Breaking News: UAE tax penalties reduced and discounts granted

May 6, 2021

On 28 April 2021, the UAE Cabinet of Ministers issued Decision No. 49/2021 amending provisions of Cabinet Decision No. 40/2017 regulating tax penalties (the "new Decision").

Important highlights:

– Late payment penalties reduced from 1% per day to 4% per month.
– 300% cap still applies.
– New starting date for calculating late payment penalties.
– Reductions for prior penalties to be made.
– Effective sixty days as of 28 April 2021.

Detailed updates below:

Penalty calculation:

Most notable of the new amendments is that the late payment penalties have been reduced from 1% per day to 4% per month.

The 300% cap on the late payment penalties still applies.

The new calculation of late payment penalties will be as follows:

- 2% of the unpaid tax immediately past the due date.
- 4% per month thereafter commencing a month after the due date.

Due date / start of penalties:

In October 2020, the UAE Federal Supreme Court ordered that late payment penalties should apply retrospective to the voluntary disclosure, calculated as of the date of the original tax return.

However, the new Decision states that the due date for the purposes of calculating late payment penalties shall be:

- 20 weekdays as of the date of submission of a voluntary disclosure.
- 20 weekdays as of the date of receipt of a tax assessment.

The text of the new Decision is explicit and reads to apply the late payment penalties 20 weekdays from the date of submission of a voluntary disclosure or receipt of a tax assessment, as opposed to retrospectively from the date of the original tax return.

(This should be read in caveat with the Supreme Court judgment of October 2020.)

Discounts for previous penalties:

The new Decision grants the Federal Tax Authority the right to reduce previously unpaid penalties to 30% of the total of such penalties where the following conditions are met:

- The penalties were applied under the previous Cabinet Decision No. 40/2017 regulating tax penalties.
- The registrant has paid all taxes due by 31 December 2021 at most.
- By 31 December 2021, at most, the registrant must have paid 30% of the total tax penalties owed until the coming into effect of the new Decision (i.e., sixty days as of 28 April).

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Federal Court finally defines and provides a test for the Tax Benefit Penalty

May 6, 2021

Recently, in a dispute that Wasel & Wasel was counsel on, the Federal Primary Court ruled providing a definition and test for the 'tax benefit' penalty for the first time.

What is the 'tax benefit' penalty?

Of the various tax penalties that are applied by the Federal Tax Authority in the United Arab Emirates is the 'tax benefit penalty' which ranges between 5% to 50% of the tax liability.

The legislator included two tests under the application of the penalties under § 10(2) of table 1 of Cabinet Resolution 40/2017:

- An error had occurred; and
- A tax benefit had been obtained.

The tax legislation, and general laws of the UAE, do not define 'tax benefit', hence whether a party has or has not obtained a tax benefit that should result in the penalties has been a matter of debate.

A ‘tax benefit’ is described by the UNCTAD (United Nations Conference on Trade and Development) as the financial, measurable value that distinguishes the source of funding from other sources, which results in incentive tax effects that reduce the tax burden and raise the company’s return.

Issue

If a tax benefit is deemed to be an increase in revenue against a reduction in a tax burden, then the question becomes should the tax benefit penalty apply if a person who submits a voluntary disclosure, or is subject of an audit, pays the value added or excise tax without having originally collected it from the end customer.

Often, tax registrants are unaware that tax needs to be applied to a particular transaction.

The awareness comes at a point of a public or private clarification, or as a result of an audit where the audit assessment informs the registrant that certain transactions should have taxable.

At times, the registrant would not have collected the tax from the customers but nonetheless pays the tax to the Federal Tax Authority as a result of voluntary disclosure or audit assessment.

In these cases, the registrant suffers a tax detriment as they would have paid the taxes without having collected said taxes from their consumers, leaving the registrant in a negative financial position with respect to their tax position.

Judgment

Recently, in deciding on whether the tax benefit applies to a registrant company, the Federal Primary Court ruled providing a definition for the first time.

There is no explicit unified definition of ‘tax benefit’ in

UAE legislation so the Defendant argued that a ‘tax benefit’ is a preferential position over other taxpayers which could arise for the purposes of § 10(2).

The Federal Primary Court concurred with the argument and ruled that the tax benefit penalty should apply:

“In order not to reap the fruit that the taxpayer does not deserve by his negligence, represented in the taxpayer obtaining a tax benefit that has not been decided for others, represented in the exploitation of the tax resources in his possession until the date of the declaration.”

The ruling provides a significant development in understanding the point at which a tax benefit is arguably triggered or not, and when the 5%, 30%, or 50% penalty should apply.

The definition provided by the Federal Primary Court also creates a test for taxpayers to consider when assessing whether the tax benefit penalty should be applied, and the threshold to which they need to substantiate to argue that no tax benefit had been obtained.

In the legislation

The tax benefit penalty applies where an error ends up *“resulting in a tax benefit”*.

The legislator included two tests under the application of the penalties under § 10(2) of table 1 of Cabinet Resolution 40/2017:

1. An error had occurred; and
2. A tax benefit had been obtained.

The events that could lead to a tax benefit are considered either:

- An incorrect tax return by the registrant.
- A voluntary disclosure by the person or taxpayer of

errors in the tax return, tax assessment or refund application.

The tax benefit penalty is calculated as:

- 50% in case no voluntary disclosure is made if a voluntary disclosure is made after being notified of a tax audit and the Federal Tax Authority has started the tax audit process, or after being asked for information relating to the tax audit, whichever takes place first.
- 30% in case a voluntary disclosure is made after being notified of the tax audit and before the Authority starts the tax audit.
- 5% in case a voluntary disclosure is made before being notified of the tax audit by the Federal Tax Authority.

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UAE Cassation Court rules arbitration clause is suspensive condition

May 6, 2021

In March 2021, the highest court in the Emirate of Abu Dhabi, the Abu Dhabi Cassation Court, upheld the denial of the

enforceability of an arbitration agreement due to the clause merely stating that arbitration shall be governed by the laws of the United Arab Emirates without explicit scope to any disputes.

The Cassation Court found that the wording of the clause which read "in arbitration, the laws of the United Arab Emirates shall be applied" did not provide sufficient detail to establish the consent of the parties to resort to arbitration as the dispute resolution mechanism.

In its reasoning, the Court found that the wording is to be read as a suspensive condition that would only come into effect should the parties subsequently explicitly agree and establish scope that any dispute shall be resolved through arbitration.

Background

The dispute was in relation to additional works in a construction contract, where the Abu Dhabi Primary Court ruled in favor of the contractor for almost AED 12,000,000 and the Abu Dhabi Appeals Court upheld the contractor's claim but reduced the quantum to approximately AED 8,500,000.

Notwithstanding the substantive issues in dispute, here we highlight the significant approach that was taken by the Abu Dhabi Courts and confirmed by the Abu Dhabi Cassation Court, that led to the rejection of the arbitration clause.

Generally, an arbitration agreement should be as detailed as possible to avoid any disagreement over its operation. Such detail would at a minimum include the seat of arbitration, the number of arbitrators, the language of arbitration, governing rules (institutional or ad hoc), and the governing law.

Additionally, parties may at times also apply a governing law to the arbitration agreement separate from the governing law of the substantive contract, identify any matters related to

confidentiality, or issues regarding sovereign immunity, amongst other particulars.

The ruling by the Abu Dhabi Cassation Court reflects the importance of clearly drafted arbitration clauses, but the Cassation Court also provides interesting reasoning in finding the arbitration clause merely a suspensive condition in the absence of an explicit agreement that any disputes shall be resolved by arbitration.

Abu Dhabi Appeals Court Judgment

The Abu Dhabi Appeals Court had ruled that the arbitration clause in its wording renders it a suspensive condition requiring the parties to subsequently agree that any dispute shall be resolved via arbitration, at which point such agreement would be governed by the laws of the UAE.

The Abu Dhabi Appeals Court has ruled as follows:

“The appendix of the construction contract between the two parties stipulated in Clause 18 (a) thereof that, in arbitration, the laws of the United Arab Emirates shall be applied, and it is a text that does not indicate that the two parties have agreed to resolve the dispute through arbitration, but rather is a suspensive condition…

Where the contract provisions lack a requirement to resort to arbitration, and no subsequent agreement to arbitration was made, which means that the current arbitration clause [Clause 18 (a)] is an unfulfilled suspensive condition.”

Abu Dhabi Cassation Court Judgment

The Abu Dhabi Cassation Court relied on Articles 5, 6, and 7 of the Federal Arbitration Law to reason that the wording of the clause does not evidence the parties’ explicit agreement to resort to arbitration to resolve any disputes.

The Abu Dhabi Cassation Court upheld the Appeals Court

judgment, and ruled as follows:

“Whereas the decision was made in the jurisdiction of this court – and in accordance with Articles 5, 6, and 7 of the Arbitration Law – for the court to reject its jurisdiction on a dispute requires the existence of an arbitration clause to evidence that the parties have agreed in writing to resort to arbitration as an exceptional means to settle disputes between them, whether through a special clause in the original contract or via an agreement independent of the main contract, given that the consent of the parties is the basis of arbitration and that the arbitrator derives their authority from the contract in which the arbitration was agreed upon.

Therefore, the judge must verify that the will of the litigants matches the agreement on arbitration and the underlying dispute, and the interpretation of the contract to identify the intent of the parties is the authority of the trial court…

…the clause subject of dispute in the contract states (governing law: the laws of the United Arab Emirates shall govern arbitration) and hence does not disclose the parties’ express will in the agreement to resort to arbitration…”

Significance

This judgment by the Abu Dhabi Cassation Court highlights the extent to which the Courts will investigate – not only the existence of an arbitration provision – but the precise wording and scope of the arbitration clause. The approach confirmed by the Abu Dhabi Cassation Courts emphasizes the need for parties to ensure a clear scope of applicability to their arbitration clauses.

Importantly as well, the UAE Courts generally find an arbitration clause binding or non-binding, but seldom has a UAE Court ordered an arbitration clause to be considered a suspensive condition; which is a condition that suspends the

effect of a clause until a future event occurs or is realized.

The UAE Courts have previously ruled on the necessity to comply with pre-conditions to arbitrate, however considering an arbitration clause a suspensive condition raises questions as to the threshold that the courts require to accept that an arbitration agreement is fulfilled.

Essentially, finding that an arbitration agreement could be deemed a suspensive condition unless the parties explicitly state that any dispute (or a particular dispute) shall be resolved by arbitration means that arbitration agreements could include minimum standards as detailed above – such as language, number of arbitrators, rules, etc. but could nevertheless be deemed a suspensive condition in the absence of an explicit agreement that disputes shall be resolved via arbitration.

Moreover, this judgment creates a novel paradigm in regards to the separability of an arbitration agreement and acknowledging an arbitration agreement, yet considering it suspended.

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New Dubai Tax Dispute Resolution Committees now

deciding on 2020 and 2021 objections

May 6, 2021

Brief

Since around September 2020, the tax dispute resolution committee of the Emirate of Dubai has been inoperable (under reformation).

On 25 November 2020, the UAE Minister of Justice issued Ministerial Decree No. 691/2020 on the Formation of Tax Dispute Resolution Committees for the Emirate of Dubai.

The Emirate of Dubai previously had only one tax dispute resolution committee to hear objections against reconsideration decisions of the Federal Tax Authority. However, the Decree formed two tax dispute resolution committees for the Emirate of Dubai (Dubai TDRCs).

The two new Dubai TDRCs began practically operating on 16 February 2021 and had docketed all tax objections lodged in 2021 for review and issuance of a decision.

Decisions for objections filed in 2021 have begun being issued as of mid-March 2021.

As of the fourth week of March 2021, objections filed in 2020 are also being considered by the Dubai TDRCs.

However, taxpayers could be required to communicate with the Ministry of Justice and confirm the validity of the objections and continued request by the taxpayer/objector for the Dubai TDRC to decide on the objection.

The Ministry of Justice may request confirmation as to whether the objector had proceeded to file an appeal before the Federal Primary Court pursuant to Article 33(2)(b) of the Tax Procedures Law which grants objectors the opportunity to challenge the non-issuance of a decision by a tax dispute resolution committee.

(The Tax Disputes Circuit of the Federal Primary Court is responsible to hear challenges against rulings of a TDRC. Both the taxpayer and the FTA may challenge a ruling of the TDRC before the Federal Primary Court, Federal Appeals Court, and finally the Federal Supreme Court.)

Timelines

If a person (domiciled in Dubai for tax purposes) disagrees with a decision by the FTA and commences the reconsideration process but does not obtain a favorable outcome, the subsequent procedure would be to object before the Dubai TDRCs.

The objection is lodged with the tax dispute resolution department of the Ministry of Justice that is responsible for lodging the objection with the Dubai TDRCs within two weekdays as of the date of the filing.

Once the Dubai TDRCs receive the objection, a decision must be rendered within a maximum of forty weekdays which comprises of an initial twenty-weekday period and an additional twenty-weekday extension period. The extension can be granted based on the request of the objector or the Federal Tax Authority, or if the Dubai TDRC deems it necessary.

After the procedure before the Dubai TDRC is concluded, either the objector or the Federal Tax Authority can challenge the committee's decision before the Federal Primary Court.

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Dubai Cassation Court rules FIDIC arbitration clause not enforceable

May 6, 2021

In a recent judgment, the highest Court in Dubai, the Dubai Cassation Court ruled that incorporating a FIDIC contract (general conditions) by reference into a transaction does not necessarily bind the parties to the arbitration clause therein that FIDIC contract (general conditions).

In this judgment, the Dubai Cassation Court also 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.

The dispute involved matters related to variation, site discharge, termination for convenience, and other issues related to the construction of a villa. The dispute quantum was around AED 20,000,000.

The employer sued the contractor before the Dubai Primary Court, which found that the Dubai Courts have jurisdiction

over the dispute, and ruled in favor of the employer.

The contractor appealed and the Dubai Appeals Court ruled that the Dubai Courts do not have jurisdiction over the dispute due to the existence of the arbitration clause that is incorporated by reference between the parties.

The parties had indeed agreed that the 1987 FIDIC Red Book General Conditions of Contract shall govern the transaction.

Clause 67 of the 1987 FIDIC Red Book General Conditions contains a multi-tiered dispute resolution clause which requires that all disputes are to be referred to the engineer in the first instance for a decision and subsequently to arbitration under ICC rules.

The Dubai Appeals Court found that incorporating by general reference the entirety of the 1987 FIDIC Red Book General Conditions is sufficient to bind the parties to the arbitration clause contained therein the General Conditions.

The employer challenged the Dubai Appeals Court judgment before the Dubai Cassation Court.

The Dubai Cassation Court overturned the Appeals Court judgment and found that the arbitration clause was not enforceable and that the Dubai Courts had jurisdiction to adjudicate the dispute.

Referring to statute; the Cassation Court relied on Article 7 of the Federal Arbitration Law which requires arbitration agreements to be in writing. Although the judgment references the entirety of Article 7, the judgment continues to implicitly highlight the provisions of Article 7(2)(b) by elaborating on the permissibility of incorporating an arbitration clause by reference in a written contract to any model contract, international agreement, or any other document containing an arbitration clause if the reference is such as to make that arbitration clause part of the contract.

The parties did indeed agree that the 1987 FIDIC Red Book General Conditions shall govern the transaction, however, the Cassation Court found that because there was no explicit reference to the arbitration clause of the General Conditions, it cannot be construed that the parties had explicitly agreed to the arbitration clause therein.

The Dubai Cassation Court upheld the Dubai Primary Court's reasoning, which provided a more in-depth analysis, as follows:

"An agreement to arbitration is considered when it is a referral contained in the original contract to the document that includes the arbitration clause if the referral is clear and explicit in adopting this condition, and the effect of the referral is only achieved if it includes an indication to the arbitration clause included in the document referring to it, yet if the referral to the aforementioned document is merely a referral in general for the texts of this document without specifying the aforementioned arbitration clause in particular that establishes the parties' knowledge of its existence in the document, the referral does not extend to such arbitration clause, and the arbitration is not deemed agreed upon between the parties to the contract, and it is also decided that if there are appendices or schedules to the contract, it is not required that the parties sign them if the parties stipulate in the contract that these appendices or schedules are considered an integral part of the contract, considering that these appendices or schedules are nothing more than a detailed statement of what the parties have agreed in substantive issues, except that if these appendices or schedules include an exceptional condition such as the arbitration clause, which does not apply to the parties, unless signed by the parties…the contract concluded between the plaintiff and the defendant which governs the relationship that is the subject of the lawsuit does not evidence the will of the parties to bring into effect the arbitration clause to settle the

disputes arising from the implementation of the contract."

A special webinar has been prepared to discuss this judgment in collaboration with the Chartered Institute of Builders, which will take place on 19 April 2021. For more details and registration click here.

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Now that you paid a tax penalty – have you looked at your tax indemnification agreements for recourse?

May 6, 2021

Scene

You are a services or goods provider registered as a taxpayer with the Federal Tax Authority.

You are facing liquidity and cash flow difficulties.

You have customers; you have issued tax invoices, but your invoices are unpaid.

In consequence, due to liquidity issues, you are late in paying your due taxes.

A few weeks or months pass since the end of your tax period until invoices are paid.

You now have the liquidity to pay your taxes, but shortly after, the Federal Tax Authority issues an administrative penalty assessment against you for late payment of taxes.

Late tax payment penalties of 2% immediately, 4% after the first week, and 1% per day, of the value of the unpaid taxes are applied.

Did you draft a comprehensive and enforceable tax penalty indemnification agreement against the late-paying customers to indemnify you against any tax penalties you incurred?

What are tax indemnification agreements against tax penalties?

A tax indemnification agreement against tax penalties (whether standalone or as part of a contract) may grant the taxpayer protection Dirham-for-Dirham for unexpected tax penalties that arise due to a customer’s late or non-payment, without necessarily the need for the taxpayer to evidence loss.

The incorporation of a tax indemnification agreement into your standard contracts provides a claim by contract, with proven values, allowing for speedier recovery and enforcement against the customer.

Contracts – in the UAE or otherwise – may generally include a tax respective provision along the lines of the following:

“The First Party agrees to bear any current or future tax or increase to any current or future tax.”

The language of such provision could be in various forms, length, or complexity, but the crux of it usually obligates one of the parties to bear the tax liabilities that arise out of a transaction. However, as a general matter, such provisions do not obligate a party to reimburse another party against tax penalties levied by the Federal Tax Authority.

Administrative tax penalties applied by the Federal Tax Authority against a taxpayer are issued in a 'Notification of Administrative Penalty Assessment' pursuant to Article 21 of the Executive Regulations to the Tax Procedures Law.

In an administrative penalty assessment issued by the Federal Tax Authority, the penalties are applied in an itemized list corresponding to the applicable tax return periods (monthly or quarterly) with details on the formulas used pursuant to Cabinet Resolution No. 40/2017 to calculate the penalties; highlighting the values which have formulated as late penalties.

A statement of account provided by the Federal Tax Authority also itemizes the taxes due and penalties in detailed chronology.

These details allow the taxpayer to correlate the tax penalties to the tax invoices issued in a respective time period, and subsequently, be able to allocate the late payment penalties to the unpaid tax invoices and the respective clients with the outstanding debts.

Are indemnification payments against tax penalties taxable?

In its public clarification VATPO01, the Federal Tax Authority states that predetermined amounts that contractual parties designate during the formation of the agreement for an injured party to collect as compensation upon a specific breach are not considered consideration for a provision of any goods or services but to compensate a party for loss.

Consequentially, tax indemnification payments against tax penalties levied by the Federal Tax Authority would arguably fall outside the scope of VAT.

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Two tax dispute resolution committees formed for Dubai (Decree No. 691/2020)

May 6, 2021

Since around September 2020, the tax dispute resolution committee of the Emirate of Dubai has been inoperable (under reformation).

Objections that have been filed since then with the Dubai tax dispute resolution committee had not been decided on.

On 25 November 2020, the UAE Minister of Justice issued Ministerial Decree No. 691/2020 on the Formation of Tax Dispute Resolution Committees for the Emirate of Dubai.

The Decree was recently published in the Official Gazette and orders the formation of two tax dispute resolution committees for the Emirate of Dubai.

The Ministerial Decree is significant because formerly, under Ministerial Decrees No. 109/2019 and 456/2020, the Emirate of Dubai had only one tax dispute resolution committee to hear objections against reconsideration decisions of the Federal Tax Authority.

Since 2018, all taxpayers registered in the Emirate of Dubai would submit their objections to only one committee and the statistics over the past three years reflect a substantial increase of objections that seem to have necessitated expanding the capacities to hear objections:

- 10 objections filed in 2018 (approximately).
- 30 objections filed in 2019 (approximately).
- 160 objections filed in 2020 (approximately).

The two new committees will be assigned objections to decide on based on whether the first numeric of the docket registration number is an odd or even number.

The Ministerial Decree names new chairs (judges) and members (experts), and new general secretaries for the two newly formed tax dispute resolution committees.

Has this happened before and what to expect?

The first tax dispute resolution committee objections were filed on 29 August 2018 with the Ministry of Justice and were a total of five objections addressed to the Dubai tax dispute resolution committee (TDRC).

However, the objections were officially registered upon the formation of the Dubai TDRC on 31 March 2019, and the decisions were issued on 8 April 2019.

In hindsight, one can see that even where objections were filed before the formation of the TDRC, the TDRC formally registered and decided on the objections when it was formed.

However, this is not the only potential outcome for the current objections filed with the Dubai TDRC since September 2020.

In mid-2020, the Federal Courts ruled that if a reconsideration decision is not issued by the FTA within the procedural time-bar, it must be considered an implied

rejection triggering the time-bar to challenge the implied rejection (twenty weekdays).

An implied rejection pursuant to Article 84(bis) of the Civil Procedures Law is the general rule that a grievance to an administrative body (in this case the FTA or TDRC) that is not decided upon within the procedural time-bar is to be considered an implied rejection.

This is also supported by Article 33(2)(b) of the Tax Procedures Law which states that challenges against objections that are not decided on may be filed with the Federal Primary Court in case of non-issuance of a decision by the tax dispute resolution committee.

As was the case in 2018 and 2019, the newly formed Dubai tax dispute resolution committees may issue decisions on the backlog of objections that had been registered since September 2020.

On the other hand, the newly formed Dubai tax dispute resolution committees and the Federal Courts may take the position that Article 33(2)(b) of the Tax Procedures Law should have been triggered by those who filed objections and the disputes should have been directed to the Federal Primary Court.

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Coronavirus (COVID-19): Emirati and Sharia law on pandemics and hardship events

May 6, 2021

With the disruption to global business and trade due to the Coronavirus pandemic, parties may look to argue hardship events under the law to alleviate extraneous obligations (such as an extraneous increase of cost in concluding the obligation).

Hardship events are occurrences that result in changing the equilibrium of a contract creating an extreme burden on one of the parties to the contract.

Contracts may provide for provisions that address hardship events, and therein include pandemics as an example of a hardship event – but if parties have entered into a contract that lacks a hardship event provision, can they rely on UAE legislation to argue that the Coronavirus pandemic makes their obligation extraneous and seek remedy from the Courts (or an arbitration tribunal)?

Hardship events are addressed under Article 249 of the UAE Federal Law No. 5/1985 on Civil Transactions.

Notably; pandemics are also addressed in one provision under Emirati law; that is Article 587 of the Civil Transactions Law. Article 587 explicitly addresses pandemics that affect fruit sales, and the obligations on the buyer and seller when the fruits sold are affected by a pandemic.

What is relevant in Article 587 is the Sharia jurisprudence that leads to its drafting before coming into promulgation in 1985, and how that jurisprudence can apply in disputes that

occur between parties over hardship events that have occurred or will manifest due to the Coronavirus pandemic.

Article 249 on Hardship Events

Article 249 of the UAE Civil Transactions Law allows that when as a result of general exceptional and unpredictable events, the performance of a contractual obligation, without being impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, a judge may reduce the obligation that has become excessive to reasonable limits.

In light of no particular event being referenced or given as an example to qualify as a hardship event in Article 249, or in Article 893 which indirectly addresses force majeure events, it is necessary to rely on other provisions in the law to confirm whether pandemics qualify as hardship events and the strength of such arguments before the judiciary.

Sharia Origin of Article 587 on Pandemics

In the implementation of the directives of the late Sheikh Zayed bin Sultan Al Nahyan (may God have mercy upon him), the founding father of the United Arab Emirates, to apply the provisions of Islamic Sharia in the UAE, the Council of Ministers issued decision No. 50/26 in 1978 to form a supreme committee for Islamic legislation and delegated His Excellency the Minister of Justice to form two subcommittees, one for criminal laws and the other for civil, commercial, maritime and civil procedure laws, in order for these committees to prepare and review laws in accordance with the provisions of Islamic Sharia.

The supreme committee reviewed civil transaction laws, and – for example – theories of individual will as a source of commitment, contracts of adhesion and their origin in Sharia as ‘contracts of trust’, and other theories and principles that became codified in UAE law.

Amongst the matters addressed by the supreme committee, and most relevant to the Coronavirus pandemic, was the theory of hardship events and their origin in Shariah law as ‘pandemic theory’.

The rule of ‘pandemic theory’ finds its basis in Islamic jurisprudence in the principle of ‘excuses’ in the Hanafi jurisprudence and ‘pandemic’ in Maliki and Hanbali jurisprudence with a difference in the provisions and in the fairness between the two parties to the contract and justice in general.

Not only is the codification of hardship events derived from ‘pandemic theory’ in Sharia law, but scholarly jurisprudence has found that in light of the principle of pandemic theory applying to contractual relations in relation to fruit trade, the same principle can arguably be applied to other contractual transactions such as industry, construction, and general trade contracts where a pandemic causes a hardship event.

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The Business of Influencing in the UAE

May 6, 2021

The ability to influence has been a topic of dialectics for centuries – how the influence was obtained, how it was used,

how much of it was at stake. When the topic of influence comes up, we may refer to great writers, composers, or philosophers. But these days the discussion of influence brings about names like Kylie Jenner, Selena Gomez, and The Rock. Influence is more powerful and puissant than ever before and that is solely due to the insurmountable ascent of social media. The social media marketing wave is truly remarkable; a conservative estimate of the new industry falls at around USD 1.28 billion, with brands estimated to spend USD 15.1 billion on influencer campaigns by 2022.

Nonetheless, some influencers fail to do the sole job that they claim to be proficient in – influencing. In 2018, Luka Sabbat, a self-proclaimed "Creative Entrepreneur exploring all the world has to offer. Stylist, Creative Director, Design Director, Actor, Model, etc" with 2.3 million followers on Instagram, was sued by Snap, Inc. for his failure to 'influence'. Sabbat had been contracted by Snap, Inc. to promote their line of eyewear by posting three Instagram stories and one Instagram feed post during fashion week in New York, Paris or Milan, along with being photographed wearing the product during Paris or Milan fashion week. Sabbat was sued on the basis that he did not post all of the required material and was not photographed wearing the product. In 2019, Sabbat was sued once more by Konus, a streetwear brand, for failure to participate in a photo shoot for the brand's look book and failure to share two permanent posts on Instagram with specified tags.

If you are a virtual purveyor, you need to be diligent in how you approach the landscape of influencing. So here the question lies, how is the business of influencers operated and what are the legal ramifications that could be in store for an influencers failure to influence.

In the UAE, there is a procedure for becoming an influencer that is a little bit more complicated than merely posting a photo with some flashy filters. Since 2019, the UAE has

established licensing procedures in order to be a professional influencer. Social media influencers have become regulated requiring Federal level licensing with the National Media Counsel (NMC) and domestic licensing in the influencer's respective Emirate.

For example, the Ras Al Khaimah Economic Zone grants a Social Media Influencer Permit is for influencers or bloggers residing in the UAE. Other economic zones across the UAE that provide social media influencer permits include Dubai Media City, Dubai Studio City, Dubai Production City, or Abu Dhabi's twofour54.

Depending on the number of followers and the rate of engagement that an influencer has, they will be approached with different business proposals. There are generally two categories that apply to influencers: reach and niche. Reach refers to influencers with large followings, while niche refers to influencers with smaller, more specialized and engaged communities.

A key consideration when it comes to a business engaging with an influencer is the appreciation that the industry is at a very early stage of development, so there will be varying expectations and varying degrees of professionalism. In this context, it is recommended that arrangements with between both parties are clearly set out in a suitable agreement, specifying the scope of work, the key performance indicators, nuanced matters such as restrictions and expectations of hashtags, and compliance with NMC guidelines.

For example, the NMC prohibits publishing any advertisements about medications or pharmaceutical products without a special permit from the Ministry of Health and Prevention. In case the influencer is needed to advertise medication or pharmaceutical products; who would be responsible for obtaining said permit? This is particularly relevant with a significant number of influencers in the UAE promoting self-care products (beauty-

care, skin-care, etc.).

On the other hand, a key consideration for influencers is taking into account that agreements entered into in their personal capacity may lead to personal liability against them – in other words, failure to comply to their influencer obligations may lead to loss of their personal assets as compensation.

An alternative model that influencers adapt is creating a company that limits liability, of which the influencer may operate through. Although the influencer licensing requirements by NMC remain necessary, influencers would bode well limiting personal liability by engaging their clients through a limited liability company. This structure is often used by actors and other talent and is referred to as a 'loan out company'. The business established by the social media influencer 'loans out' the influencer themself to the client.

The influencer would then separate their personal wealth from that of the 'loan out company'; holding separate bank accounts, contract liabilities, and so on.

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UAE Sports Arbitration Centre Kicks Off Operations

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The Court of Arbitration for Sport ("CAS") is based in Switzerland and is considered the elite international dispute resolution forum for legal disputes relating to sports, including commercial disputes (i.e., issues arising from sponsorship agreements or player contracts) and discipline (i.e., doping, non-compliance with codes of conduct). CAS also acts as an appeals court for decisions made by the arbitration systems of sports organizations or dispute resolution mechanisms, including global associations with disciplinary arms such as FIFA and the International Olympic Committee.

In May 2012, Abu Dhabi hosted the first seat for the Court of Arbitration for Sport outside Switzerland. Now, Abu Dhabi is home to its own arbitration centre, dubbed the UAE Sports Arbitration Centre ("UAE SAC") which has been established under the Federal Law No 16 for 2016 issued by His Highness Sheikh Khalifa bin Zayed Al Nahyan.

UAE SAC partly began operations in 2016, but as of June 2020, it has commenced full operations. The UAE SAC is equipped with every facility, which is available for anyone seeking to resolve their disputes related to sports through mediation or arbitration. This significant milestone is a positive development in sport, aiming at spreading a culture of sports mediation or arbitration in the United Arab Emirates.

According to a recent study, Dubai's burgeoning sports industry now exceeds USD 1.7 billion annually; this accounts for 0.8% of Dubai's GDP. Of the USD 1.763 billion, USD 670 million originates from overseas markets, which indicates Dubai's growing importance as a world sporting destination.

The UAE is renowned as a prime emerging sports market and continues to grow and offer a landscape for development. This aptitude across the nation brings vast opportunities and challenges and will most certainly act as a catalyst for sustainable development; with such development requiring a parallel expansion in the legal infrastructure of the sports

market.

The UAE SAC will seek to be the answer to the legal challenges in play and assist in the sustainable development of the market. Although the UAE SAC has yet to unveil its rules of arbitration, they will most likely be revealed to the public in the coming weeks. However, looking at the CAS – which the UAE SAC is closely modeled after – we can arguably presume that the standard clause to be inserted into contracts for resolution by the UAE SAC will look like this:

"Any dispute arising from or related to the present contract will be submitted exclusively to the Sports Arbitration Centre in Abu Dhabi, United Arab Emirates, and resolved definitively in accordance with the [UAE SAC Rules]."

Optional explanatory phrases:

"The Panel will consist of one [or three] arbitrator(s)."

"The language of the arbitration will be…"

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