

Differentiating between an Arbitration Deed and Terms of Reference in UAE law

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The UAE legislator opted to use one term “arbitration instrument” in the UAE Civil Procedures Code, and it is not always clear whether this is referring to an arbitral agreement or the terms of reference. In a series of decisions the Abu Dhabi Court of Cassation has helpfully clarified which of the Procedures Code provisions apply to the arbitral agreement, and which provisions apply to the terms of reference. The Abu Dhabi Court of Cassation has also explained how these terms relate to each other, as well as other key issues, thus helping to clarify the applicable formal requirements applying to arbitration under UAE law.

Background

Arbitration agreements can take one of three forms: an arbitration clause in the contract; an arbitration deed entered into after the dispute arises; and an arbitration clause incorporated into the contract by reference.

In Case No.467/2013, the Abu Dhabi Court of Cassation stated that the arbitration clause constitutes an agreement between the contracting parties in their contract that any dispute resulting from the execution or interpretation of their contract shall be referred to arbitration. The arbitration clause exists before the dispute arises. Where there is no arbitration clause or any other arbitration agreement between the parties to refer a dispute arising between them to arbitration, the parties may enter into an agreement to refer the dispute to arbitration. Such an agreement is known as an “arbitration deed”. Unlike the arbitration clause, the arbitration deed begins its existence only after the dispute arises between the parties.

In case No.214/2014, the Abu Dhabi Cassation Court stated that if the contract entered into between the parties refers to another document, which includes an arbitration clause, then this is considered an arbitration clause by incorporation. However, the Abu Dhabi Cassation Court stipulated that in order to have a valid arbitration clause by incorporation, the reference to the document which includes the arbitration clause must include an explicit and specific reference to the arbitration clause in the referenced document.

Article number 203(1) of the Civil Procedures Code states that:

“It shall be permissible for contracting parties generally to stipulate in the original contract or in a subsequent agreement to refer any dispute between them concerning the implementation of a specified contract to one or more arbitrators and it shall likewise be permissible to agree by special conditions to arbitration in a particular dispute.”

This recognizes the difference between an arbitration clause and an arbitration deed. It highlights that the parties may agree on the arbitration in their original contract (i.e. an arbitration clause), or can agree in a subsequent agreement (i.e. an arbitration deed).

The meaning of “Arbitration Instrument” in articles 203 and 216

Aside from the arbitration clause, arbitration deed, and arbitration clause by incorporation, the Abu Dhabi

Court of Cassation judgment No. 467/2013 noted the existence of “terms of reference”. This refers to a procedural document that is prepared by the arbitrators to evidence the parties’ agreement of the procedural matters relating to the arbitration proceedings.

As noted before, the Civil Procedures Code refers only to one term, which is “arbitration instrument”, it does not use the terms “terms of reference” or “arbitration deed”. How then are we to recognise those provisions using ‘arbitration instrument’ to refer to ‘arbitration deed’, and those using it to refer to ‘terms of reference’? The Abu Dhabi Court of Cassation, in judgment No.467/2013, confirmed that the UAE legislator meant to refer to the “terms of reference” in some of the Civil Procedures Code articles, and to the “arbitration deed” in some other articles:

- Article 203(3) states that “The subject matter of the dispute must be defined in the arbitration instrument or during the trial of the action even if the arbitrators are empowered to effect a conciliation, failing which the arbitration shall be void”. The Court confirmed that the UAE legislator meant to refer to the “arbitration deed”, and did not mean to refer to the “terms of reference”.
- Article 216(1)(a). This article states that either party to an arbitration award may request the court to nullify it if, among other things, the award is issued without “arbitration instrument”, or an invalid “arbitration instrument”. If the UAE legislator meant to refer to the ‘arbitration deed’ in this article, then the “arbitration deed” must be signed by the parties for the award to be valid because article 203/2 stipulates that the arbitration agreement cannot be evidenced unless it is in writing. However, if the UAE legislator meant to refer to ‘terms of reference’, then these do not need to be signed and so a party unhappy with the process cannot void the proceedings by simply refusing to sign the terms of reference. The Abu Dhabi Court of Cassation held that the UAE legislator was referring to the ‘terms of reference’, and not to the ‘arbitration deed’. The Abu Dhabi Court of Cassation confirmed, among other things, that if either party declines to sign the terms of reference, this ought not to result in the setting aside of the arbitration award.
- There is another precedent issued by Abu Dhabi Court of Cassation in judgment No. 112/2015, in which one of the parties sought the nullification of an arbitration award on the basis that the terms of reference were not signed by the respondent during the arbitration proceedings. The Cassation Court highlighted that the respondent was given five chances to sign the terms of reference, but refused to do so without a valid reason. The Court characterised this as an abuse of right by the respondent, and one that the respondent should not be allowed to benefit from it, and the award was upheld.

Conclusion

The use of the term ‘arbitration instrument’ in the Civil Procedures Code has caused some confusion as it could be referring to ‘arbitration deed’ or ‘terms of reference’.

The “arbitration deed” is a type of arbitration agreement. The “terms of reference” is a procedural document that is prepared by the arbitrators to evidence the parties’ agreement regarding the procedural matters related to the arbitration proceedings.

The Abu Dhabi Court of Cassation has confirmed that Article 203(3) of the Civil Procedures Code is referring to the “arbitration deed”. Article 216(1)(a) is referring to the “terms of reference”. Unlike the arbitration agreement, the “terms of reference” does not have to be signed by the parties in order to be valid. This interpretation by the Court makes the arbitral process more robust in the UAE.