owner – possession by means.

The second accused focused on arguing that the Primary and Appeals Court judgments did not prove the second accused's

contribution to the non-payment of tax and that the first accused admitted that the goods belonged to it and that it deposited them in the second accused's warehouse until they were to be exported outside the country and that the first accused bears the full tax due.

The Federal Primary and Appeals Court relied on the testimony of the second accused during interrogation with the Public Prosecution which was quoted as follows:

"The second accused testified that during interrogation by the Public Prosecution that a quantity of tobacco that was not allowed to be circulated inside the second accused's warehouse was seized from and that it was owned by the first accused, and that the first accused sent it to their warehouse for the purpose of storing it and then shipping it outside the country, but they were unable to export it, so it remained in their (the second accused's) possession. This indicates that the second accused participated with the first accused in evading the tax stipulated in the laws of the State and that he shall be jointly and severally liable before the State with the first accused towards paying the due tax and administrative fines."

On the basis of the interrogation testimony, the Federal Appeals Court upheld the conviction of the second accused as ordered by the Primary Court.

Supreme Court trial

The first accused was represented by the company owner in interrogation and in liability.

The second accused was represented by a corporate representative in interrogation and in liability.

The alleged evaded excise tax was AED 320,000.

The alleged evaded value-added tax was AED 24,000.

The provisions of law in question and review by the Federal Courts were the following:

- Articles 1, 2, 26(1) of the Tax Procedures Law.
- Article 1, 2, 4, 23(1), 23(2), and 23(3) of the Tax Procedures Law Executive Regulations.
- Articles 2 and 4 of the Value Added Tax Law.
- Article 1 of the Excise Tax Law.
- Articles 1 and 2 of Cabinet Decision No. 42/2018 on Marking Tobacco and Tobacco Products.
- Articles 1, 2, and 3 of Cabinet Decision No. 38/2017 on Excise Goods, Excise Tax Rates and the Method of Calculating the Excise Price.
- Article 1 of FTA Decision No. 3/2018 on Implementing the Marking Tobacco and Tobacco Products Scheme.

In February 2021, Federal Primary Court had ordered the confiscation of the goods (amounting to a few million Dirhams), payment of the outstanding excise, and value-added tax amounting to AED 344,000, and a jail sentence of four months to both accused parties.

In June 2021, the ruling was upheld by the Federal Appeals Court.

The first and second accused both petitioned the Supreme Court to quash the Appeals Court judgment.

In October 2021, the Federal Supreme Court ruled on the case.

Supreme Court judgment – first accused

The Supreme Court rejected the arguments of the first accused and upheld the ruling of the Appeals Court convicting the first accused of tax evasion for supply, transfer, storage or possession of cigarettes without the distinctive marks (tax stamps).

Supreme Court judgment – second accused

The Supreme Court quashed (set aside / voided) the Appeals Court judgment in respect of the second accused reasoning as follows:

“It was proven in the evidence that the second accused did not dispute that the goods were seized in his warehouse, but he held that the elements of the crime were missing and good faith was established, and that the second accused was storing for the benefit of others according to its commercial license and that it had stored the seized goods belonging to the first accused without knowing that they were not carrying distinguished marks prohibiting their possession or storage, and that the first accused requested to store them to be sent outside the country, and that the second accused had no interest in not paying the tax imposed and due on the goods.

The appealed judgment had established its judiciary by convicting the appellant [second accused] of what he mentioned in his testimony during interrogation by the Public Prosecution that a quantity of tobacco that was not allowed to be circulated inside the second accused's warehouse was seized and that it was owned by the first accused, and that the first accused sent it to their [second accused] warehouse for the purpose of storing it and then shipping it outside the country, but they were unable to export it, so it remained in their [second accused] possession. The Appeals Court found that this indicates that the second accused participated with the first accused in evading the tax stipulated in the laws of the State and that he shall be jointly and severally liable before the State with the first accused towards paying the due tax and administrative fines.

What the appealed judgment concluded is not valid in response to the second accused's defense and does not convict him. Additionally, the Appeals Court's finding that the mere presence of the goods in the second accused's warehouse is considered participation with the first accused in evading the tax as stipulated in the laws of the State, without indicating

the laws criminalizing the act and validating conviction, stigmatizes the judgment for insufficient causation, and breaches the [second accused's] right of defense, which requires it to be quashed."

(The translation of the judgment is for informational purposes only and is not a substitute for the official judgment. The original version of the judgment, found with the UAE Federal Supreme Court, is the only definitive and official version.)

The Federal Supreme Court found that it was not valid to convict the second accused in complicity with the first accused for the crime of tax evasion for mere storage of the non-compliant tobacco goods where no legal provisions permit such conviction.

The Supreme Court ordered that the Appeals Court judgment be quashed (set aside / voided) in respect of the second accused.

Author: [Mahmoud Abuwaseel](#)

Author: Mahmoud Abuwaseel

Title: Partner – Disputes

Email: mabuwaseel@waselandwaseel.com

Profile:

<https://waselandwaseel.com/about/mahmoud-abuwaseel/>

Lawyers and consultants.

Tier-1 services since 1799.

www.waselandwaseel.com

business@waselandwaseel.com

Dubai Cassation Court accepts arbitration jurisdictional challenge even when not filed

at Primary and Appeals Courts

February 21, 2022

Novelty

It has generally been the case that a jurisdictional challenge against the courts to hear a dispute where an arbitration agreement exists must be made at the first hearing that takes place, at the first level of the overseeing trial court.

(To clarify – the ‘first hearing’ is in reality usually the first case management session where a party is ordered to file their pleading. It does not necessarily refer to be a trial hearing before the supervising or trial judge.)

Long-standing case law authority has been that where a party does not challenge the courts’ jurisdiction on the grounds that an arbitration agreement exists between the parties, it would be deemed as implicit consent to the courts’ jurisdiction.

In a landmark judgment passed by the Dubai Cassation Court in October 2021, the Court found that:

- The court may of its own accord reject jurisdiction where an arbitration agreement exists.

And (more significantly):

- That a party can file its jurisdictional challenge for the first time at the appellate or cassation courts – even if not presented at the primary or the appeals courts.

Case

The dispute revolved around a private corporate share

acquisition where the share transfer agreement was subject to an arbitration agreement as the dispute resolution forum.

The buyers filed their claim before the Dubai Primary Court seeking claw-back of the share sale with an order on the seller to re-acquire the shares.

The seller did not defend before the Dubai Primary Court, nor before the Dubai Appeals Court, only filing their defense and rejection of the courts' jurisdiction before the Cassation Court.

Rulings

The Dubai Primary Court rejected its jurisdiction to hear the dispute by its own accord, citing that the parties had agreed to resort to arbitration – even though the seller/defendant had not appeared nor filed any statements before the Court.

The buyers appealed before the Dubai Appeals Court.

The Dubai Appeals Court overturned the Dubai Primary Court judgment and ruled on the substance of the dispute. The seller/defendant had not appeared nor filed any statements before the Appeals Court either.

The seller/defendant petitioned the Dubai Cassation Court to review and overturn the Dubai Appeals Court judgment.

The Cassation Court ruled that:

“...and it was proven in the evidence that the appellant [seller] did not appear before the Primary Court or before the Appeals Court, whose judgment is being contested, and he [the seller] did not submit any memorandum of his defense in the case, proving that he had not made any request or any defense or argument on the subject matter of the case in the two stages of litigation and that he had done so for the first time – arguing against the jurisdiction of the court due to the existence of the arbitration agreement – before this

[Cassation] Court before making any request or any defense in the subject matter of the case...so the appellant's argument that the Dubai Courts have no jurisdiction over the dispute in question due to the presence of the arbitration agreement is valid, and since the judgment of the Appeals Court has contradicted this consideration and decided on the merits of the case, it is thus defective, which requires its revocation."

The Cassation Court overturned the Appeals Court judgment and ordered that the Dubai Courts lack jurisdiction in view of the arbitration agreement.

As noted, the position by the courts has generally been that a party must iterate and voice their challenge to the jurisdiction of the courts at the first hearing/case management session.

This judgment and position taken by the Dubai Cassation Court expand the temporal and procedural spectrum of challenging the courts' jurisdiction where an arbitration agreement exists between the litigants – granting litigants avenue to trigger jurisdictional arguments at latter court stages.

Author: [Mahmoud Abuwase1](#)

Author: Mahmoud Abuwase1

Title: Partner – Disputes

Email: mabuwase1@waselandwase1.com

Profile:

<https://waselandwase1.com/about/mahmoud-abuwase1/>

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www.waselandwase1.com

business@waselandwase1.com

Abu Dhabi Cassation Court

acknowledges verbal, implied, or apparent authority to bind principal to an arbitration agreement

February 21, 2022

Novelty

In a landmark judgment by the Abu Dhabi Cassation Court in October 2021, the Court confirmed that an agent/representative may bind a principal to an arbitration agreement if they have:

- Explicit written authority.
- Explicit verbal authority.
- Implied authority.
- Apparent authority.

It was recently the case that the Dubai Courts acknowledged apparent or implied authority to bind a party to an arbitration clause/agreement whilst the Abu Dhabi Courts generally required evidence of explicit written authority to do so.

As a general matter, explicit authority as construed by the Abu Dhabi Courts had high thresholds such as maintaining an attested and valid power of attorney.

This novel judgment by the Abu Dhabi Cassation Court establishes substantial precedent in expanding the validity of explicit authority to include verbal authorization.

But more so, creates a new dynamic in acknowledging implied authority of an agent/representative to bind a party to an

arbitration agreement.

And furthermore, the position by the Abu Dhabi Cassation Court falls in line with global jurisprudence and practice in accepting the general principle of apparent authority (sometimes referred to as 'ostensible authority') which is a central principle of the doctrine of agency.

Petition to invalidate the award

Two subcontract agreements were entered into by the disputing parties containing an arbitration clause/agreement.

The dispute was adjudicated, and an arbitration award was issued, under the rules of the Abu Dhabi Commercial Conciliation and Arbitration Centre.

The net-loser of the arbitration procedures challenged the award before the Abu Dhabi Appeals Court on the basis that the signing representative was not an authorized signatory per the petitioner's corporate bylaws and commercial registration records, nor did the representative have explicit authority to agree to an arbitration clause/agreement.

The petitioner relied on Article 58/2 of the Federal Civil Procedures Law which states:

"It is not valid, without a special authorization, to declare a right of the defendant, disclaim it, reconcile or arbitrate therein, approve the oath, or direct or challenge it, abandon the litigation, renouncing the judgment entirely or partially, relinquishing one of the channels of appeal therein, releasing the attachment (seizure), relinquishing the insurances with the continuation of the debt, claiming the falsification, recusing the judge or the expert or the real petition, or accepting it, or any other disposition that the law requires therein a special authorization."

Appeals Court finding

The Abu Dhabi Appeals Court reasoned that the contracts, subject of the arbitration award, were signed by a representative who had previously been issued a duly notarized power of attorney, and that the contracts were signed within the year 2016 whilst the power of attorney was valid, notwithstanding lack of explicit authority in the power of attorney documents to bind the principal to an arbitration agreement.

The Court continued to reason that the representative had indeed signed the contracts between the two parties in his capacity as a representative, and hence the petitioner (principal) is bound by all the clauses in those contracts, including the agreement on arbitration in the event of a dispute between the two parties.

The court also factored in that it was proven during the arbitration proceedings that the petitioner paid some of the payments owed to the net-winner of the arbitration award and that the dealings regarding the contract transactions were conducted with the representative signatory of the contracts subject of the arbitration award.

The Appeals Court concluded that these elements suffice to establish the validity of the arbitration agreement between the parties, and no basis is available to invalidate the arbitration agreement pursuant to the grounds available in Article 53 of the Federal Arbitration Law which governs possible objections to an arbitral award.

Cassation Court decision

The Abu Dhabi Cassation Court upheld the finding of the Appeals Court and further elaborated that:

“...the authority of the agent may be explicit, implicit or apparent, and the authorization is explicit if it is verbal or written, and the authorization is implicit if it is inferred from the reality of the situation, and everything that was

said or written, or the normal method of dealing may be considered...”

The Cassation Court rejected the petition and upheld the validity of the arbitration agreement.

Apparent or implied authority test

In recent years the UAE courts have identified certain elements that test whether apparent or implied authority binds a principal to an arbitration agreement signed by an agent/representative lacking explicit authority. The courts consider any or all of the following elements if evidenced.

- The contract states the name of the signatory in the preamble.
- The contract states the name of the signatory in the signature page.
- The contract is stamped with the corporate seal/stamp.
- The contract is signed/initialed on every page.
- The contract is on the company’s letterhead.
- The contract was operated by the company.
- The contract was overseen by the signing agent/representative.
- The signing agent/representative communicated to the effect of enacting the transaction/contract.

The courts do not necessarily require all these elements to be evidenced, but use their application to weigh and test whether implied or apparent authority manifests.

Author: [Mahmoud Abuwase1](#)

Author: Mahmoud Abuwase1

Title: Partner – Disputes

Email: mabuwase1@waselandwase1.com

Profile:

<https://waselandwase1.com/about/mahmoud-abuwase1/>

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business@waselandwase1.com

UAE overhauls tax dispute procedures (re-litigation, penalty refunds, fewer payments, longer time-bars)

February 21, 2022

As of first November 2021, the tax dispute procedures have been amended pursuant to Federal Decree-Law No. 28/2021 creating a new opportunity to re-litigate disputes, permitting payments by installments or bank guarantees, providing longer time-bars for objection actions, reducing the payments required to proceed with a tax dispute, and other notable changes.

Re-litigation

- Article 33(2)(c) of the new amendments states:

“Failure of the person to provide proof of payment of no less than 50% of the amount of the administrative penalties as decided by the Committee, or as ruled by the court, as the case may be...”

- The text of this article illustrates a novel circumstance where the court may issue a judgment ordering a person to pay certain penalties, but subsequently, the person re-litigates those penalties before the court. Essentially creating a new opportunity to dispute penalties that have already been ruled on.
- It has generally been the case that tax disputes make

their way to court in challenging a decision by the Federal Tax Authority only, after fulfilling the requirements of filing a reconsideration application and objection the competent tax dispute resolution committee.

- The new text creates a new dynamic for the Federal Courts to potentially consider re-litigation for cases that have been already concluded.
- This also goes hand-in-hand with the new amendments to the Civil Procedures Law (the overarching legislation to the Tax Procedures Law) which – as of 2 September 2021 – allow for re-litigation of final and binding judgments in certain circumstances such as procedural mistakes, or judgments based on a repealed law, where the application of the correct law would change the opinion reached in the case.

Penalty refunds and installment payments

- A new committee is to be formed responsible for deciding on penalty waivers, permission to pay penalties in installments, and penalty refunds.
- The new amendments require bylaws to be issued to manage the procedures to be conducted by the committee.
- A matter of consideration is whether the refund mechanisms will apply to penalty refunds granted by the FTA directly, or also to refunds ordered by the court.

Time-bars

- The time-bar to file a reconsideration application against a decision of the FTA has been increased to forty weekdays as opposed to the prior twenty weekdays' limit.
- The time-bar for the FTA to decide on a reconsideration application has also been increased to forty weekdays from twenty weekdays.
- Objections against FTA reconsideration decisions to be

filed before a tax dispute resolution committee must be filed within forty weekdays from the date of notification of the reconsideration decision. This is also an increase from the prior twenty-weekday limit.

- Once a tax dispute resolution committee issues its decision, the person may challenge that decision before the Federal Primary Court. The new amendments have increased the timeframe to file the challenge before the Federal Primary Court to forty weekdays as well, as opposed to the prior time-bar of twenty weekdays.

Pay-now-argue-later (tax dispute resolution committees)

- Objections before a tax dispute resolution committee previously required settlement of all taxes and penalties subject to the objection prior to filing with the committee. Otherwise, the objection would be rejected on a procedural basis.
- The new amendments require payment of only the taxes subject of the objection. The amendments are silent on any requirements to pay any penalties. Implicitly, this should mean that payment of penalties is no longer necessary for a tax dispute resolution committee to rule on an objection.

Pay-now-argue-later (Federal Primary Court)

- Once a tax dispute resolution committee issues its decision, the person may challenge that decision before the Federal Primary Court.
- The new amendments require payment of at least 50% of the penalties in dispute to be conducted before the Federal Primary Court (or subsequent Appeals and Supreme Court) may address the dispute.
- However, the new amendments permit payment by cash to the FTA, or by an approved bank guarantee in favor of the FTA.

Government-to-Government disputes

- The new amendments exclude Government taxpayers (Federal or Emirate specific) from the application of the texts governing the tax dispute resolution committee's jurisdiction, the procedure for submitting objections, procedures of the committee, enforcement of the committee's decision, and challenges before the courts.
- However, the new amendments require a decision to be issued by the Cabinet of Ministers to create new mechanisms for Government-to-Government tax disputes, and until then, the standard procedure will continue to apply.

Author: [Mahmoud Abuwase1](#)

Author: Mahmoud Abuwase1

Title: Partner – Disputes

Email: mabuwase1@waselandwase1.com

Profile:

<https://waselandwase1.com/about/mahmoud-abuwase1/>

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www.waselandwase1.com

business@waselandwase1.com

Dubai Cassation Court clarifies the limit of permitted extension periods for issuance of awards under the DIAC Arbitration Rules 2007

February 21, 2022

In a recent judgment issued in October 2021, the Dubai Cassation Court addressed the permissible number of extensions that may be granted to the time limit for rendering an arbitration award under the DIAC Arbitration Rules 2007 (“DIAC Rules”).

DIAC Rules

Article 36 of the DIAC Rules provides that the time limit within which the tribunal must render its final award is six months from the date the sole arbitrator (or the chairman in the case of three arbitrators) receives the file. The tribunal may, on its own initiative, extend the time-limit for up to additional six months. The executive committee may extend this time limit further pursuant to a reasoned request from the tribunal or on its own initiative if it decides that it is necessary to do so.

Case and petitioned motion

The arbitration award subject to set-aside had been rendered after three extensions took place.

One extension took place by the tribunal, and two subsequent extensions granted by the executive committee.

The petitioned motion before the Dubai Cassation Court requested the nullification of the award based on two limbs. One limb in that the award addressed a subject matter that was outside the scope of the arbitration award.

The second – more notable – limb was that the tribunal had issued the award after three extensions.

The petitioner argued before the Cassation Court that Article 36 of the DIAC Rules limited extensions to only two: one extension by the tribunal and a second extension by the executive committee.

The petitioner also argued that the third extension was not agreed to by the parties.

Cassation Court reasoning

The Dubai Cassation Court applied a textualist approach to its interpretation of Article 36 of the DIAC Rules – particularly Article 36(4) which grants the executive committee authority to extend time limits for the issuance of an award.

The text of Article 36.4 of the DIAC Rules explicitly states:

“The executive committee may extend this time limit further pursuant to a reasoned request from the tribunal or on its own initiative if it decides that it is necessary to do so.”

The Court ruled:

“...Article 36(4) never came about the number of times to extend the time limit for arbitration, and the text did not limit the executive committee to one period [of extension], as the plaintiffs’ lawyer had argued...it is necessary to take the text *prima facie* as long as the legislator was conscious of the text and did not limit it and hence the Court considers that the [third] extension of the time limit from the executive committee of DIAC is consistent with the correct application of the provisions of the law...”

The judgment provides a significant judicial clarification in respect of extension periods under Article 36 of the DIAC Rules that may be granted by the executive committee, and guidance for arbitrators adjudicating disputes under the DIAC rules.

Author: [Mahmoud Abuwase1](#)

Author: Mahmoud Abuwaseh

Title: Partner – Disputes

Email: mabuwaseh@waselandwaseh.com

Profile:

<https://waselandwaseh.com/about/mahmoud-abuwaseh/>

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business@waselandwaseh.com