

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

November 1, 2021

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of final and binding judgments in certain circumstances such as procedural mistakes, or judgments based on a repealed law, where the application of the correct law would change the opinion reached in the case.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.

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

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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.

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Recent Decree Abolishes the Emirates Maritime Arbitration Centre and the DIFC Arbitration Institute

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On 14 September 2021, H.H. Sheikh Mohammed bin Rashid Al Maktoum – the Ruler of Dubai – issued [Dubai Decree No. 34/2021](#) (the Decree), which ameliorates and enhances the position of the Dubai International Arbitration Centre (DIAC) in the global industry and completely redefines the arbitration ecosystem in Dubai.

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Dubai Courts order new condition for construction claims mandating the filing of an authorized expert report (also for liquidation and intellectual property claims)

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Brief

The Dubai Courts issued Circular No. 9/2021 on 13 September 2021 mandating that an authorized expert prepared technical report be filed when submitting a statement of claim related to construction, liquidation, or intellectual property claims for acceptance of the claim.

The Circular instructs the case management office of the Dubai Courts to reject the registration of any claim related to construction, liquidation, or intellectual property unless the claim is supported by an expert report prepared by an authorized expert.

Authorized experts are identified as the experts registered with the Centre for Amicable Settlement of Disputes that is affiliated with the Dubai Courts and established pursuant to Dubai Law No. 16/2009.

The Circular clarifies this necessity being the result of the

complex nature of construction, liquidation, and intellectual property claims. And that supplementing the statement of claim with an authorized expert report would assist in the preparation and expediency of the trial procedures.

It is important to note that the Circular does not limit collaboration by an authorized expert with any other experts. There are no restrictions set in the Circular on reports being developed jointly by authorized experts and third-party or experts from other jurisdictions (such as the DIFC or other Emirates such as Abu Dhabi or otherwise).

Time bar considerations (general and appeals)

It is unclear from the Circular whether this new prerequisite applies only to filing claims with the Dubai Primary Court. The language of the Circular is broad and appears to apply to all court circuits and potentially the Dubai Appeals and Cassation Courts.

This new condition for acceptance of construction, liquidation, and intellectual property claims creates a significant consideration for litigants with respect to time bars being respected.

An expert report would naturally increase the preparation time required for the lodging of a claim with the respective court.

Time bars for general civil and commercial claims range between two to fifteen years inherently granting litigants sufficient time to prepare.

However, there are circumstances where current litigants will need to apply preemptive consideration to this new condition established under the Circular.

Appealing a Dubai Primary Court judgment before the Dubai Appeals Court must occur within thirty calendar days as of notification of the judgment.

And petitioning the Dubai Cassation Court for review of a Dubai Appeals Court judgment must occur within sixty days of notification of the judgment.

As it is unclear whether the condition applies only to filings with the Dubai Primary Court, it would be prudent for current litigants to account for the potential necessity of preparing an expert report by an authorized expert prior to trying their dispute before a higher level of court.

Time bar considerations (urgent petitions)

Another consideration is urgent matter petitions (such as freezing orders or travel bans).

Generally, when a dispute manifests in construction claims, contractors, subcontractors, suppliers, and otherwise take an initial step of requesting an urgent matters judge to issue a freezing order against performance guarantee/s respective of the project in dispute.

An urgent matters judge would grant the injunction against the liquidation of the performance guarantee/s, subject to a substantial claim being filed with the trial court within eight calendar days.

Under the new condition ordered by the Circular, litigants would need to prepare an expert report as required by an authorized expert ready to be filed with the trial court within this short time period of eight days.

Failing which the case management officer would refuse to register the case, and consequently, if the eight days expire, the injunction against the liquidation of the performance guarantee/s would be at risk of cancellation.

Powers of the case management office

The Circular refers to the requirements under the Civil Procedures Law (as amended by Decision 57/2018 and 75/2021),

and particularly Article 16(2)(e):

“The statement of claim shall contain the following data...the subject-matter of the lawsuit, the demands and grounds thereof.”

And Article 17(3):

“The case management office shall be responsible for the preparation and management of the case before referral of the lawsuit to the competent court, including its registration, announcement, exchange of memoranda and documents and expertise reports between the litigants.”

And Article 20(1):

“In the case of the use of remote communication technology or electronic registration...The plaintiff shall, upon registration of his statement of claim, submit a number of copies thereof equal to the number of defendants. A copy to the case management office shall be saved electronically or in a special file. Moreover, the plaintiff shall submit, along with the statement of claim, copies of all the supporting documents, in addition to expertise reports drafted by registered experts, if any.”

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Dubai Judicial Authority orders DIFC Courts as courts of original jurisdiction under the NY Convention

November 1, 2021

Brief

In a recent judgment by the Joint Judicial Tribunal in March 2021, the Tribunal ordered that:

“...the United Arab Emirates is a party to the New York Convention for the recognition of foreign arbitration decisions and their implementation by Decree No. 43 of 2006, which states to accept the procedure in any jurisdiction in the country and the DIFC Courts is one of such jurisdictions.”

Cassation No. 8/2020 (Judicial Tribunal)

For clarity; the parties to the arbitration award had no connection with the Dubai International Financial Centre.

For background; the Joint Judicial Tribunal (or Committee) was established on 9 June 2016 by H.H. The Ruler of Dubai via Decree 19/2016 for the purpose of resolving conflicts of jurisdiction between the Dubai International Financial Centre Courts and the Dubai Courts. The Tribunal comprises three DIFC Court judges, and three Dubai Court judges, and the President of the Dubai Courts.

Prior position of the Tribunal

In the 2017 case of *Gulf Navigation Holding P.S.C. v Jinhai*

Heavy Industry Co. an arbitration award was issued in favor of Jinhai against Gulf Navigation in a London-seated arbitration.

In considering whether the DIFC Courts or the Dubai Courts have jurisdiction, the majority of the Tribunal ordered that “...this case is not similar to cases in which the Courts apply the provisions of the New York Convention 1958 because the two courts are in one Emirate, viz, Dubai Emirate.”

Three judges on the Tribunal dissented, in the operative part of the dissent stating as follows:

“It follows that the award in an arbitral award within the meaning of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“The New York Convention”) to which the UAE is a party, Article III of the Convention imposes an obligation on each contracting state to recognize and enforce any such award. As regards the DIFC this obligation is reflected in Article 42 of DIFC Arbitration Law No. 1 of 2008.

...

The decision is based on the “*general principles of law embodied in the procedural laws and since Dubai Courts have the general jurisdiction then they are the competent courts to entertain its case.*” This implies that, whenever there is a conflict (or apparent conflict) between Dubai Courts and DIFCC, DIFCC must give precedence to Dubai Courts. There is no such principle in Dubai law. Indeed, the contrary is the case.

...

The New York Convention can be enforced in different parts of the counties e.g. in different states of the USA and in other Federal jurisdictions such as Australia and Canada. Furthermore, under Article 42 of DIFC Arbitration Law of 2008, DIFCC is given the express power (and duty) to enforce Awards “irrespective of the State or jurisdiction in which it was

made". If DIFCC were to be prevented from enforcing this foreign Award, this would place the UAE in breach of its obligations under Article III of the NYC, which requires all States which have acceded to the Convention to enforce foreign awards."

The new position of the Tribunal

The prior position of the Tribunal was that the Dubai Courts have original jurisdiction in the Emirate of Dubai to enforce foreign arbitration awards vis-a-vis the DIFC Courts.

The judgment in *Cassation No. 8/2020 (Judicial Tribunal)* issued in early 2021 by the Tribunal creates a new trajectory in the confirmation of the DIFC Courts as courts of jurisdiction for the purposes of recognition and enforcement of foreign arbitral awards under the New York Convention.

The Tribunal explicitly ordered that the United Arab Emirates is a party to the New York Convention for the recognition of foreign arbitration decisions and their implementation by Decree No. 43 of 2006, which states to accept recognition and enforcement procedures in any jurisdiction in the country and that the Courts of the DIFC Courts are of such jurisdictions.

It is important to note that neither party to the arbitration award had any connection with the DIFC.

And that the prior ruling in *Gulf Navigation Holding P.S.C. v Jinhai Heavy Industry Co.* was issued prior to the new UAE Arbitration Law No. 6/2018.

Significance

The DIFC Courts have often been referred to as a 'conduit' jurisdiction for the enforcement of foreign arbitral awards. The concept was developed to refer to the DIFC Courts as non-original jurisdiction court but rather a conduit option for recognition and enforcement of foreign arbitral awards.

Subsequent to which a judgment by the DIFC Courts on recognition and enforcement would be enforced before the Enforcement Circuit of the Dubai Primary Court through a special DIFC Courts / Dubai Courts expedited enforcement system, and further through the rest of the Emirates through judicial cooperation systems between the different judicial authorities in the UAE.

The term 'conduit' jurisdiction connotes that the DIFC Court acts as an extraordinary channel for the enforcement of foreign awards, as opposed to a Court of original jurisdiction in the UAE.

And such jurisdiction has been curtailed in the past, such as in the case of *Gulf Navigation Holding P.S.C. v Jinhai Heavy Industry Co.*

The Tribunal's new position in *Cassation No. 8/2020 (Judicial Tribunal)* dispenses from the consideration that the DIFC Courts are a 'conduit' jurisdiction and instead enforces that the DIFC Courts are UAE Courts of original jurisdiction for the purposes of foreign arbitral award recognition under the New York Convention.

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UAE Supreme Court: First Tax

Evasion Criminal Case

November 1, 2021

Case brief

In May 2021, the UAE Federal Supreme Court ruled on the first tax evasion criminal case ordering payment of five times the amount of the evaded tax, amounting to almost 4.2 million Dirhams.

At a hearing in October 2020, the Federal Primary Court ordered the taxpayer to pay five times the tax evaded. The Primary Court had relied on an expert report to confirm the quantum of the evaded tax.

The taxpayer appealed this sentence and at a hearing in March 2021, the Federal Appeals Court ruled accepting the appeal procedurally but rejected the taxpayer's defenses and upheld the Primary Court sentence.

Subsequent to this, the taxpayer challenged the Federal Appeals Court judgment before the Federal Supreme Court. The Federal Supreme Court upheld the sentence rendering it the first recorded Supreme Court case on tax evasion.

Previous address by the Supreme Court on tax evasion

Tax evasion was addressed by a court for the first time during civil proceedings in October 2020 when the Federal Supreme Court addressed tax evasion obiter dicta (in passing) in judgment number 227/2020 related to voluntary disclosures.

The Federal Supreme Court took the position that where a person discovers an error, they must disclose and correct the error (within twenty weekdays) – or be found to have committed

tax evasion, as follows:

“That is due to the fact that the voluntary disclosure along with tax differences it contained is not only a guarantee for the State Treasury but also a means of rectifying the taxpayer’s error as such in the declaration – or the result of the tax assessment – therefore, the aforementioned had to, in all cases, correct the errors in his declaration for the purpose of maintaining the dues of the State; otherwise, he would have faced the tax evasion offense, which requires his penalization.”

Tax evasion in law

Articles 1 of both the Tax Procedures Law and the Excise Tax Law defines ‘tax evasion’ as the “...use of illegal means, resulting in the reduction of the amount of the due tax, non-payment thereof or a refund of a tax that the Person did not have the right to have refunded...”.

Article 26 of the Tax Procedures Law sets out the penalties for tax evasion as imprisonment and/or a penalty of up to five times the amount of the evaded tax

Federal Tax Authority powers

Article 50 of the Tax Procedures Law grants the Director-General, and tax auditors appointed by a decision of the Minister of Justice, the capacity of judicial officers for tax violations.

Under Article 30 of the Criminal Procedures Law, judicial officers have the power to inquire about crimes, search for their perpetrators and collect the necessary information and evidence for investigation and indictment.

Article 45 of the Criminal Procedures Law grants judicial officers the power to order the arrest of the accused, present and against whom there is enough evidence that they committed

a crime.

Criminal complaints accusing a taxpayer of tax evasion are generally investigated by the State Funds department of the Federal Public Prosecution.

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UAE Supreme Court sets new test for tax dispute time limits (extensions)

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In a recent judgment, the Federal Supreme Court ruled that the time limits related to tax disputes do not necessarily commence when notification is issued – but rather require evidence of the receipt and fulfillment of knowledge of the taxpayer of that decision and its contents.

The Supreme Court judgment sets a new test for taxpayers who may have had issues in receiving reconsideration decisions from the Federal Tax Authority or decisions issued by the tax dispute resolution committees, and lost their rights to challenge before the Federal Courts.

Facts

The taxpayer had challenged a decision by the FTA through the reconsideration procedure.

The FTA issued the reconsideration decision to the email address that had been submitted as the notification address by the taxpayer in the reconsideration form.

The taxpayer had high-level security systems that restricted the receipt of the email containing the reconsideration decision.

The email containing the reconsideration decision was discovered after a few weeks from its issuance pursuant to follow-up by the taxpayer – at which point the FTA recommunicated the reconsideration decision.

The taxpayer filed their objection against the reconsideration decision within twenty weekdays thereafter.

The tax dispute resolution committee, the Federal Primary, and Appeals Court rejected addressing the dispute any further on the basis that the taxpayer should have filed their objection against the reconsideration decision within twenty weekdays of the original date the decision was issued.

Supreme Court Decision

The Supreme Court overturned the findings of the tax dispute resolution committee, and the lower Courts, and applied the principle of administrative law that governs fulfillment of knowledge of an administrative decision.

Administrative law is that which governs the relationship between the public and private sectors.

An administrative decision is a decision that is issued by a public/government agency.

The Supreme Court ordered that evidence of the notification with the reconsideration decision being issued does not necessarily suffice to trigger the twenty-weekday time limit to proceed to challenge the decision before the tax dispute resolution committee.

The Court reasoned based on principles of administrative law that require evidence of the taxpayer obtaining fulfillment of knowledge of the reconsideration decision and its contents to trigger the time limit.

Otherwise, the time limit remains unextinguished until such evidence is made.

The Supreme Court took this position notwithstanding that Article 30 of the Tax Procedures Law requires the time limit of twenty weekdays to file an objection with the tax dispute resolution committee to commence from the date of the notification.

Significance and administrative law

The relationship of a taxpayer with the FTA is not a commercial relationship, but an administrative relationship, i.e. a relationship with a government entity arising from the responsibility of a person or company towards the government to comply with public responsibilities – such as paying tax.

Administrative relationships are governed by administrative

law in the UAE – which is the overarching corpus of rules that govern tax disputes.

However, administrative law in the UAE is not codified (with the exception of Article 84 (bis) of the Civil Procedures Law). Otherwise, there is no single statute or legislation that governs administrative law.

Administrative law in the UAE is derived from authoritative case law and scholarly works.

The judgment by the Supreme Court is significant as it applies a principle of administrative case law in dominion to the tax legislation.

By doing so, taxpayers now have higher degrees of comfort in that their arguments and pleas to the judiciary in tax disputes are not delimited to the explicit wording of the law – but can expand beyond those parameters to incorporate rules of administrative law.

Extensive experience in administrative disputes, including tax disputes, lead to the taxpayer being in a stronger and more comprehensive position by incorporating into their defenses and arguments principles and jurisprudence that govern administrative disputes – that ultimately provide more grounds for the higher judiciary (such as the Supreme Court) to accept and overturn decisions by the lower Courts or the tax dispute resolution committees.

Fulfillment of knowledge

Fulfillment of knowledge is one of the core principles in administrative law and essentially means that the decision reaches the knowledge of the person subject to that decision in a sure and certain way so that it does not leave room for doubt about the lack of their knowledge about the decision or its content.

The Federal Supreme Court affirmed prior that *“the fulfillment of knowledge with which the date of the annulment lawsuit opens, is that knowledge that surrounds the content of the administrative decision, its source, and the legal position established by it for the addressee of the decision or the person concerned with it.”*

(Federal Supreme Court, Case No. 423 of 2014)

The Abu Dhabi Court of Cassation also confirmed this as follows:

“Although the time limit for appealing administrative decisions is scheduled to apply from the date of publication of the administrative decision or the notification of the person concerned, and if the texts of the law have identified the fact of the announcement as a tool of knowledge of the contested administrative decision, however, given that it is not accepted for a presumption that the contested decision has reached the knowledge of the person concerned, jurisprudence and the judiciary in the field of administration are stable that certain knowledge of the administrative decision takes the place of publication and announcement, provided that it is certain fulfillment of knowledge, neither presumptive nor hypothetical when conclusive evidence is established in accordance with the requirements of the circumstances and nature of the dispute. Fulfillment of knowledge that includes all the contents of the decision and its performance, so that it is possible for the person, by virtue of this knowledge, to determine his legal position in the decision. It indicates that it happened without being restricted to a certain means of proof, and the judiciary may verify the existence or non-existence of this presumption or that fact and assess the effect that can be arranged on it in terms of sufficiency or insufficiency of knowledge...”

(Abu Dhabi Court of Cassation, Case No. 13 of 2013)

And more recently by the Federal Supreme Court where the Court stated:

“While it was stipulated by the text of Article 84 bis of the Civil Procedure Code and what was done by the judiciary of this court that the beginning of the deadline for the right to appeal against administrative decisions starts from the date of publication or announcement of the decision or from the date on which the addressee’s knowledge of the decision is proven with a certain knowledge of the content of the decision in a way that enables him to determine his position towards it, and this knowledge is proven from any valid fact or presumption that it took place...”

(Federal Supreme Court, Appeal No. 210 of 2017)

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Dubai Cassation Court rejects enforcement of unsigned arbitration award

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In April 2021, the Dubai Cassation Court refused to grant an arbitration award writ of enforcement for violation of public

policy on the grounds that the reasoning and decision of the award were not signed by the arbitrator.

Background

In 2020, a net-winner of an international / foreign arbitration proceeding submitted the arbitral award to the enforcement circuit of the Dubai Courts with a petition request for its enforcement.

The arbitration award was issued by the China International Economic and Trade Arbitration Commission and adjudicated on by a single arbitrator.

The enforcement judge accepted the request and granted the award writ of enforcement.

The counterparty challenged the enforcement grant before the Dubai Appeals Court on two grounds:

- Violation of Article 16(2) of the Civil Procedures Law Regulations (Dec. no. 57/2018) which require certain information to be included in any statement of claim, and signatures of the claimants or their representatives.
- Lack of valid representation for deficiency in the powers of attorney submitted to the courts for the net winner of the arbitration award (the enforcing party).

The Appeals Court rejected the appeal and confirmed the validity of the enforcement grant.

In late 2020, the counterparty petitioned the Dubai Cassation Court to overturn the Appeals Court judgment, arguing that the arbitral award had violated Articles 85 and 86 of the Civil Procedures Law Regulations which govern the enforcement of foreign judgments, orders, bonds, and arbitral awards.

The principal argument presented to the Cassation Court was that the arbitral award was not signed – and that the

arbitrator had signed a separate document that is 'disconnected' from the award itself.

Dubai Cassation Court judgment

The Dubai Cassation Court issued its judgment in April 2021.

The Cassation Court relied on the authorities granted to the UAE courts under Articles V(1) and V(2)(b) of the New York Convention to refuse recognition and enforcement of an arbitral award if it is deemed contrary to public policy of the UAE.

The Court further based its reasoning on Article III of the Convention in ensuring compliance with the rules of procedure of the UAE for recognition and enforcement.

The Court confirmed that in identifying the 'rules of procedure' for the UAE as referenced in the Convention one cannot limit such rules to the Civil Procedures Law (and its regulations) – but consideration must be given to the Federal Arbitration Law as well with respect to rules of procedure respective to arbitration matters.

The Court cited Article 41 of the Federal Arbitration Law in respect of requirements for the arbitration award to be signed by the arbitrator (or arbitrators).

The Court further reasoned that the signature of the arbitrator(s) is the only legal confirmation of their acknowledgement and oversight of the award. Lack thereof would result in the inability to attribute the award to the arbitrator(s).

And in identifying the term 'award' for purposes of signing, the Court emphasized the inclusion of the reasoning and the decision.

In other words, for compliance with UAE public policy and to ensure enforcement validity, the reasoning and decision of an

arbitration award must be signed by the arbitrator(s).

The Cassation Court also confirmed its acceptance of this novel argument notwithstanding that it had not been raised before the Appeals Court, seeing as it is a matter of public policy.

The Cassation Court overturned the Appeals Court judgment and ordered the refusal of granting the arbitration award writ of enforcement for its violation of public policy on the grounds that it lacked the signature of the arbitrator in its reasoning and decision.

Significance

The UAE Courts have previously emphasized the requirement for arbitration awards to include the signature of the arbitrator(s) on the reasoning and decision to ensure validity.

This new judgment is significant as it applies the same public policy conditions under the 2018 Federal Arbitration Law and reconfirms the position of the UAE Courts.

Moreover, it is significant for parties currently litigating arbitral award enforcement proceedings as the Dubai Cassation Court confirms the legality of presenting it with arguments on lack of signature even where such arguments were not submitted to the Appeals Court.

And most importantly, the judgment reinforces the necessity for foreign parties and UAE parties involved in foreign / international arbitration proceedings, that intend on enforcing the awards in the UAE (or otherwise in some instances) to ensure that the final and certified award complies with the requirements for enforcement in the UAE – including issues of public policy from the perspective of the UAE Courts.

For arbitrators, the judgment signifies the importance of accounting for statutory and case law public policy considerations in the UAE to ensure the sanctity of their awards.

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Restrictions on unincorporated joint ventures disputing taxes and tax penalties in the UAE

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Issue

Companies often engage in, and operate projects, in the UAE through a joint venture or consortium structure. This is often the case in the construction industry.

Generally, these joint ventures or consortiums are unincorporated – meaning that the parties making up the joint ventures do not incorporate a company but are rather organized contractually.

For tax purposes, joint ventures or consortiums may nonetheless register for tax and obtain tax certificates.

However, the Federal Supreme Court has yet to confirm whether obtaining a tax certificate grants joint ventures or consortiums the right to dispute decisions by the Federal Tax Authority in the UAE, and/or subsequently litigate decisions by the FTA before the Federal Courts.

Unincorporated joint ventures (registered as a single taxpayer) may not be permitted to dispute decisions by the Federal Tax Authority.

To avoid the risk of losing the right to challenge or grieve against a tax decision, unincorporated joint ventures should consider the trial procedure restrictions and ensure their dispute process is initiated properly from the reconsideration stage (or earlier).

Background / personhood

When the FTA issues a decision, the Tax Procedures Law and its Executive Regulations grant a person the right to challenge that decision through a five-tier dispute resolution process:

1. Lodging a reconsideration application with the FTA disputing the decision;
2. Submitting an objection against the FTA's reconsideration decision before the competent tax dispute resolution committee;
3. Filing a case to challenge the tax dispute resolution committee ruling before the Federal Primary Court;
4. Appealing the Federal Primary Court judgment before the Federal Appeals Court; and
5. Filing a case before the Federal Supreme Court appealing the Federal Appeals Court judgment.

The Tax Procedures Law is explicit in limiting the permission to proceed with the dispute process to a single 'person' as

follows:

- “Any person shall have the right to submit an application to the authority for reconsideration of any decision issued by it...”
- “...the authority and the person may appeal the decision of the Tax Dispute Resolution Committee before the competent court...”

The Tax Procedures Law has explicitly restricted the dispute procedure to persons (i.e., those enjoying personhood under law) – not merely those with an issued tax certificate.

Statutory limitations

The general rule is that the capacity to sue or be sued requires the party to litigation have the requisite legal capacity (personhood) to be a party to a lawsuit. Article 93 of the Civil Transactions Law grants the right to sue to legal persons.

By law, a ‘person’ may be a natural person (i.e., a human) or a legal person. A legal person is defined under Article 92 of the Civil Transactions Law as mainly State entities, companies, and private associations and institutions, amongst others.

Unincorporated joint ventures were previously recognized as commercial companies under the old Commercial Companies Law of 1984 as particular partnership companies (‘*Mahasa*’ companies) – albeit not necessarily obtaining independent legal personhood – but merely being governed with respect to the liabilities and obligations of the parties to the unincorporated joint venture.

Under the new Commercial Companies Law of 2015, unincorporated joint ventures are no longer considered a form of a commercial company.

Consequently, under the current legislative regime in the UAE, each company that is party to an unincorporated joint venture or consortium is a separate legal person. The joint venture itself does not enjoy legal personhood.

This was confirmed by the Dubai Cassation Court in 2011 (in respect of both the old and new Commercial Companies Laws) where it ruled that:

“It is also decided in the judiciary of this court that the association of the names of two companies in the contract with the word “joint venture” does not make them one company and does not create another legal person other than them and does not affect the right of each of them to sue in their name, and the meaning of this word is nothing more than the two companies’ sharing of interests and rights resulting from the [joint venture] contract.”

Given that unincorporated joint ventures lack legal personhood, it is the general rule that they are hence not granted the right to sue (or be sued).

FTA guide

The Federal Tax Authority acknowledges that unincorporated joint ventures are not necessarily legal persons.

In the ‘Getting Started Guide – VAT’ reference VATG115, the FTA highlights in Section 2 therein that:

“A person can be an individual (i.e., operating as a sole trader), or a legal person ... or another form of entity (e.g., an unincorporated body such as a charity or club, a partnership or trust).”

Accordingly, the FTA identifies that registrants can be natural persons (humans / individuals), legal persons, or another form such as an unincorporated body. The FTA recognizes that unincorporated bodies are not legal persons

for tax purposes.

Considerations

These considerations must be taken into account for unincorporated joint ventures when facing a decision by the FTA that they wish to challenge.

The right to challenge a decision is permissible only once and is subject to strict time limitations that are generally twenty weekdays triggered upon the issuance of a decision at a particular stage.

If the procedure is found deficient at any step – at the reconsideration stage, tax dispute resolution committee, or at any level of the Federal Courts, the taxpayer may lose their right to challenge said decision again.

That deficiency may very well be lack of personhood for an unincorporated joint venture to challenge a decision by the Federal Tax Authority.

Erring on the side of caution would be the most appropriate way forward until the Federal Supreme Court addresses this issue and confirms or defuses whether an unincorporated joint venture with a tax certificate can challenge decisions by the Federal Tax Authority – or whether the dispute procedure has to be strategized differently to ensure the right of the joint venture to challenge an unfavorable tax decision.

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ADGM Arbitration Centre Introduces Protocol for Remote Hearings

November 1, 2021

The days of the COVID-19 pandemic are gradually becoming a thing of the past and it comes as a sign of glee for companies around the world; but if there is one positive that has been derived from the pandemic, it is the advancement of technology in the workplace to allow people to work/operate from anywhere with a suitable internet connection.

In staying up to date with the trends, the ADGM Arbitration Centre has introduced its new set of protocols for remote hearings, structuring the framework for what appears to be the new normal in arbitration hearings. The protocol is designed to ensure that the remote hearings are organized and conducted in a fair, efficient, reliable and cost-effective manner.

The protocols cover a range of topic including the sequence of proceedings, electronic bundles of documents, transcripts, and preparatory arrangements. In this article, we will take a look at aspects of the protocols that other arbitration centers should seek to duplicate.

Choice of Platforms

Right off the bat the protocols address the issue of the platform for the hearings – whether it be WebEx, Zoom, or Microsoft Teams – the parties must agree on which platform will be used for the hearings and failing to do so, the arbitral tribunal will select the platform.

Additionally, the parties must have a video-conferencing system, an electronic document management system, and real-time transcripts.

In all cases, the platform should be of sufficient quality to allow for clear video and audio transmission, documents to be shown to all speakers when required, and an accurate written transcript of the proceedings on a real time basis.

Participants, Speakers and Attendees

A benefit of the increase in video-conferencing is that anyone, anywhere in the world can attend; however, this same benefit is a drawback which the protocols seeks to address.

The protocols create a clear differentiation between the participants, speakers and attendees of the hearings.

Participant is defined as:

“Each person who is permitted to attend the Remote Hearing, being each of the Tribunal members or sole arbitrator, the Tribunal Secretary (if any), each Party’s legal counsel, and each Party’s representatives, witnesses, and experts.”

Speakers are participants who can be both seen and heard by all other participants; and attendees are participants who are only able to see and hear the speakers but cannot themselves be seen or heard.

The speakers are considered:

1. Members of the arbitral tribunal
2. Members of the parties’ legal counsel who will be advocating for the parties
3. Any fact witness or expert witness who is testifying on that day
4. Any simultaneous interpreter who is needed on that day

All other individuals (e.g., other members of the parties’

legal team, any party representatives or personnel, and any other permitted participant such as a secretary to the arbitral tribunal,) will join as attendees.

The protocols call for the parties to exchange and provide their respective list of participants to the arbitral tribunal by a set number of days before the commencement of the remote hearings.

Semi-Remote Hearing Arrangements

The protocols define semi-remote hearing arrangements as a situation in which several participants attend the remote hearing from the same physical room.

To ensure that the parties are treated equally, *inter alia*, with respect to the appearance of the parties and their lawyers before the arbitral tribunal, the protocols dictate that the following arrangements should be avoided where possible:

1. The arbitral tribunal and the legal team of only one of the parties appearing in person, while the legal team of the other party appears remotely; and/ or
2. The legal team of one of the parties examining an opposing party's witness or expert in person, without the opposing party and/ or its legal team also present in person

In the context of a semi-remote hearing, expert and fact witnesses shall remain sequestered for the duration of their testimony.

Recognition and Enforcement

At the conclusion of the proceedings when an award has been rendered, the parties will seek to recognize and enforce said award. Given that the hearings may be held remotely, the protocols suggest for the following to be implemented and

signed by both parties to ensure a smooth post-arbitration stage:

“The parties have agreed that:

- 1. The arbitral tribunal may use remote video-conferencing as the means for conducting the arbitral hearing in this matter;*
- 2. Remote video-conferencing constitutes a fair and acceptable means of holding hearings and taking of evidence by the arbitral tribunal pursuant to the parties’ arbitration agreement and the rules and legal requirements applicable in this matter, including those at the seat of the arbitration;*
- 3. The conduct of the hearing is consistent and compliant with the [law of the seat] and is substantially in accordance with this Protocol; and*
- 4. No party will seek to set aside or oppose the recognition or enforcement of any resultant arbitral award on the basis that the arbitral hearing was conducted by remote video-conferencing, and hereby waives any right to seek any such set-aside.*

[Signed: Claimant’s authorised representative]

[Signed: Respondent’s authorised representative]”

Conclusion

Remote hearings have been successfully implemented by courts and arbitral institutes across the globe over the past year. The ICC introduced remote hearings in the ICC’s Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, dated 9 April 2020 – this guidance note contained an annex specifically dedicated to the ICC’s checklist for a protocol on virtual hearings.

As one of the youngest arbitration centers in the world, the ADGM Arbitration Centre has already taken steps to ensure its

spot among the elite.

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