

# Dubai Cassation Court clarifies challenging interim and precautionary arbitration orders

May 15, 2021

In a recent judgment, the Dubai Cassation Court clarified the procedure for challenging arbitration-related interim and precautionary orders issued by the competent court or the arbitral tribunal (or arbitrator).

## Case

The contract between the plaintiff and the defendant is governed by an arbitration clause. The plaintiff is the beneficiary of a bank guarantee provided by the defendant.

The plaintiff submitted a petition to the President of the Dubai Appeals Court requesting a precautionary order to seize a bank guarantee, pursuant to the provisions of the Federal Arbitration Law.

The defendant challenged the precautionary order before the Dubai Primary Court. The Dubai Primary Court accepted the challenge and nullified the precautionary order.

The plaintiff did not appeal the Dubai Primary Court judgment, instead, the plaintiff reverted to the President of the Appeals Court and requested the reinstatement of the precautionary order to seize the bank guarantee. The President of the Appeals Court accepted the request and reinstated the precautionary order.

The defendant challenged the precautionary order before the Appeals Court.

The defendant argued that the Federal Arbitration Law did not describe the procedures to which a precautionary order may be challenged, and hence, a party wishing to challenge a precautionary order issued in relation to arbitration proceeding should do so pursuant to Article 114 of the Executive Regulations to the Civil Procedures Law.

The defendant also argued that the plaintiff failed to comply with the requirements under Article 114(2) of the Executive Regulations to the Civil Procedures Law which states that:

“The attachor shall, within no later than (8) eight days from the date of issue of the attachment decision, file a claim of right before the competent court, in the cases where the attachment is ordered by the judge of summary proceedings. Otherwise, the attachment shall be considered as if not made.”

The Appeals Court rejected the challenge on the basis that the defendant had not complied with the required procedures in the first instance when the defendant had initiated its original suit before the Dubai Primary Court requesting nullification of the precautionary order.

The defendant continued to appeal the judgment before the Dubai Cassation Court.

### **Legislative basis of the Court**

The Dubai Cassation Court established its reasoning on Article 21(1) of the Federal Arbitration Law which states that unless otherwise agreed by the parties, the arbitral tribunal may, upon request of a party, or on its own initiative, order either one to take interim or precautionary measures as it may deem necessary and as required by the nature of the dispute, including taking necessary measures to preserve the goods that constitute a part of the subject-matter of the dispute, such

as the order to deposit with third parties or to sell perishable goods, and preserving assets and property of which a subsequent award may be enforced, and taking action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself.

The Court also referenced Article 21(4) which permits a party in whose interest an interim order is granted and upon a written authorization from the arbitral tribunal, to request the competent court to grant an order for the enforcement of the order issued by the tribunal or any part of it, within fifteen days after having received the request.

The Court further relied on Article 18(2) and 18(4) of the Federal Arbitration Law in respect of the powers of the President of the competent court (i.e., the Appeals Court), to order, upon request of a party or upon request of the arbitral tribunal, interim or precautionary measures, as he may deem necessary, for the current or future arbitration proceedings, whether before or in the course of the arbitration proceedings, and the effects of such an order shall not terminate, wholly or partially, except by decision of the President of the competent court.

### **The reasoning of the Court**

The Dubai Cassation Court clarified that the legislator regulated interim and precautionary measures that may be taken either before the commencement of the arbitration procedures or during the course of those procedures, in a particular way different than the Civil Procedures Law in terms of the authority to issue the order, procedures and rules, and with respect to appealing or challenging such orders.

The Court continued to confirm that an interim or precautionary measure related to arbitration proceedings governed by the Federal Arbitration Law may not be canceled

except by a decision issued by the authority that made the order, whether it is the arbitral tribunal or the President of the Appeals Court, as regulated by the Federal Arbitration Law.

The Dubai Cassation Court established that it is not permissible to argue that the legislation is devoid of regulating challenges against arbitration interim or precautionary orders, which necessitates the application of the provisions of the Civil Procedures Law to challenge the seizure order, as it is clear from the Federal Arbitration Law that it has regulated grievance procedures against such orders vis-à-vis the authority that issues the interim or precautionary order.

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# Federal Supreme Court restricts tax clarification disputes

May 15, 2021

In late April 2021, the UAE Federal Supreme Court issued the first judgments on disputes arising out of tax private clarifications.

The disputes had previously been adjudicated on by the Dubai tax dispute resolution committee, and by the Federal Primary Court and the Federal Appeals Court.

The Federal Supreme Court rejected the previous judgments and ordered that private clarifications issued by the Federal Tax Authority do not fulfil the requirements to be disputed.

### **Private clarification disputes**

Previously, there was a level of procedural ambiguity with respect to disputes over private or public clarifications issued by the Federal Tax Authority.

These are disputes over decisions by the Federal Tax Authority that do not have an immediate monetary value; in comparison with a dispute over a tax assessment or voluntary disclosure, and the penalties arising thereof.

There have been different judicial interpretations on this particular issue as to whether a dispute that has no immediate monetary value (such as a private or public clarification dispute) can be accepted by the tax dispute resolution committees and Federal courts.

As a general matter, the Tax Procedures Law and the Cabinet Decision forming the tax dispute resolution committees require that a tax dispute litigant settle any taxes and/or penalties in dispute prior to objecting before the competent TDRC, which implies that tax disputes require a monetary value to be attached to the dispute.

However, general administrative law grants any person the right to dispute an administrative decision if that decision alters the legal position of the person subject of that decision, or if that decision affects (or potentially affects) the interest of the disputing person.

In some instances, the tax dispute resolution committees had

accepted disputes over private clarifications. In other instances, the committees had rejected such disputes.

The Federal Primary Court and the Federal Appeals Court had also accepted disputes over private clarifications and ruled on their subject matter.

In April 2021, the Federal Supreme Court addressed this issue for the first time.

### **Federal Supreme Court decision**

In its interpretation, the Federal Supreme Court reasoned that private clarifications are not administrative decisions – i.e., are not disputable decisions – because they do not alter nor cancel the legal position of the person to whom the decision is addressed.

To provide a comparable illustration of the nature of private clarifications issued by the Federal Tax Authority, the Court compared private clarifications to internal guidelines, and legal reports and commentary.

Finally, the Court established a private clarification cannot be disputed until such clarification results in tax or penalties being applied to the disputing person.

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# Breaking News: UAE tax penalties reduced and discounts granted

May 15, 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 15, 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 15, 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 15, 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 15, 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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# Bid Bonds and Evaluation Methods under the 2019 Tender Regulations in Qatar

May 15, 2021

On 20 June 2019, the Qatar Cabinet issued Decision No. 16/2019 On the issuance of the Implementing Regulation to the Tenders and Bids Law (the “Regulations”).

Long-awaited, the new Regulations govern the tendering process as have been established by Law No. 24/2015 Regulating Tenders and Bids, providing detailed provisions regarding the step-by-step procedures that take place.

Below are the important takeaways for tenderers looking to bid for projects in the State of Qatar with respect to bid bonds and evaluation methods:

## **Bond Forms**

For both bid bonds and performance bonds, the Regulations permit either submission of a cashier's cheque, or of a bank guarantee letter issued by a local or a bank accredited by decision of the Prime Minister after obtaining the approval of the Qatar Central Bank, whether such bank is located inside or outside the State of Qatar ("Accredited Bank").

Cheques that are drawn on foreign banks shall be accepted if they are annotated with the acceptance of a local or an Accredited Bank that the local or the Accredited Bank undertakes to pay the amount equal to the required bond and that it is bound to pay it in full upon first request to do so.

Bank guarantees for both bid bonds and performance bonds must be unconditional, unrestricted, fully payable and irrevocable.

## **Bid Bonds**

Every bid shall be submitted with a bid bond within the conditions of the announcement or the invitation. The maximum amount that may be requested would not exceed five percent (5%) of the estimated value. The bidder who fails to submit the required bid bond shall be excluded.

Exemption from the bid bond requirement shall be possible in the following:

1. In tenders related to consultancy services.
2. In tenders related to technical, research, media, sponsorship and marketing services.
3. In tenders whose value is less than 500,000 Qatari Riyals.

In supply tenders which may be split, the amount of the bid bond may be set at not more than five per cent (5%) of the estimated value of each item separately, in which case the

bidder shall submit the required bid bond for the items he wishes to bid for.

If the tenderer submits a bank guarantee as opposed to a cashier's cheque, the guarantee must be valid for no less than one hundred twenty (120) days from the date set for the submission of the bids.

The bid bonds shall be returned to the unsuccessful bidders within a period not exceeding seven working days from the date of issuance of the decision rejecting their bids, or from the expiration of the bond without its renewal. The bid bond shall be returned to the successful bidder within a period not exceeding seven working days from the date of collecting the performance bond.

### **Performance Bond**

The announced tender conditions shall determine the amount of the performance bond at not less than ten percent (10%) of the contract value. The full performance bond shall be kept until the final execution of the contract, including the warranty or maintenance period pursuant to the tender conditions.

Exemption from submitting the performance bond in full or in part shall be possible in tenders, bids Mumarasa\* and direct agreements related to the following:

1. Consultancy services.
2. Technical, research, media, sponsorship and marketing services.
3. If the value of the process is less than 500,000 riyals.
4. Warranty and maintenance services.

\*Mumarasa contracts are those that are executed for procurement, works, or services which are requested in urgent cases, or that were tendered but for which no bids were submitted, or for which bids were submitted with unacceptable prices but urgent requirements to the end that they cannot be



put out to tender again.

### **Language of Documents**

The documents of the tenders, bids and contracts shall be drafted in Arabic, but English documents may be accepted if accompanied with an Arabic summary. However, the bidding shall be in Arabic except in certain cases where the Tenders and Bids Committee approves submissions in another language so long as they are accompanied by a summary translated into Arabic.

### **Evaluation by Points**

In the cases where the tender requires the evaluation of bids using a points system, the tender conditions shall include the elements and the basis for evaluation as well as the details and basis for scoring points. They shall likewise specify the evaluation points and the minimum limit for the technical acceptance of the following elements:

1. The length of experience in the required field of execution.
2. The permanent technical and administrative cadres working for the bidder.
3. The projects that were successfully executed, and the value of the project executed at the highest cost.
4. The permits for exercising the technical works of specialized nature.
5. The financial capacity of the bidder shown by an audited budget.
6. The equipment, machines and devices available with the bidder, which are necessary for the completion of the requested work.
7. Any data or information that is deemed necessary.

The tender shall be awarded to the lowest bidder whose bid meets the requirements of minimum technical acceptance. The evaluation by points may be based on the calculation of the

common points for joint technical and financial acceptance, in which case the contract shall be awarded to the bidder whose bid has scored the highest points in the joint evaluation provided that the price he has submitted is within the limits of the estimated value or the limit accepted.

## **Tender Documents and Approvals**

Tender documents shall sufficiently be delivered to whoever requests them, after the payment of the financial consideration prescribed in the announcement. The documents shall include the following:

1. The form of announcement of the tender.
2. The form of the tender (the bid).
3. The instructions and general conditions of the tender, which refer to the legal provisions to be complied with by the bidders when submitting their bids.
4. The special conditions of the tender, which refer to the technical matters that are specific to each tender according to its type.
5. The forms of the bid bond and the performance bond.
6. The accurate and detailed bills of quantities showing the particulars of the items.
7. The full detailed drawings and specifications.
8. The form of the contract.
9. The elements and basis for evaluation and the details and basis for scoring points.
10. The general conditions of contracting set by the Government Authority, after notifying the Department.
11. Any other relevant documents which the Department decides to add in coordination with the Competent Department

## **Samples**

The Regulations require that where a tender requires the provision of samples; the weight, size or volume of the

samples shall be stipulated. For items which need to be supplied inside boxes; the type, capacity, and specifications of these boxes shall be indicated. A bid that is not accompanied by said samples shall not be accepted, and samples at the showrooms of the bidders may be inspected on-location in the cases that so require. The samples shall be returned to the unsuccessful bidders within seven working days from the date of rejecting their bids. The samples submitted by the contracted party shall be kept throughout the validity period of the contract.

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# **Ruling Sets Precedent on Applicable Penalties for Voluntary Tax Disclosures (UAE)**

May 15, 2021

In the extremity; when faced with errors in tax filings, taxable persons may be subject to fines amounting to the equivalent of up to 350% of any unpaid taxes.

Comparatively, with appropriate record-keeping and diligent filing of a voluntary disclosure(s), the penalty that could apply to errors would only be 5%, as supported by a recent ruling of one of the three Tax Dispute Resolution Committees

(TDRC) in the United Arab Emirates.

Taxable persons wishing to notify the Federal Tax Authority (FTA) of an error or omission in their tax return, tax assessment, or tax refund application may submit a voluntary disclosure pursuant to Article 8 of the Executive Regulations to the Tax Procedures Law.

There have been cases of voluntary disclosures that have resulted in penalties specific to voluntary disclosures being applied to the taxable person amounting to 50%, 30%, or 5% of the unpaid tax.

There have also been cases where voluntary disclosures have resulted in the taxpayer being subjected to retroactive penalties that would amount to a maximum of 300% of the unpaid tax in addition to the 50%/30%/5% voluntary disclosure penalties.

A recent landmark ruling by the Tax Dispute Resolution Committee (TDRC) clarified that where the taxpayer can clearly evidence that they have acted in good faith and made the voluntary disclosure within the timeframe of twenty business days as of the date their awareness of the error, only the voluntary disclosure penalties apply – and not the retroactive penalties that could amount to an additional penalty of 300% of the unpaid tax.

As opposed to merely stating the necessity to remedy a mistake without noting the taxable person's consciousness of the error; both the Executive Regulations and the Tax Procedures Law emphasize the element of a taxable person's awareness of a mistake when making a voluntary disclosure filing:

- Article 8 of the Executive Regulations: *"...the taxable person shall make a voluntary disclosure to the Authority within twenty business days from the date when the taxable person became aware of the error."*

- Article 10 of the Tax Procedures Law in each of the four sub-articles: *"If a taxable person becomes aware..."*

The TDRC's ruling is in line with UAE court precedent such as the Federal Supreme Court's rulings in appeals 555/2012 and 1/1991 where the Court clearly indicated that unintentional error is not punishable especially if the subject person acted in good faith [when becoming aware of a mistake] within the parameters of the law.

The significant takeaway of this ruling for taxable persons is that evidence of how the error and/or omission came about, and how the taxable person became aware should be clearly recorded and transmitted to the FTA when a voluntary disclosure is made. That evidence should indicate that the taxpayer had discovered the error (and made the voluntary disclosure) within the twenty-business day period.

When reconsideration requests to the FTA are made, challenges before the TDRC are submitted, or an appeal is raised before the Federal Courts on voluntary disclosure, it is paramount that the taxable person can clearly evidence how it is they came about becoming aware of the error that required a voluntary disclosure.

Such evidence can be in the form of internal communication between personnel, private clarifications (a response to a clarification request issued to the FTA), issuance of an FTA guide or public clarifications, adjustment of systems and processes (especially in light of the novelty of the tax reforms in the UAE), deployment to production systems, internal audits, and so on.

## **The Penalties in Detail**

Cabinet Resolution No. 40/2017 on Administrative Penalties for Violations of Tax Laws in the UAE explicitly provides for the application of two penalties in cases of voluntary disclosure by the taxable person. The first is a fixed penalty of AED

3,000 for the first occurrence of voluntary disclosure and an AED 5,000 penalty in case of repetition.

If the taxable person makes a voluntary disclosure after being notified of the tax audit and the FTA starts the tax audit, or after being asked for information relating to the tax audit, whichever takes place first, a 50% penalty of the unpaid tax shall apply.

If the taxable person makes the voluntary disclosure after being notified of the tax audit but before the start of the tax audit, a 30% penalty of the unpaid tax shall apply.

If the taxable person makes a voluntary disclosure before being notified of the tax audit by the FTA, a 5% penalty of the unpaid tax shall apply.

Nonetheless, there are also additional penalties that have been imposed on taxable person retroactively when voluntary disclosures are submitted to the FTA. These penalties have been those that fall under the category of failure to settle the tax within the timeframe (i.e. late payment penalties). These penalties are:

- 2% of the unpaid tax is due immediately once the payment of payable tax is late.
- 4% is due on the seventh day following the deadline for payment, on the amount of tax which is still unpaid.
- 1% daily penalty charged on any amount that is still unpaid one calendar month following the deadline for payment with a maximum of 300%.

The calculation of the above late penalty percentages commences as of the date of when the disclosure should have been made initially (i.e. when the error occurred).

## **Knowledge of Tax Legislation**

In a short period of time, the UAE witnessed several federal

legislations (laws, legislative decrees, cabinet decisions, ministerial decrees, all of which comprise new tax legislation). This legislation is new to the community and the Emirati judiciary and came in succession rapidly. Moreover, there have been more than 20 guidelines and 10 public clarifications issued by the FTA.

Albeit the general principle is that ignorance of the law is not an excuse; it is in UAE jurisprudence that it is necessary for those subject to the law to understand the content and application of the law as an additional condition after its publication and entry into force. This is pursuant to the principles of justice that a person is required to respect legislation only after he or she has become aware of its requirements.

This axiom is significant for taxable persons who see a voluntary disclosure triggered due to new guidelines or public clarifications issued by the FTA, private clarifications provided, or errors that stem from the organizational compliance efforts that a taxable person puts in place to comply with the tax reforms.

In 2008, the Federal Supreme Court ruled that the general constitutional requirements and the legal system are based on the principle that laws and the like are not enforced once they are enacted, but must be sufficiently communicated to all and brought to their knowledge. Otherwise, the adverse would be contrary to the principles of justice and the obligation to protect acquired rights, and the stability required by the public interest in the transactions of individuals and maintenance of public confidence.

The Federal Supreme Court ruled in the same manner in 2002 that in accordance with the principles of the Shari'a law, the general constitutional principles and the foundations of the legal system, it decided laws and the like (regulations, etc.) shall not be effective once issued, but shall be communicated

to all and brought to their knowledge in order for those subject to the law to conform to.

The principles of knowledge of the law – particularly in tax legislation – have also been grounded by the Egyptian Court of Cassation in a recent ruling in 2016 where the Court found that late payment penalties due to the introduction of new tax legislation should be reconsidered by the respective authorities, and in certain cases, not be applied due to the time period necessary for a taxable person to become aware of the new tax requirements.

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# **UAE employment disputes amidst COVID-19: force majeure, class actions, unionization, and procedures**

May 15, 2021

As the Coronavirus pandemic takes its toll on businesses, many employment relationships are facing disruption, and employers are taking action on a mass-scale, with issues relating to unpaid leave, undue termination, or other actions that may be seen as a breach of contractual or lawful employment rights.

Comparatively, employees who deem themselves victimized in the



current circumstances look to avenues to protect their interests individually or collectively.

In this article, we look at updates to unionization and class action lawsuits in the United Arab Emirates, the risks of employers arguing force majeure circumstances, and procedures for a collective claim by employees.

### **Example of past cases on collective employment disputes**

In 1991, the Federal Supreme Court ruled in favor of the employees in a collective employment claim lodged by three employees (and referred to the Federal courts by the deputy minister at the time).

In 2002, the Federal Supreme Court rejected a claim by 18 employees on the basis that it was a joinder of 18 independent claims and did not fulfill the requirements under Article 154 of the UAE Labor Law (Employment Law) governing collective employment disputes.

In 2006, the Federal Supreme Court rejected defense by an employer that the claim should have been lodged as a collective employment dispute and ruled in favor of the employee.

### **2018 updates; thresholds, class actions, and unionization**

In 2018, the regulatory procedures for collective employment disputes were amended by the Minister of Human Resources and Emiratization. Amongst which three crucial amendments were introduced.

The first of the crucial amendments made in 2018 was establishing a minimum threshold of one-hundred employees to fulfill the conditions of a collective employment dispute.

Secondly, the employees making the claim do not necessarily have to be employed by the same employing entity. Even if the employees are employed by different entities, but share a

common denominator, they may form a class on the condition that all their employers share the same owner.

Finally, the employees must be represented by three to five employees designated by the collective employees; essentially a mechanism akin to unionization in other jurisdictions.

### **Force majeure and the dangers of making the argument**

Employers looking to legitimize actions against employees based on an argument of a force majeure event occurring may face inquiry (by the conciliation committee, the supreme arbitration committee for employment disputes, a court, or opposing counsel) as to whether the employer's financial condition justified such action against the employees.

A critical example would be large enterprises (such as banks, airlines, or real estate developers) who publicly announce annual revenues in billions of Dirhams, in which case an overseeing conciliator, arbitrator or judge would question whether adequate human resource provisions were made against potential business disruption in light of the magnitude of revenues generated.

Provisioning for human resource liabilities is of particular importance as Emirati law requires that employment debts are prioritized in the payment of debts during liquidation or bankruptcy, and are also prioritized over government or third-party debts, which essentially reflects the significance the Emirati legislator has given in terms of preferring employment debts against any others.

Moreover, limited liability companies (and other forms of commercial companies) must maintain a certain cash reserve. Administration and liabilities of corporate cash reserves are complex and vary, but as a general matter, the reserve must amount to half of the paid-up share capital amount. For example, a corporate with a paid-up share capital of AED 100,000,000 must maintain a statutory reserve of AED

50,000,000.

Read collectively, companies must provision funds out of annual profits into cash reserves and employment debts arguably have priority over government or third-party debts. The formulation of these two elements dilutes an argument of force majeure as the employer is – by law – required to establish a cash reserve to cover unexpected expenses of which employees are prioritized over third parties (such as suppliers, landlords, etc.).

Even in the odd circumstance that an employer has an insignificant shareholding capital, such as AED 10,000 for example which would require a reserve of only AED 5,000 – but the employer operates with annual figures amounting to millions or more, an employee may argue factual contradiction to the requirements of the commercial companies law which necessitates that a company must have sufficient capital to achieve the purpose of its incorporation.

Importantly; employers face creating a liability over the personal assets of the shareholders and managers if arguing that the Coronavirus is a force majeure event that hindered the employer from paying salaries (or any other employee debt).

The risks arise if the employer is found to have not maintain the required cash reserves (which are meant to cover unexpected circumstances) due to excess distribution of profits to shareholders, in which case the owners and managers of the employer may become liable in their personal capacity (i.e. with their personal assets) for breach of the commercial companies law.

### **Procedure for collective employment disputes**

Commencing collective employment dispute procedures (whether as employees of the same employer, or a class of employees of different employers who share the same owner) requires the

employees to notify the employer in writing of any collective dispute to commence a preconditional amicable settlement period.

The employees and the employer must also notify the Customer Happiness Center of Ministry of Human Resources and Emiratization located in the Emirate that has jurisdiction over the dispute, on the day the dispute occurs, or directly on the following business day, that a collective employment dispute has commenced.

The employees must continue to adhere to their employment obligations, and the employer must keep the entity valid and operational until the dispute has been resolved.

If direct negotiations do not resolve the dispute within seven business days, either of the employer or employees may request the Center to mediate the dispute.

If mediation efforts by the Center are not accepted by the parties within ten days from the date the Center is notified of the request to mediate, the Center must then refer the dispute to the respective conciliation committee.

The conciliation committee has the authority to set hearings and obtain evidence to adjudicate the dispute, and question any of the employees or persons concerned with the dispute, as it deems fit.

The conciliation committee must issue its ruling within two weeks of the dispute being referred to it or otherwise refer the matter to the supreme arbitration committee for employment disputes.

If the conciliation committee issues its ruling, and either of the parties disagrees with the ruling, they may object before the supreme arbitration committee for employment disputes.

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