UAE Supreme Court acquits warehouse operator in tobacco tax evasion case

November 22, 2021

Brief

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

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

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

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

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

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

However, the Supreme Court quashed (set aside / voided) the judgment of the Appeals Court on the finding that the mere presence of the goods in the second accused’s warehouse is not sufficient to convict the second accused of participating in tax evasion with the first accused.

Arguments – first accused

The first accused confirmed that:

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

The first accused argued – however – that the Federal Primary and Appeals Courts applied a repealed law, because the date of arrest was on 27 May 2020, and the provisions in force at that time were that of Law No. 2/2019 on Implementing the Marking Tobacco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

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

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

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

possessing designated excise goods without the tax stamps as of 1 June 2020.

Article 1 of the canceled Law No. 3/2018 provided similar prohibitions against importing and supplying.

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

Arguments – second accused

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

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

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

The second accused focused on arguing that the Primary and Appeals Court judgments did not prove the second accused’s contribution to the non-payment of tax and that the first accused admitted that the goods belonged to it and that it deposited them in the second accused’s warehouse until they were to be exported outside the country and that the first accused bears the full tax due.

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

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

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

Supreme Court trial

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

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

The alleged evaded excise tax was AED 320,000.

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

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

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

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

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

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

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

Supreme Court judgment – first accused

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

Supreme Court judgment – second accused

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

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

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

What the appealed judgment concluded is not valid in response to the second accused’s defense and does not convict him.

Additionally, the Appeals Court's finding that the mere presence of the goods in the second accused's warehouse is considered participation with the first accused in evading the tax as stipulated in the laws of the State, without indicating the laws criminalizing the act and validating conviction, stigmatizes the judgment for insufficient causation, and breaches the [second accused's] right of defense, which requires it to be quashed."

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

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

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

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Dubai Cassation Court accepts

arbitration jurisdictional challenge even when not filed at Primary and Appeals Courts

November 22, 2021

Novelty

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

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

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

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

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

And (more significantly):

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

Case

The dispute revolved around a private corporate share acquisition where the share transfer agreement was subject to an arbitration agreement as the dispute resolution forum.

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

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

Rulings

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

The buyers appealed before the Dubai Appeals Court.

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

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

The Cassation Court ruled that:

"…and it was proven in the evidence that the appellant [seller] did not appear before the Primary Court or before the Appeals Court, whose judgment is being contested, and he [the seller] did not submit any memorandum of his defense in the case, proving that he had not made any request or any defense or argument on the subject matter of the case in the two stages of litigation and that he had done so for the first time – arguing against the jurisdiction of the court due to the existence of the arbitration agreement – before this [Cassation] Court before making any request or any defense in the subject matter of the case…so the appellant's argument that the Dubai Courts have no jurisdiction over the dispute in question due to the presence of the arbitration agreement is valid, and since the judgment of the Appeals Court has contradicted this consideration and decided on the merits of the case, it is thus defective, which requires its revocation."

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

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

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

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Abu Dhabi Cassation Court acknowledges verbal, implied, or apparent authority to bind principal to an arbitration agreement

November 22, 2021

Novelty

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

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

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

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

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

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

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

Petition to invalidate the award

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

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

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

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

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

Appeals Court finding

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

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

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

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

Cassation Court decision

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

"…the authority of the agent may be explicit, implicit or apparent, and the authorization is explicit if it is verbal or written, and the authorization is implicit if it is inferred from the reality of the situation, and everything that was said or written, or the normal method of dealing may be considered…”

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

Apparent or implied authority test

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

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

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

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

November 22, 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.

<u>Re-litigation</u>

- 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, <u>or as ruled by the court</u>, 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.

<u>Pay-now-argue-later (tax dispute resolution committees)</u>

- 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.

<u>Pay-now-argue-later (Federal Primary Court)</u>

- 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

November 22, 2021

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

November 22, 2021

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.

Click here to read our coverage by LexisNexis.
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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)

November 22, 2021

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 date…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 22, 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 <u>and the DIFC Courts is one of such jurisdictions</u>."

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 <u>and that the Courts of the DIFC Courts are of such jurisdictions</u>.

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 connotates 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)* disperses 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 22, 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)

November 22, 2021

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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