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

September 15, 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

September 15, 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

September 15, 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

September 15, 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

September 15, 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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UAE Federal Supreme Court weighs in on liability of shareholders in bankruptcy proceedings

September 15, 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.

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

September 15, 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 apparencies.

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.

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

September 15, 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…”

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

September 15, 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, ad 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.

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UAE Cassation Court rules amended memorandum of association not subject to

the arbitration agreement in the original memorandum

September 15, 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.

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