

Legal Study on Arbitration Before the Securities Authority

by Mohammed Jamil AK BIK - m.bik@tamimi.com -

October – November 2011

Preamble: Arbitration in civil and commercial matters is an alternative method of dispute resolution that may be agreed upon by the parties –Article 203 of the Civil Procedure Law.

Preamble:

Arbitration in civil and commercial matters is an alternative method of dispute resolution that may be agreed upon by the parties –Article 203 of the Civil Procedure Law.

Certain laws exist which contain special provisions requiring certain disputes to be settled through arbitration. This is known as mandatory arbitration.

One example is Article 118 of Federal Law No. 28 of 2005 (Personal Status Law) which deals with the role of arbitration in cases of marital discord.

Another example is Article 160 of Federal Law No. 8 of 1980 (Labour Law) which deals with collective labour disputes.

In addition to those listed above, a number of comparative laws contain provisions relating to agricultural, water, property and other disputes exist.

In all cases where the legislator requires disputes to be referred to arbitration, this may only take place pursuant to a legislative provision enacted by the competent authority.

The rule is that courts have jurisdiction over disputes with the exception being that parties may agree to submit their dispute to arbitration. When deciding that certain disputes should only be settled through arbitration, the legislator must enact appropriate legislation.

The above considerations and the importance of securities, bonds and shares trading in the UAE led to the enactment of Federal Law No. 4 of 2000 establishing the Securities & Commodities Market & Authority. The Law generally provides for arbitration as follows:

1) Federal Law No. 4 of 2000 concerning the Emirates Securities & Commodities Authority

1- Article (2) of the Law states: “A public authority with the name of the “Securities & Commodities Authority” shall be established in the State’s capital. It shall enjoy legal personality and financial and administrative independence, and shall have the supervisory and executive powers necessary to perform its functions according to the provisions of this Law and the regulations issued in implementation thereof

2- Article 4 of the Law sets out the powers of the Authority and states at Paragraph 2 that the Authority may issue regulations in consultation and coordination with the Markets licensed in the State, including:

[Regulations on the arbitration of disputes arising from securities and commodities transactions]

3- Article 47 of the Law states:

The Board (Board of Directors of the Authority) shall issue the resolutions necessary for the implementation of this Law

4- Further, on 05 February 2001, the Chairman of the Board of Directors of the Securities & Commodities Authority issued Resolution No. 1 of 2001 concerning the regulation on the arbitration of disputes arising from securities and commodities transactions pursuant to a resolution of the Board of Directors of the Authority and following consultations with the authorities concerned with the setting up of markets in the UAE

Article (2) of the Regulation provides:

“Disputes arising from the application of the Law(1) between parties involved in the securities and commodities industry shall be resolved solely through arbitration. The provisions of this Regulation shall apply in this regard.”

“Market dealing signifies one’s agreement to arbitration and to be bound by the decision of the arbitrators and one’s waiver of the right to appeal the decision save as provided in this Regulation.”

“Article 30 of Resolution No. 1 of 2000, issued by the Chairman of the Board of Directors of the Securities Authority concerns the regulation of brokers. It provides:

“All disputes relating to securities and commodities transactions and brokers shall be subject to such arbitration regulations as the Authority shall lay down in consultation and conjunction with the licenced markets of the State.”

5- On 1 September 2008 the Chairman of the Board of Directors of the Authority issued Resolution No. 35/T of 2008 amending certain arbitration provisions of the Authority’s regulations.

The Resolution makes several amendments to the brokers’ regulations, which are contained in Article 9 of the regulations dealing with market operation. Also amended are Article 2 of the regulations on the arbitration of disputes arising from securities and commodities transactions, and Article 25-2 of the regulation on commodity listing and trading and commodity contracts.

Article 2, as amended, of the regulation on the arbitration of disputes arising from securities and commodities transactions states: “Disputes arising from securities and commodities transactions shall be settled through arbitration when the parties at their discretion agree to arbitration. The provisions of this Regulation shall apply in this regard.”

The same provision appears in the regulation on brokers and the regulation on commodity listing and trading with the following additional phrase:

“The provisions of the regulation on the arbitration of disputes arising from securities and commodities transactions shall apply in this regard.”

It is thus clear that Federal Law No. 4 of 2000 concerning the Securities Authority and Market grants the Authority the power to issue the regulations necessary to implement its provisions and to issue arbitration regulations for disputes arising from securities and commodities transactions.

Pursuant to this legal authority, the Chairman of the Authority’s administration issued Resolution No. 1 of 2001 concerning the regulation on the arbitration of disputes arising from securities and commodities transactions which provides that disputes arising from the application of the law establishing the Authority shall be settled solely through arbitration (Article 2)

This provision was amended by Resolution No. 35/T of 2008 which makes arbitration optional such that it does not take place before the Authority unless the parties so agree.

In the view of the writer, Resolution No. 35/T of 2008 was enacted in response to the many objections raised over the legality or constitutionality of Article 2 of the regulation on the arbitration of disputes arising from securities and commodities transactions.

The question is: Can the Board of Directors impose a legal obligation to pursue arbitration as the only recourse for settlement of disputes arising from securities and commodities transactions?

The author's position is that Law No. 4 of 2000 grants the Authority the power to issue the regulations necessary to implement its provisions and to issue regulations on the arbitration of disputes arising from securities and commodities transactions

In legislative jurisdiction, where the legislator grants power to any authority to issue rules, regulations and decisions implementing the law, the role of the authority, be it the Cabinet, a minister, department head, or board of directors, is limited to adopting and issuing the law's implementing rules and regulations without introducing legislative provisions that are not found anywhere in the law.

I consider that the provision in Resolution No. 1 of 2001 concerning arbitration regulations referring to arbitration as the only recourse is a legislative provision that should have appeared in the law. Since the law does not deal with the matter and only authorises the Authority's Board of Directors to issue arbitration regulations, the introduction of such provision is an encroachment upon the legislator's chief function, which is to enact laws.

While the Dubai Courts have consistently regarded that provision of Resolution No. 1 of 2001 as correct, the Securities Authority saw fit to amend that provision in Resolution No. 35T of 2008 by providing optional recourse to arbitration where arbitration would take place before the Authority only if the parties so agree.

Resolution No. 1 of 2001 applies to all disputes that were not referred to arbitration before the Authority and were not reserved for judgment prior to its issue (see Article (1) of the Civil Procedure Law in this regard).

However, on 20 January 2011, the Abu Dhabi Judicial Department Supreme Court ruled differently based on other reasons in Commercial Appeals No.'s 809, 841, 848, 867-2010. In the case before the Court, a decision had been rendered declaring the court to be without jurisdiction and conferring jurisdiction upon the Authority to which the matter was referred in order to be heard by an arbitration tribunal appointed pursuant to Resolution No. 1 of 2001 (in its pre-amended form). Since that decision had been issued prior to the coming into force of Resolution No. 35T of 2008, the Court applied *res judicata* as the overriding principle above any public policy considerations and ruled that based on the principle of *res judicata*, the subject matter of the dispute would be referred to the Authority for arbitration as the only recourse for settlement of the parties' dispute.

Concluding Comments

1) The Securities & Commodities Authority was set up in the UAE under Federal Law No. 4 of 2000. The Law grants the Authority, represented by its Board of Directors, the power to issue regulations on the arbitration of disputes arising from securities and commodities transactions.

2) Pursuant to a Board of Directors resolution, the Chairman of the Board of Directors of the Authority issued Resolution No. 1 of 2001 concerning the regulation on the arbitration of disputes arising from securities and commodities transactions which provides that such disputes shall be settled solely through arbitration (Article 2).

3) In Civil Appeal No. 50-2007, on 17 April 2007, the Dubai Court of Cassation confirmed this provision, holding that the courts had no jurisdiction over matters involving a dispute over securities

transactions.

4) On 01 September 2007 the Chairman of the Board of Directors of the Authority issued Resolution No. 35/1 of 2008 amending Article 2 of the regulation on the arbitration of disputes arising from securities and commodities transactions such that the Authority could only arbitrate a matter when parties have agreed to refer their matter to it.

5) On 20 January 2011, the Abu Dhabi Judicial Department Supreme Court, in Appeals No.'s 809, 841, 848, 867-2010, confirmed that a ruling was res judicata and accordingly declared the Court of First Instance to be without jurisdiction to hear a matter involving securities and shares transactions because the ruling had acquired the force of res judicata prior to the issue of Resolution No. 35T of 2008 and res judicata overrode any public policy concerns

6) The question of the constitutionality of the old resolution imposing a mandatory arbitration provision has been resolved by Authority Resolution No. 35/1 of 2008 which makes recourse to arbitration optional on the basis that the parties to the dispute must agree to arbitration.