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A ROUND-UP OF LEGAL, FINANCE AND TAX DEVELOPMENTS ACROSS THE MIDDLE EAST

THE RIGHT TRACK

Clarifications and Changes to UAE Copyright Law

ARBITRATION CORNER

POWERED BY WASEL & WASEL ARBITRATOR SERVICES INC.

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THE PRICE OF JUSTICE

Osman Salih Tekin, Arbitrator at Wasel & Wasel Arbitrator Services Inc examines the dispute resolution aims of Saudi Arabia's Judicial Costs Law.

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In the past the Saudi legal system did not charge fees for the filing of claims or requests. However, that is set to change as Saudi Arabia has issued Saudi Arabia Royal Decree No. M16/1443 On the Approval of the Judicial Costs Law in an attempt to make reforms in this area. The Law, which came into force on 13 March 2022, provides a new framework for judicial costs. It aims to reduce malicious lawsuits, improve the quality of the judicial work and the quality of litigation procedures, as well as urging litigation parties to fulfil their obligations before they resort to the court as judicial fees will be an additional cost which the defaulting party will have to bear if they have not-fulfilled their obligations.

EXCLUDED LAWSUITS

Article 2 of Saudi Arabia Royal Decree No. M16/1443 breaks down which lawsuits and cases are subject to the law. These are matters related to Criminal and disciplinary lawsuits against public officials, lawsuits on family issues and estate distribution, terminations related to proof of determination of inheritance, proof of divorce, proof of wills, other requests related to social and family matters and administrative lawsuits filed against Government bodies.

There is also a distinction between the categories of people judicial costs are and are not imposed on. Under Article 17 of Saudi Arabia Royal Decree No M16/1443, prisoners and detainees at the time of judicial cost accrual in non-criminal financial cases and lawsuits filed, whether issued by them or against them and workers, employees and their heirs claiming their entitlements arising from the employment contracts are excluded from Saudi Arabia Royal Decree No. M16/1443. Under Article 12 of Saudi Arabia Royal Decree No. M16/1443, exception in the case of a petition for reconsideration and request for cassation, a failure to pay the prescribed judicial costs does not preclude the filing of the suit or the request. It is clear that the State has taken the types of people who may not be able to make these payments into account. In such cases the State either bears these costs or postpones payment in order to achieve justice and fairness to those in need.

QUANTIFYING THE JUDICIAL COSTS

Although Saudi Arabia Royal Decree No. M16/1443 does not identify the exact fees, payable leaving these to the Implementing Regulations, it does set out the maximum fees payable. In new lawsuits, there is a maximum of 5% of the claim value and a maximum amount of one million Riyals, dependent on and in line with the assessment criteria in Article 3 of Saudi Arabia Royal Decree No. M16/1443.

In the case of an arbitral award 1% of the amount of an award will be charged to the claimant in an annulment of an arbitral award case under Article 5 of Saudi Arabia Royal Decree No. M16/1443.

In addition, if the court decides to dismiss a lawsuit because the claimant is not present or a lawsuit is inadmissible because the claimant has not filed the case in an appropriate way, an additional charge of 25% of the fees prescribed for the original lawsuit will be levied. The claimant will bear these fees even if a ruling is issued in their favour under Article 4 of Saudi Arabia Royal Decree No. M16/1443. An amount not exceeding 10,000 Riyals for any applications made will also be charged. These include applications for permission to appeal to the Court of Appeal and the Supreme Court and petitions to review a decision under Article 7 of Saudi Arabia Royal Decree No. M16/1443. There will also be a maximum fee of 1,000 Riyals which applies to certain applications made by interested parties for copies of documents or court records.

WHO PAYS?

Saudi Arabia Royal Decree No. M16/1443 states that the losing party will have to pay the judicial costs prescribed for the case and related requests, or a part of them, unless the Law or Regulations states otherwise. The aggrieved party is also entitled to request compensation for the additional expenses or other damages which have arisen from the lawsuit. In addition, if the case for judgment ends without collection of the judicial costs, the competent department will issue a final report which operates as an executive bond against the payee. However, to encourage parties to amicably settle disputes, the Law states that if a settlement takes place before the first hearing, the judicial costs are waived and can be recovered by the payer.

RECOVERY OF JUDICIAL COSTS

Some commentators have stated the process of collecting, identifying and recovering costs, will increase the burdens on the courts and the Justice Ministry. However, the Justice Ministry are to provide quick electronic solutions to ensure cost collection procedure is more efficient.

This law is a monumental step in improving the Saudi legal system by potentially reducing the numbers of malicious lawsuits. As fees increase we may also see, reconciliation and alternative dispute resolution methods being used more frequently in Saudi and parties being encouraged to uphold their obligations.

ARBITRATOR SPOTLIGHT

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JUSTICE SUBODH SHAH

HAVING SERVED AS A JUDGE FOR 22 YEARS BEFORE TRANSITIONING TO ARBITRATION ON YOUR RETIREMENT FROM THE BENCH, HAVE YOU SEEN ANY PARALLELS BETWEEN YOUR WORK AS A JUDGE AND YOUR NEW ROLAE AS AN ARBITRATOR?

I would say there are quite a few similarities in both the activity and the role of a judge and an arbitrator. For example, as a judge and as an arbitrator, you tend to perform the same type of judicial work, you have to read case papers in the same sort of way and need to use decision-making skills. In addition, with both positions you have the same level of prestige, respect and honour. You also have to remain reserved and aloof and act in an independent manner in both these role. In addition, although it is not compulsory, either for a judge or arbitrator to do so, I think it is advisable that those who hold either of these positions do not also participate in political movements.

HOW MANY CASES HAVE YOU PRESIDED OVER AS A JUDGE

As a City Civil and Sessions Judge, I used to conduct civil and criminal matters. This saw me deciding 1,388 cases in 174 days which is the equivalent of eight cases a day. As a Central Bureau of Investigation (CBI) Judge in India I worked on complex scam cases and criminal cases. This saw me deciding 88 cases in 138 days. I also decided more than 250 discharge applications and examined 272 witnesses in 138 days. This was equivalent to almost two cases a day and to recording depositions of two witnesses a day.

I was also a High Court of Gujarat Judge. There I dealt with almost all subjects and delivered approximately 19,832 judgements within 1,260 days or more than 15 cases a day.

WHAT ADVANTAGE DOES THIS EXPERIENCE GIVE YOU IN YOUR WORK AS AN ARBITRATOR?

My experience as an advocate, a judge and then the head of the E-Committee of the Supreme Court of India helps me a lot when it comes to applying the use of technology in arbitration.

For example, my advocacy allows me to understand the modality of parties during arbitrations. While my experience as a judge has given me astute decision-making powers. I also find that my technical knowledge can help me handle everything in a more meticulous way which is faster but involves less effort. Often, I find too that I can handle several things personally without having to wait for any help from others which can be particularly useful.

YOU SERVED AS THE HEAD OF THE E-COMMITTEE OF THE SUPREME COURT OF INDIA WHICH FOCUSED ON THE COMPUTERIZATION OF THE ENTIRE JUDICIARY IN INDIA. HOW FAR DO YOU SEE INDIA TAKING THE DIGITIZATION OF THEIR LEGAL SYSTEM AND WHAT IS INDIA'S ULTIMATE VISION FOR THEIR JUDICIARY?

The E-Court Project began in 2006, when there was no technical support in the country's judiciary. Therefore, I had to start the project from scratch which meant designing the requirements for the hardware and software. Over time, the development in technology, particularly in software allowed the project design to be appropriately moulded. The ultimate aim of this project was to ensure there was appropriate disposal of cases, as there are a huge number of cases in the Indian Courts. Every detail and all orders and judgment of each case are now available to the public online. When filing cases and in hearings/trials, litigants do not have to wait and queue in front of a window or desk. Online filing and case hearings have made the judiciary progress efficiently.

Justice Subodh Shah is the former Judge of the High Courof Gujarat in India and an independent arbitrator listed with Wasel & Wasel Arbitrator Services Inc. Having served for 22 years as a judge, Justice Shah has decided almost 17,000 cases during his career, before transitioning to arbitration in 2019 after his retirement from the bench. Since then, he has presided over eight different arbitration disputes.

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ARBITRATION CASE FOCUS

RECENT KEY ARBITRATION CASES

Case No .... ACC 341/2022 issued on 17/05/2022
Jurisdiction ....Abu Dhabi
Court ....Abu Dhabi Court of Cassation
Recommended by .... Wasel & Wasel Arbitrator Services Inc

Article 135 of Federal Law No. 5/1985 states that no statement may be attributed to a silent person. However, circumstantial silence will be seen to constitute acceptance.

Silence will also amount to acceptance if there have been previous dealings between the contracting parties which have been met by the offer made or where the offer is made to the benefit of the offeree.

PREVIOUS CASE

The DIFC Court of First Instance considered the meaning of Article 135 of Federal Law No. 5/1985 in DAS Real Estate Owned and represented by Mussabeh Salem Mussabeh Humaid AlMuhairi v First Abu Dhabi Bank Pjsc DIFC Case No. 002/2016.

This was a case involving the termination of a bank loan where it was argued that a person who had remained silent should not be deemed to have made an utterance but silence in the face of need was tantamount to a statement and should be regarded as acceptance, when arguing that the Defendant had waived any right to rely upon the non-provision of documents.

Chief Justice Sir David Steel noted that 'In the event of silence the secondary question arises as to whether there was a 'need' to speak...Silence in the face of 'need' amounts to 'acceptance'. Indeed Article 135(2) of Federal Law No. 5/1985 identifies the specific example of acceptance of an offer in the context of prior dealing between the parties.

The commentary on the UAE Civil Code (Federal Law No. 5/1985) by James Whelan also gives the example of a person who it is stated has the right to prohibit the act by their words and is regarded as consenting to it by having deliberately abstaining from saying anything.

So basically, silence will be considered acceptance under Article 135 of Federal Law No. 5/1985 in certain circumstances.

SILENCE IN ARBITRATION AGREEMENTS

However, arbitration agreements have a high threshold in the UAE in terms of evident acceptance by the parties, for example in relation to capacity, authority to represent a principal, or where arbitration agreements are in a separate document to the substantive agreement, or in reference to standard forms such as the FIDIC forms of contract.

Article 7(2)(a) of Federal Law No. 6/2018 (the Federal Arbitration Law) states that 'The requirement that an Arbitration Agreement be in writing is met in the following cases...If it is contained in a document signed by the Parties or mentioned in an exchange of letters or other means of written communication or made by an electronic communication according to the applicable rules in the State regarding the electronic transactions'.

However, Article 7(2)(a) of Federal Law No. 6/2018 does provides room for interpretation with respect to the nuances which can arise in exchanges of electronic communication to conclude an arbitration agreement.

In the past the UAE Federal Supreme Court has confirmed that an arbitration agreement can be concluded through written electronic communication or through instant messaging.

Therefore this raises questions as to whether an offer to bind a dispute to arbitration which has been issued by some form of manuscript or particularly electronic communication may fall within the parameters of Article 135 of Federal Law No. 5/1985 where silence is considered acceptance.

RECENT CASE

On 17 May 2022, in ACC Case No. 341/2022 in a matter involving a payment order and whether the courts had jurisdiction vis-a-vis a purported arbitration agreement, the Abu Dhabi Court of Cassation explicitly addressed the issue of silence in an arbitration agreement offer.

The Abu Dhabi Court of Cassation found that it was not permissible to derive proof of an arbitration agreement from the mere silence of one of the parties on the response to the arbitration offer from the other party, or the implementation of what was presented to them by this party related to the invitation to conclude a specific contract as long as it was not proven that the party to whom this offer was addressed had accepted the writing of arbitration while accepting the contract.

In addition, it was also not permissible to deduce the proof of arbitration from the mere work taking place between the two parties to arbitrate in certain contracts that arbitration would also apply to another contract between those parties.

That work did not provide for arbitration since the agreement on arbitration was not presumed and could not be implicitly drawn.

WHY IS THIS CASE IMPORTANT?

This case shows the difference between silence during the negotiation of a more general agreement such as the one in the previous DIFC case which involved a bank loan and the specific position as in the Abu Dhabi Court of Cassation case where there was an attempt to derive proof of an arbitration agreement by mere silence in response to the arbitration agreement offer.

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