

## **Client Alert: Kuwait's Court of Cassation Upholds Arbitration Clause in Distribution Agreement**

**By Dr Kilian Bälz and Christopher Gunson**

*On 13<sup>th</sup> February 2018, the Kuwaiti Court of Cassation confirmed in a landmark judgement that an arbitration clause providing for international arbitration in a distribution agreement is valid and excludes the jurisdiction of the Kuwaiti courts. The decision puts an end to many years of ambiguity regarding the arbitrability of disputes based on commercial agency, dealership, and franchise agreements in Kuwait.*

For many years, whether disputes based on distribution agreements may be submitted to arbitration was an unsettled matter in Kuwait. This ambiguity stems from Article 285 of the Kuwaiti Commercial Code, which establishes the competence of the courts at the “place where the contract is performed” for all “disputes based on agency”. Furthermore, Article 286 of the Commercial Code applies Article 285 to exclusive dealership contracts.

Legal commentators in the past interpreted these provisions broadly and inferred that disputes based on distribution agreements (generally understood to comprise commercial agency, dealership, and franchise agreements) could not validly be submitted to arbitration. Therefore, according to widespread opinion, an arbitration clause contained in a distribution agreement was invalid and did not exclude the Kuwaiti courts' jurisdiction.

### **The Case in the Court of Cassation**

On 13<sup>th</sup> February 2018, the Kuwaiti Court of Cassation decided a case based on a typical set of facts: the principal, an international company, terminated its medical products distribution agreement with a Kuwaiti distributor. Aggrieved by the termination, the distributor brought a claim for compensation against the principal.

The distribution agreement contained an arbitration clause providing for LCIA arbitration in London, in the English language. In court, the distributor argued that the clause did not exclude the jurisdiction of the Kuwaiti courts. First, the distributor claimed that Article 285 of the Commercial Code rendered arbitration impermissible in matters relating to distribution, making the arbitration clause invalid. Second, the distributor argued that its management had lacked the authority to enter into the arbitration clause. Third, the distributor claimed that the arbitration clause lapsed once the principal terminated the distribution agreement.

### **The Decision of the Court**

The Court refuted the distributor's arguments and held that, under Kuwaiti law, an arbitration clause providing for international arbitration in a distribution agreement is valid and excludes the Kuwaiti courts' jurisdiction.

First, the Court held that Article 285 of the Commercial Code does not prevent parties from agreeing to arbitration. Accordingly, Article 285 of the Commercial Code is limited to determining the competent court in Kuwait when a dispute enters litigation and says nothing

about the arbitrability of distribution agreements. Second, the Court held that a limited liability company's management has the full power and authority to enter into an arbitration clause. Thus, it opted against an interpretation that would require special approval by the shareholders assembly in order to enter into an agreement including an arbitration clause. Third, the Court emphasized that an arbitration clause can survive the termination of the contract in which it is contained. Therefore, in the present case, the arbitration clause continues to apply, although the principal terminated the agreement.

### **The New York Convention**

Throughout its decision, the Court pays tribute to the New York Convention, to which Kuwait has acceded. The Court emphasizes the importance the Convention gives to the recognition of arbitration clauses.

However, the present case shows that the Convention's provisions prove futile without supporting legislation and case law at the local level. The Convention does not define what matters can be submitted to arbitration. Instead, it leaves this decision to local law. In view thereof, the Court of Cassation's decision is a major step, irrespective of the application of the New York Convention in Kuwait.

### **The New Commercial Agency Law**

Ultimately, the Court of Cassation's decision cannot be fully understood in isolation. Article 20 of the new Commercial Agency Law (Law No. 13 of 2016), addresses disputes based on distribution agreements, stating that, "it is permitted to agree on resorting to arbitration when settling the disputes". This provision, in conjunction with the Court of Cassation's decision clearly establishes that distribution agreements may be submitted to arbitration.

See our previous client alert on Kuwait's new Commercial Agency Law [here](#).

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**If you would like more information about this topic, please contact us.**

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