

Does legislation operate retrospectively?

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Claim:

This judgment of the Court of Appeal arose from four appeals. The facts are that the First Respondent (as he was known in all four appeals) brought Abu Dhabi Commercial Action No. 41-2010 (Full Bench) against the Appellants seeking judgment against them jointly for AED 231 million, which the First Respondent alleged represented compensation for loss of anticipated profits, in addition to AED 15 million in compensation for moral damages. Statutory interest at the rate of 12% from the date of filing of proceedings until full payment was also requested.

It is contended that in mid-March 2005 a Member of the Board of Directors of UAB Shareholders Investment Portfolio Limited notified the First Respondent of opportunity to purchase portfolio shares at a price of AED 8 per share. The First Respondent confirmed an interest in purchasing the portfolio shares. Members of the Board invited the First Respondent to a meeting to discuss the arrangements. Personal circumstances meant the First Respondent could not attend; instead, he authorised his two business partners to attend on his behalf and accept the deal. The First Respondent was notified that his first business partner would receive 10 million shares, the Member of the Board who had initially brought the deal to the attention of the First Respondent would receive 5 million shares. The First Respondent was to receive 30 million shares. These arrangements were confirmed to the First Respondent by way of fax, which set out the details of the deal, the number of shares, and the price per share. The fax was followed by an email setting out the same details and requesting the First Respondent's signature, which he provided in reply to the email. In order to pay for the deal, the First Respondent sold a number of his shares at reduced prices. The First Respondent also requested provision, from a certain Member of the Board, of details of the account number in which he was to deposit the price for the purchase of the shares. The First Respondent alleged, however, that two Members of the Board and his business partner had executed an arrangement pursuant to which the balance of shares (including those the First Respondent intended to sell) to Qatar Bank, which the First Respondent alleged caused him substantial loss and damage by way of a loss of anticipated profits, because the share price had increased to AED 15.7 per share. The share portfolio was held by UAB and its shareholders, and the First Respondent alleged that the Chairman of the Board of Directors of UAB and one additional person caused the collapse of the deal and thus were jointly liable for the damage suffered by the First Respondent.

The Appellants pleaded both *res judicata* (relying on a previous decision of the Abu Dhabi Federal Court and a previous decision of the Sharjah Courts) and a lack of local jurisdiction on the part of the Abu Dhabi Court.

Court of First Instance:

The Court of First Instance dismissed those arguments (*res judicata* and lack of jurisdiction) and appointed an expert in the proceedings.

Court of Appeal:

The individuals against whom the First Respondent alleged were the source of his loss and damage appealed in separate appeals. UAB also lodged an appeal.

In 30 June 2010 the Court of Appeal upheld the decision of the Court of First Instance.

Supreme Court:

Again, all parties appealed.

They again placed reliance on the doctrine of *res judicata*, citing Abu Dhabi Court of First Instance Decision No. 2402-2007 which both confirmed that the Court had no local jurisdiction and referred the matter to the Sharjah Court of First Instance. The Appellants had also argued that the Abu Dhabi Court of First Instance had no local jurisdiction on the basis that they were not employed in UAB's Abu Dhabi branch, and that one of them resided in Dubai, which meant he was not competent to receive service of proceedings in Abu Dhabi.

These arguments were held to be unsound. The determination of whether a decision can be appealed is a public policy issue which the Court must decide on its own motion even if not raised by the parties. It is established according to Article 151 of the Civil Procedure Law that rulings which are made during the course of proceedings and which do not entirely conclude the dispute may not be contested until after the issue of the ruling which concludes the dispute in its entirety. Exceptions to this principle include interim or summary rulings, rulings issued with respect to the suspension of a case, rulings subject to forcible implementation, rulings of lack of jurisdiction and likewise those rulings confirming jurisdiction. In those exceptional circumstances, the ruling can be appealed separately even if it does not conclude the merits of the case in its entirety. A decision confirming the jurisdiction of the Court may be appealed separately as long as the court is not competent to try the matter i.e. the matter is outside its jurisdiction within the meaning of Article 85 the Civil Procedure Law. With local jurisdiction however, once the Court has dismissed the jurisdictional plea, its decision cannot be appealed to the Courts of Appeal or Cassation. Likewise, a Court of First Instance's dismissal of a plea of *res judicata* is a decision rendered prior to the adjudication of the merits and as such may not be appealed separately. It is deemed to be appealed along with the decision on the merits. The decision may not be challenged by way of appeal or cassation as it does not conclude the case definitively.

In this case, the Court of First Instance ruled it had local jurisdiction to hear the matter, hence it dismissed the plea regarding lack of local jurisdiction and the plea of *res judicata*. The Appellants challenged the ruling and the Court of Appeal held that no appeal would be entertained with respect to Court of First Instance's dismissal of the pleas. The Court of Appeal was found to have correctly applied the law and its decision on the matter cannot be appealed to the Court of Cassation.

The Appellants argued that the lower Court had erred in its application of the law by dismissing the plea as to its jurisdiction on the basis that the arbitration of disputes involving shares and bonds had become optional by virtue of Chairman of the Board of Directors of Securities & Commodities Authority Resolution No. 35/T of 2008 amending Article 2 of Securities & Commodities Authority Resolution No. 1 of 2001. This was despite the Sharjah Court of First Instance having ruled on 14 May 2008 that it lacked jurisdiction to hear Sharjah Civil Action No. 755-2008 (Full Bench) and that jurisdiction over the dispute belonged solely to the arbitration committees of the Capital Market Authority. Since no appeal was filed, that ruling became final.

The Chairman of the Board of Directors of Securities & Commodities Authority Resolution was dated 1 September 2008, which meant that the amendment was inapplicable here (i.e. inapplicable to matters which have been decided). The fact that the ruling has not been appealed amounts to an implicit agreement to refer the dispute to the arbitration committees of the Securities & Commodities Authority. The decision is thus flawed and ought to be reversed.

This Court of Cassation considered that this argument had merit. It is established according to Article 1 of the Civil Procedure Law that laws on procedure shall apply to proceedings awaiting determination and to proceedings not yet concluded to the exclusion of the cases specifically mentioned Article 1, including laws amending jurisdiction, if those laws they came into force after the closing of the arguments in the case. Normally, laws amending jurisdiction apply forthwith to all pending cases unless pleadings had closed and the case was reserved for judgment before the new law came into force. Laws amending jurisdiction are laws that amend all manners of jurisdiction: subject matter jurisdiction, local jurisdiction or jurisdiction of

value, to the exclusion of laws that cancel a Court or remove an issue from the scope of a judicial authority, which laws apply forthwith with the changes taking effect as soon as the law comes into force such that cases pending before the cancelled court are transmitted to the judicial authority specified in the law (unless otherwise stipulated).

Cases which are “decided” are those that have been determined, even without finality. Cases decided prior to the entry into force of the new law are not subject to the new law and remain subject to the old law in deference to the settled and complete position. They are not reconsidered in the light of the new law even if the new law materially amends the procedure for hearing, filing or proving the case. The principle of non-retroactivity of laws requires that litigation which ended with a decision must not be interfered with even if the decision is open to ordinary or extraordinary forms of review or has in fact been challenged.

It is further established that when ruling that it has no jurisdiction and remanding, as per Article 85 of the Civil Procedure Law, the Court ends the entire proceedings with its determination of jurisdiction, which is not followed by any ruling on the merits. The ruling may, therefore, be appealed forthwith and, if not appealed, it becomes final and binding on the Court which has been declared as having jurisdiction even if it: a) contradicts an earlier ruling or, b) is based on a different rule that is incorrect as a matter of law. This is because *res judicata* overrides any public policy considerations and prevents the re-litigation of issues that have already been decided.

Accordingly, such rules must be applied whenever the issue at hand relates to jurisdiction, including circumstances where the ordinary court declares itself without jurisdiction because the matter falls within the jurisdiction of arbitration committees set up under Resolution No. 1 of 2001 (concerning the regulation on the arbitration of disputes arising from securities and commodities transactions).

Article 2 of the said Resolution provides that “disputes arising from the application of the Law 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.” The Resolution was then amended by Chairman of the Board of Directors of the Authority via Resolution No. 35 of 2008 dated 1 September 2008, which was published in the Official Gazette and made arbitration before those committees optional and at the discretion of the parties.

When faced with this issue, the Sharjah Court of First Instance ruled on 14 May 2008 that it had no jurisdiction in the matter and that jurisdiction belonged to the arbitration committees of the Capital Market Authority. With no appeal, the ruling became final prior to the coming into force of Resolution No. 35 of 2008. Hence, the instant action is not subject to the Resolution but subject to the old Resolution irrespective of the position regarding its constitutionality in deference to *res judicata* principles which override any public policy considerations and prevent the re-litigation of issues that have been decided. In adopting a different view, the Court of First Instance erred in dismissing the plea of the absence of its jurisdiction, on the basis of Resolution No. 35 of 2008.

The appeals were therefore upheld by the Court of Cassation. The matter regarding the collapse of the share purchase was referred to the arbitration committees of the Securities & Commodities Authority.