

Know your type three types of Arbitration agreements in a nutshell

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This article sheds light on three different types of arbitration agreement, namely: 1. arbitration clauses; 2. submission agreements (arbitration deeds); and 3. arbitration agreements incorporated by reference.

1. Arbitration Clause

Many commercial agreements now have an arbitration clause embedded within them. The clause regulates the method of resolving any possible future disputes. Usually these are standard clauses provided by the institution which the parties have agreed to use to administer the future dispute. Such clauses should contain, as minimum, details of (a) the arbitration rules that will govern the proceedings and the institution, if any, which is to administer the process; the seat, or legal place of the arbitration, the number of arbitrators, and the language of the arbitration.

A clause lacking in one of these respects may be inoperable or allow the other party to delay the proceedings whilst the ambiguity is resolved. For example, if the clause does not state the number of arbitrators and no agreement is made on such issue, this will need to be determined by the institution administering the arbitration) or, if the parties have not agreed on an institution, the courts of the seat.

If national courts are asked to assist this can waste a significant amount of time and money. In one case handled by Al Tamimi & Company in Abu Dhabi, the claimant resorted to the national court to seek the appointment of a sole arbitrator and the court issued a judgment to appoint a sole arbitrator in line with arbitration clause referred to in the disputed agreement. The agreement specified that the arbitrator shall be one arbitrator to be mutually agreed to by the parties.

Instead of closing its file the court kept the case on hold by not deciding on the court's fees which was to be decided on at later stage. The court essentially adopted the arbitration and treated it as a court-administered arbitration under the UAE Procedural law, which is not what the parties had agreed to.

The sole arbitrator administered the arbitration and proceeded to issue an award in favor of the claimant, who then filed a fresh case before Abu Dhabi Court to ratify the award. The Abu Dhabi Court of First Instance rejected the case on the basis that law applying to court-administered arbitrations had not been followed. Article 213(1) of the UAE Procedural Law provides that the arbitrator should submit the award to the court within 15 days of its issuance, which did not occur. The claimant appealed on the grounds that article 213(1) was not applicable to this case as the arbitration was agreed to pursuant to the arbitration clause signed before resorting to court, and so was not a court-administered arbitration. The Court of Appeal confirmed the claimant's view and overturned the ruling of the Court of First Instance.

Although eventually this matter was resolved, this case shows how a badly drafted arbitration clause leads to a series of unwanted obstacles. To avoid similar obstacles, the parties should have agreed that in the event of disagreement to choose an arbitrator, he will be chosen by the institution

to administer the proceedings.

2. Submission Agreements / Arbitration Deeds

We noted that arbitration clauses are made before any dispute arises. Submission agreements however are agreements to arbitrate made after the dispute has arisen. Submission agreements are also known as 'arbitration deeds', and sometimes as 'Terms of Reference' (although as explained below, an arbitration deed or terms of reference are usually prepared irrespective of whether the agreement is by way of a submission agreement or arbitration clause).

A submission agreement is less common than an arbitration clause. As they are prepared after the dispute has arisen, they tend to be much longer than an arbitration clause. A submission agreement will contain details of the dispute and the issues between the parties, and clearly record that it is being referred to arbitration.

It will then contain the same important details as an arbitration clause, such as the legal seat and number of arbitrators. A submission agreement which does not clearly state the details of the dispute being referred to the arbitration may be declared later on as null and void, along with any award made pursuant to it.

Submission agreements can be made during litigation to remove the dispute from the jurisdiction of the court provided the Court of First Instance has not issued its judgment yet and the pleadings stage is still taking place.

It may be assumed that having an arbitration clause means that there is no need for a submission agreement. The purpose of a submission agreement is to define and specify the scope of arbitration so as to enable the court – later on – to ensure that the arbitral award was issued within the limits specified by the parties. It can be argued that an arbitration clause fulfills this purpose as it limits any arbitration to issues arising from or connected to the agreement, even though the limits are wide.

UAE Law however is not clear on this. Article 203(3) of the UAE Civil Procedural Law states that the subject of the dispute must be defined in an arbitration clause or during the examination of the claim, and Article 216(1)(a) provides that an arbitral award can be annulled for lack of an 'arbitration document'. It is not clear if this means arbitration clause or more substantial document such as a submission agreement.

It is therefore always recommended that, even though there may be an arbitration clause, that a submission agreement (usually known in this context as an 'arbitration deed' or 'terms of reference') be signed in any arbitration proceedings whether there is an arbitration clause in the disputed contract or not.

3. Arbitration Agreement incorporated by reference

A disputed agreement may not include an arbitration clause. Nevertheless if the agreement refers clearly and explicitly to another document which does contain an arbitration clause, the arbitration clause will be deemed to have been incorporated into the main agreement by reference provided the reference is made clearly (such as under the title of "Dispute Resolutions and Governing Law"). If the referral is vague or subject to conflicting interpretation, the national courts may retain jurisdiction.

It is common to find this type of arbitration agreement in construction contracts, where the contract may make reference to standard FIDIC conditions which contain a standard arbitration agreement. In this regard, the Court of Cassation stated in one of its judgments that:

“It is sufficient in a construction contract to make a referral, so that in case a dispute arises between the client and the contractor in respect of the construction contract, it becomes resolved through the general conditions of construction (FIDIC). This means that the parties agreed to arbitration in respect of all the disputes arising out of the obligations stated in said contract without the need to refer to the details of such condition, where the referral to it is sufficient...”

(Cassation no. 462 of 2002- Hearing of 2/3/2003)

Nevertheless, the UAE case law has been consistent in its view that arbitration agreements are special agreements which deprive a party of its right to refer a dispute to the local court and therefore must be absolutely clear. We therefore advise that such clauses are avoided, and if this is not possible, that the referred to document be signed in full on every page so that there can be no dispute that it forms part of the main agreement and the arbitration clause was brought to the attention of the parties.