UAE Cassation Court rules amended memorandum of association not subject to the arbitration agreement in the original memorandum

December 13, 2021

In a recent judgment by the Abu Dhabi Cassation Court, the Court looked into whether an amended memorandum of association binds the shareholders to the arbitration agreement in the original memorandum.

Case

The shareholders of a limited liability company included an arbitration agreement in the memorandum of association at the time of incorporation of the company. The memorandum was duly attested by the public notary and registered with the commercial registrar. The arbitration agreement between that parties stated that:

"In the event that any dispute arises regarding the interpretation, implementation, or application of the agreement [the memorandum of association] provisions or for any other reason, it shall be resolved by amicable means agreed upon between the parties. If this is not agreed upon, the dispute shall be referred to an arbitration tribunal composed of three arbitrators."

Subsequently, one of the shareholders sold their shares in totality to the other shareholder, and the amended memorandum

of association reflecting the new share ownership was duly attested by a public notary and registered with the commercial registrar.

The amended memorandum expressly stated in its sixth clause that with the exception of the amendments stated therein, the rest of the terms of the original memorandum of association remain in effect.

The amended memorandum did not include an arbitration agreement.

The shareholders disputed and the case was brought before the Abu Dhabi Courts.

The Courts applied their jurisdiction to adjudicate the dispute on the reasoning that the amended memorandum of association did not include its own respective arbitration agreement, and that the parties were not bound by the arbitration agreement in the original memorandum of association.

Cassation Court reasoning

The Cassation Court found that the referral to the original memorandum of association contained in the sixth clause of the amended memorandum did not imply the express consent of the parties to the arbitration agreement in the original memorandum and that it was not to be deemed clear and express reference to the arbitration agreement in the original memorandum.

The Court’s position was that the reference to the original memorandum of association was just a general reference to its texts without specifying the arbitration agreement to evidence the parties’ knowledge of its presence in the original memorandum, and hence the general referral to the provisions of the original memorandum of association does not extend to the arbitration agreement therein.

The Cassation Court reasoned as follows:

“The provisions of Articles 4, 5 and 6 of Federal Law No. 6 of 2018 on Arbitration states that arbitration is an express agreement of the parties on the jurisdiction of the arbitrator excluding the courts to settle a dispute between them, and whether the agreement on arbitration is in the form of terms or conditions, it must be established in writing, whether the writing is in writing signed by the parties or what the parties exchanged in letters, telegrams or other written means of communication, and is considered an agreement on arbitration every reference in the substantive agreement to the document that includes the arbitration clause if the referral is clear and explicit in approving this clause. The effect of referral is achieved only if it specifies the arbitration agreement contained in the document to which it is referred.

If the reference to the substantive agreement is just a general reference to the texts of this agreement without specifying the arbitration agreement evidencing that the parties know of its presence in the referred to substantive agreement, then the referral does not extend to the arbitration agreement and the arbitration is not to be considered agreed upon between the contracting parties, just as if there are annexes or schedules to the substantive agreement, it is not required that the parties sign and stipulate that these schedules and appendices are considered an integral part thereof, given that these annexes and schedules are nothing more than a detailed statement of the essential issues agreed upon by the parties, except that if those annexes include an exceptional condition such as the arbitration agreement, in which case the arbitration agreement does not apply to the parties unless they sign that annex.”

(The translation of the judgment is for informational purposes only and is not a substitute for the official judgment. The original version of the judgment is the only definitive and

official version.)

Takeaway

In this judgment, the Abu Dhabi Cassation Court sheds light on the judicial approach with respect to Article 7(2)(b) of the Federal Arbitration Law which permits incorporating arbitration clauses by reference to any model contract, international agreement, or any other document containing an arbitration clause.

And particularly does so in the sense of corporate constitutional documents.

For shareholders with arbitration agreements in their memoranda of association, this judgment provides guidance on the position of the courts if any amendments are made to the original memorandum without an explicit arbitration agreement governing that amendment.

Revisiting amendments to memoranda of association, or registered share transfer deeds, to ensure they reflect express consent to the arbitration agreement in the original memorandum would be a cautionary step to take to ensure the validity of the arbitration agreement.

Author: Mahmoud Abuwasel

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com