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

January 6, 2022

Brief

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

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

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

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

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

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

Decree

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

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

The Decree comes into effect on 1 March 2022.

Acceptability of tax penalty installments

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

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

Acceptability of tax penalty waivers

Approval of requests to waive tax penalties (in part or in full) is subject to the tax penalties not be associated with

any crimes of tax evasion. The law is unclear on whether 'crimes' refers to mere allegations or actual convictions.

Accepted reasons to grant penalty waivers are as follows:

- Death or illness of the taxpayer if the taxpayer is a natural person or owner of an establishment.
- Death, illness, or resignation of a principal employee of the tax registrant.
- Evidence of restrictions, or precautionary or preventive measures, applied on the taxpayer by UAE government agencies.*
- Evidence of system failure in the general, payment or communication systems of the Federal Tax Authority that affects a class of persons.
- Causes relating to restrictions on liberty and freedom of a natural person taxpayer or owner of an establishment.
- Payment of all taxes via the tax account of another registered taxpayer.
- In cases of insolvency or bankruptcy, penalties may be waived if they have been paid prior to the insolvency or bankruptcy, ad if it is evident that the insolvency or bankruptcy was not for purposes of tax evasion.

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

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

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

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

accepted reasons noted above.

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

Procedure for either tax penalty installment or waiver applications

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

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

Importantly for waiver requests, the taxpayer must file an undertaking that the cause of the penalties shall be rectified, and that the cause shall not occur again.

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

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

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

Committee decisions

The committee will be responsible for setting the time limit

for filing waiver applications.

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

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

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

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

- A new payment plan if there is a justifiable excuse for non-compliance with the schedule, or
- Action by the Federal Tax Authority against the taxpayer to collect the penalties.

Retrospective penalty waivers

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

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

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

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UAE Cassation Court rules amended memorandum of association not subject to the arbitration agreement in the original memorandum

January 6, 2022

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

Case

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

"In the event that any dispute arises regarding the interpretation, implementation, or application of the agreement [the memorandum of association] provisions or for

any other reason, it shall be resolved by amicable means agreed upon between the parties. If this is not agreed upon, the dispute shall be referred to an arbitration tribunal composed of three arbitrators."

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

The amended memorandum expressly stated in its sixth clause that with the exception of the amendments stated therein, the rest of the terms of the original memorandum of association remain in effect.

The amended memorandum did not include an arbitration agreement.

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

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

Cassation Court reasoning

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

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

The Cassation Court reasoned as follows:

“The provisions of Articles 4, 5 and 6 of Federal Law No. 6 of 2018 on Arbitration states that arbitration is an express agreement of the parties on the jurisdiction of the arbitrator excluding the courts to settle a dispute between them, and whether the agreement on arbitration is in the form of terms or conditions, it must be established in writing, whether the writing is in writing signed by the parties or what the parties exchanged in letters, telegrams or other written means of communication, and is considered an agreement on arbitration every reference in the substantive agreement to the document that includes the arbitration clause if the referral is clear and explicit in approving this clause. The effect of referral is achieved only if it specifies the arbitration agreement contained in the document to which it is referred.

If the reference to the substantive agreement is just a general reference to the texts of this agreement without specifying the arbitration agreement evidencing that the parties know of its presence in the referred to substantive agreement, then the referral does not extend to the arbitration agreement and the arbitration is not to be considered agreed upon between the contracting parties, just as if there are annexes or schedules to the substantive agreement, it is not required that the parties sign and stipulate that these schedules and appendices are considered an integral part thereof, given that these annexes and schedules are nothing more than a detailed statement of the

essential issues agreed upon by the parties, except that if those annexes include an exceptional condition such as the arbitration agreement, in which case the arbitration agreement does not apply to the parties unless they sign that annex."

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

Takeaway

In this judgment, the Abu Dhabi Cassation Court sheds light on the judicial approach with respect to Article 7(2)(b) of the Federal Arbitration Law which permits incorporating arbitration clauses by reference to any model contract, international agreement, or any other document containing an arbitration clause.

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

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

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

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UAE Supreme Court acquits warehouse operator in tobacco tax evasion case

January 6, 2022

Brief

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

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

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

The first accused acknowledged knowing that the goods did not have the required tax stamps and that no evidence was provided

from the selling party validating the entry of the goods into the UAE. The first accused's defenses relied on whether the provisions of law relied on by the Prosecution were valid at the time of charge by the Public Prosecution.

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

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

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

Arguments – first accused

The first accused confirmed that:

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

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

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

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

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

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

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

Arguments – second accused

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

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

The principal argument of the second accused (the storer) was that it was convicted despite the absence of the elements of the crime and the absence of criminal 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

January 6, 2022

Novelty

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

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

Long-standing case law authority has been that where a party does not challenge the courts' jurisdiction on the grounds that an arbitration agreement exists between the parties, it

would be deemed as implicit consent to the courts' jurisdiction.

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

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

And (more significantly):

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

Case

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

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

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

Rulings

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

The buyers appealed before the Dubai Appeals Court.

The Dubai Appeals Court overturned the Dubai Primary Court

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

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

The Cassation Court ruled that:

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

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

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

This judgment and position taken by the Dubai Cassation Court expand the temporal and procedural spectrum of challenging the courts' jurisdiction where an arbitration agreement exists

between the litigants – granting litigants avenue to trigger jurisdictional arguments at latter court stages.

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

January 6, 2022

Novelty

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

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

It was recently the case that the Dubai Courts acknowledged

apparent or implied authority to bind a party to an arbitration clause/agreement whilst the Abu Dhabi Courts generally required evidence of explicit written authority to do so.

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

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

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

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

Petition to invalidate the award

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

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

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

The petitioner relied on Article 58/2 of the Federal Civil

Procedures Law which states:

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

Appeals Court finding

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

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

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

The Appeals Court concluded that these elements suffice to

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

Cassation Court decision

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

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

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

Apparent or implied authority test

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

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

- The signing agent/representative communicated to the effect of enacting the transaction/contract.

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

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

January 6, 2022

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

Re-litigation

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

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

- The text of this article illustrates a novel circumstance where the court may issue a judgment ordering a person to pay certain penalties, but subsequently, the person re-litigates those penalties before the court. Essentially creating a new opportunity to dispute penalties that have already been ruled on.
- It has generally been the case that tax disputes make their way to court in challenging a decision by the Federal Tax Authority only, after fulfilling the requirements of filing a reconsideration application and objection the competent tax dispute resolution committee.
- The new text creates a new dynamic for the Federal Courts to potentially consider re-litigation for cases that have been already concluded.
- This also goes hand-in-hand with the new amendments to the Civil Procedures Law (the overarching legislation to the Tax Procedures Law) which – as of 2 September 2021 – allow for re-litigation of final and binding judgments in certain circumstances such as procedural mistakes, or judgments based on a repealed law, where the application of the correct law would change the opinion reached in the case.

Penalty refunds and installment payments

- A new committee is to be formed responsible for deciding on penalty waivers, permission to pay penalties in installments, and penalty refunds.
- The new amendments require bylaws to be issued to manage the procedures to be conducted by the committee.

- A matter of consideration is whether the refund mechanisms will apply to penalty refunds granted by the FTA directly, or also to refunds ordered by the court.

Time-bars

- The time-bar to file a reconsideration application against a decision of the FTA has been increased to forty weekdays as opposed to the prior twenty weekdays' limit.
- The time-bar for the FTA to decide on a reconsideration application has also been increased to forty weekdays from twenty weekdays.
- Objections against FTA reconsideration decisions to be filed before a tax dispute resolution committee must be filed within forty weekdays from the date of notification of the reconsideration decision. This is also an increase from the prior twenty-weekday limit.
- Once a tax dispute resolution committee issues its decision, the person may challenge that decision before the Federal Primary Court. The new amendments have increased the timeframe to file the challenge before the Federal Primary Court to forty weekdays as well, as opposed to the prior time-bar of twenty weekdays.

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

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

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

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

Government-to-Government disputes

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

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

January 6, 2022

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

DIAC Rules

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

Case and petitioned motion

The arbitration award subject to set-aside had been rendered

after three extensions took place.

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

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

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

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

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

Cassation Court reasoning

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

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

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

The Court ruled:

"…Article 36(4) never came about the number of times to extend the time limit for arbitration, and the text did not limit the executive committee to one period [of extension], as the plaintiffs' lawyer had argued…it is necessary to take the text

prima facie as long as the legislator was conscious of the text and did not limit it and hence the Court considers that the [third] extension of the time limit from the executive committee of DIAC is consistent with the correct application of the provisions of the law…"

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

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

January 6, 2022

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)

January 6, 2022

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

January 6, 2022

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 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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