High Judicial Commission issues first UAE stare decisis order: concept of absolute invalidity, doctrine of apparent circumstances, and standard of good faith

February 4, 2022

Brief

In December 2019, the UAE formed a high Commission to establish unifying precedents across the various judicial systems of the UAE.

The UAE has six judicial systems: Federal, Abu Dhabi, Dubai, Ras Al-Khaimah, the Dubai International Financial Centre, and the Abu Dhabi Global Market. Historically there have been conflicting positions between the judicial authorities.

The power of stare decisis has been granted to the decisions of this high Commission by law. Even where a high court of the UAE (including the Federal Supreme Court) rules in contradiction to an order of the high Commission, standing is granted to appeal against that contradictory ruling.

Whether the DIFC and/or ADGM courts are subject to the jurisdiction of the high Commission is unclear.

This high Commission issued its first decision in July of 2021 addressing a few issues. Of those issues, we discuss here, are the concept of absolute invalidity of contracts, the doctrine

of apparent circumstances, and the standard of good faith.

The high Commission acknowledges that the doctrine of apparent circumstances is not stipulated in UAE legislation neither implicitly nor explicitly.

And with this acknowledgment made clear by the high Commission, it has issued what may be considered as the UAE's first stare decisis order – the first case law binding precedent in the UAE enshrining a nationwide binding doctrine that is prior non-existent in statutory nor customary law.

The Commission

The 'Commission for the Unification of Conflicting Judicial Principles' was established on 19 December 2019 by Federal Law No. 10/2019 on the Regulation of Judicial Relationships between Federal and Local Judicial Authorities.

The Commission is headed by the President of the Federal Supreme Court and paneled by judges from each of the Federal Supreme Court and the Courts of Cassation of the UAE.

Res judicata effect and stare decisis status

The decisions of the Commission have res judicata effect and stare decisis status.

All Federal and local judicial authorities must abide by the principles decided by the Commission.

Violation by any judgment of a lower trial court to any Commission principle is grounds for appeal.

If the violation is by the highest court of a respective UAE jurisdiction, that provides standing to appeal before the respective courts.

Commission Order 1 of 2020

The first petition to the Commission was filed on 4 October

2020 by the Federal Public Prosecution. The Commission issued its decision on 7 July 2021.

Concept of absolute invalidity

Brief: The Commission held that the absolute invalidity of a contract does not affect persons who relied on the contract, nor does it affect contract successors, should such persons (or successors) had relied on apparent circumstances that created an appearance of validity for the contract.

Holding of the Commission on absolute invalidity:

Applying the concept of absolute invalidity in contracts and extending the effects of invalidity to others leads to instability in transactions and conflicts with (i) the requirement to protect those who relied on what appeared to be truthful acts by the contract right holder and (ii) the good faith presumption that applies in considering the truthfulness of apparent circumstances.

This is because the invalidation of a contract that is acted on within the apparent circumstances and cancellation of its effects from the time it was concluded will inevitably lead to turbulence and instability of transactions.

Moreover, considerations of justice and the requirements for protecting the sanctity of transactions and upholding public trust in them requires protecting good-faith actors from the consequences of the contracts of their predecessors* when entering into such contracts after they – the good-faith actors – were assured of and believed in the validity of those contracts.

Public interest requires that such protection be given for public welfare and the legitimate trust on which people depend. This protection finds its support in the fact that the absolute invalidity of a contract does not prevent considering its existence an actual reality. As the contract, despite its

invalidity, creates apparent circumstances of validity on the basis of which a person acts in perceived good faith that it is a legally valid contract, as long as no error or negligence attributed to the person in this belief.

**Predecessors is meant to mean the market, historically, or in a corporate sense, not the familial predecessors of the good faith actor. In other words, the market consists of a plethora of contracts. Many are predecessors or foundational to novel transactions or successor contracts. Should absolute invalidity be accepted by default, reliance on such predecessor contracts and bodies would fade and disrupt market stability.*

Doctrine of apparent circumstances

Brief: Apparent circumstances that are deemed to have granted a contract validity must be given the same weight as the actual circumstances whose elements had invalidated the contract.

Holding of the Commission on the doctrine of apparent circumstances:

The actual circumstances that are deemed contractually illegal in respect of an invalid contract carry the same effect vis-à-vis persons who acted on such contract in good faith in the same manner as would have manifested if the required elements to perfect the validity of the contract had been achieved.

This is based on the doctrine of apparent circumstances which justifies protection of persons in the event of wrongful disposal – that arise due to contracting with the agent of the apparent circumstances – that is contradictory to the actual circumstances, so long as good faith is evidenced on the part of the protected person.

Notwithstanding that the doctrine of apparent circumstances is not stipulated explicitly nor implicitly in the Civil

Transactions Law, the doctrine can still be relied on in pursuit of the protection of justice and interests. This is particularly the case as Article 1 of the Civil Transactions Law states that the rules of justice and interests are considered foundational to the law, after considering legislation, custom, and the principles of Islamic Law.

Standard of good faith

Brief: The act conducted between the agent of the apparent circumstances and any good faith actor is effective against the right holder as the apparent right holder. If the good faith actor fails in their duty of care towards investigating the actual circumstances and any apparent contradictions, they lose the protection of the doctrine of apparent circumstances.

Holding of the Commission on the standard of good faith:

Good faith is considered prevailing if a party (i) could not possibly have come to know the actual circumstances that are contrary to the apparent circumstances and (ii) had applied the care of an ordinary person and did not fail to investigate the actual circumstances and any apparent contradictions.

If a party fails in applying such care and investigation, the presumption of good faith ceases to exist, and such party loses the protection established by the doctrine of apparent circumstances.

Hence:

The act conducted between the agent of the apparent circumstances and any good faith actor is considered effective against the right holder as the apparent right holder, as the good faith actor was prompted to contract with the agent of the apparent circumstances based on the surrounding evidence.

And in turn, this would generate the common belief among all that this appearance matches the truth. Subject to the good

faith actor not committing a mistake or shortfall in investigating the truth and relying on such mistake or shortfall.

A trial court has jurisdiction to assess the evidence and understand the facts of the case as drawn from the evidence and assess the extent of the contribution of the right holder in establishing those facts and evidence, and the effort made by the party contracting with the agent of the apparent circumstances in investigating the truth of the apparencies.

Significance of this Commission Order 1 of 2020

The significance of this Order will span across myriad issues.

In addition to the effects on general transactions; the position of the Commission on the concept of absolute invalidity will transpose onto regulated transactions, such as corporate restructurings (share transfers, etc.), real estate transactions, commercial agency registrations, industry license transfers, intellectual property transactions – essentially any regulated transaction where the sanctity of registered rights may be prejudiced by a subsequently discovered invalidity of an underlying contract. The position of the Commission that the concept of absolute invalidity should not be applied by default creates grounds for parties to protect registered rights notwithstanding the latter discovered invalidity of an underlying contract.

The elaboration on the doctrine of apparent circumstances provides much-needed expansive guidance on the application of apparent authority by the UAE courts. And creates stability in its application across the judicial jurisdictions of the UAE. This is a particular issue with arbitration agreements where courts have concurrently issued contradicting positions on whether apparent authority may be relied on to uphold the validity of an arbitration agreement if an agent lacked explicit authority to bind the principal to it.

And the elaboration on the standard of good faith by the Commission creates a bipartisan onus between litigants to the effect that the concept of apparent authority would not automatically apply. But rather within the doctrine of apparent circumstances and the standards of good faith, a party relying on the agency (authority) of another has a duty of care towards confirming the actual authority of said agent. The Commission even goes so far as to clarify the role of a trial court in that it should assess the extent of the contribution of the principal and also the effort made by the party contracting with the agent in investigating the truth.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com