Dubai Cassation Court rejects enforcement of unsigned arbitration award

June 22, 2021

In April 2021, the Dubai Cassation Court refused to grant an arbitration award writ of enforcement for violation of public policy on the grounds that the reasoning and decision of the award were not signed by the arbitrator.

Background

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

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

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

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

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

winner of the arbitration award (the enforcing party).

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

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

The principal argument presented to the Cassation Court was that the arbitral award was not signed – and that the arbitrator had signed a separate document that is 'disconnected' from the award itself.

Dubai Cassation Court judgment

The Dubai Cassation Court issued its judgment in April 2021.

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

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

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

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

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

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

In other words, for compliance with UAE public policy and to ensure enforcement validity, the reasoning and decision of an arbitration award must be signed by the arbitrator(s).

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

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

Significance

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

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

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

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

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

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

June 22, 2021

Issue

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

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

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

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

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

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

Background / personhood

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

1. Lodging a reconsideration application with the FTA disputing the decision;
2. Submitting an objection against the FTA's reconsideration decision before the competent tax

dispute resolution committee;
3. Filing a case to challenge the tax dispute resolution committee ruling before the Federal Primary Court;
4. Appealing the Federal Primary Court judgment before the Federal Appeals Court; and
5. Filing a case before the Federal Supreme Court appealing the Federal Appeals Court judgment.

The Tax Procedures Law is explicit in limiting the permission to proceed with the dispute process to a single ‘person’ as follows:

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

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

Statutory limitations

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

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

Unincorporated joint ventures were previously recognized as commercial companies under the old Commercial Companies Law of

1984 as particular partnership companies (‘*Mahasa*‘ companies) – albeit not necessarily obtaining independent legal personhood – but merely being governed with respect to the liabilities and obligations of the parties to the unincorporated joint venture.

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

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

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

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

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

FTA guide

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

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

"A person can be an individual (i.e., operating as a sole trader), or a legal person … <u>or another form of entity (e.g., an unincorporated body</u> such as a charity or club, a partnership or trust)."

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

Considerations

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

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

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

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

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

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ADGM Arbitration Centre Introduces Protocol for Remote Hearings

June 22, 2021

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

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

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

Choice of Platforms

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

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

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

Participants, Speakers and Attendees

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

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

Participant is defined as:

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

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

The speakers are considered:

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

All other individuals (e.g., other members of the parties' legal team, any party representatives or personnel, and any other permitted participant such as a secretary to the arbitral tribunal,) will join as attendees.

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

Semi-Remote Hearing Arrangements

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

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

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

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

Recognition and Enforcement

At the conclusion of the proceedings when an award has been rendered, the parties will seek to recognize and enforce said award. Given that the hearings may be held remotely, the protocols suggest for the following to be implemented and signed by both parties to ensure a smooth post-arbitration stage:

"The parties have agreed that:

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

[Signed: Claimant's authorised representative]

[Signed: Respondent's authorised representative]"

Conclusion

Remote hearings have been successfully implemented by courts and arbitral institutes across the globe over the past year.

The ICC introduced remote hearings in the ICC's Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, dated 9 April 2020 – this guidance note contained an annex specifically dedicated to the ICC's checklist for a protocol on virtual hearings.

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

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Dubai Cassation Court clarifies challenging interim and precautionary arbitration orders

June 22, 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

June 22, 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

June 22, 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

June 22, 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

June 22, 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

June 22, 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

June 22, 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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