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The Jordanian Court of Cassation Upholds the Validity of an Arbitration Clause in a Distribution Agreement

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In many Arab countries, including Jordan, special legislative and regulatory instruments are in place to provide certain protections for local commercial agents and distributors. The relevant laws regularly vest the local courts with exclusive jurisdiction to rule on disputes between agents/distributors and principals. Such exclusive jurisdiction rules prevent derogation from the jurisdiction of local state courts in favor of foreign state courts in order to protect the local agent/distributor from having to pursue their claims abroad.

There is, however, controversy as to whether such clauses also prohibit conferring jurisdiction on arbitral tribunals, i.e. in such jurisdictions, others have [questioned](#), whether disputes arising from commercial agency agreements and distribution agreements are arbitrable at all. In practice, the answer is decisive as to (i) whether a terminated distributor can bring claims before local courts despite a previously agreed arbitration clause and (ii) whether a principal can successfully enforce an arbitral award against the distributor in the distributor's country under the regime of the New York Convention of 1958.

While some Arab countries have opted to amend their commercial agency laws stipulating explicitly that referring disputes arising from commercial agency and distribution agreements to arbitration is permissible (for instance Kuwait, Article 20 of [Law 13/2016](#)) some others did not. In these countries the question of arbitrability of disputes arising from distribution agreements remains controversial. Jordan belongs to the latter set of countries. Indeed, the substantive validity of arbitration clauses in distribution agreements has been debated for decades now.

The remainder of this post focuses on the Jordanian position on these issues and, in particular, discusses a landmark decision, issued on 14 June 2022, in which the Jordanian Court of Cassation upheld the substantive validity of an arbitration clause in a distribution agreement ([Decision in case no. 916 of 2022](#)). This decision hopefully ends controversy over whether the sole jurisdiction of Jordanian courts under the Commercial Agency Law over distribution disputes invalidates arbitration clauses in distribution agreements.

Background on the Jordanian Commercial Agency Law

Distribution agreements – understood under Jordanian law to comprise commercial agency,

dealership, and franchise agreements – are governed by Law 28/2001 on Commercial Agents and Intermediaries ([Commercial Agency Law](#)). The term commercial agent encompasses also distributors (Article 2 [4] Commercial Agency Law).

Article 16 (a) Commercial Agency Law reads “*Jordanian courts have jurisdiction over any dispute or disagreement arising from commercial agency contracts or from applying the provisions of this law*”. The old Commercial Agency Law contained a similar provision stating, “*Notwithstanding any agreement to the contrary, the courts at the place in which the agent perform its activity have jurisdiction over disputes arising from a commercial agency contract*” ([Article 20 of Law 44/1985 on Agents and Intermediaries](#)).

Legal scholars have often taken the view that disputes arising out of distribution agreements are not arbitrable because, as a matter of public order, they are subject to the mandatory jurisdiction of Jordanian state courts.

Adversaries of this opinion tried fiercely to establish that disputes arising from arbitration agreements are indeed arbitrable. Their main arguments include: (i) Article 16 (a) of the Commercial Agency Law does invalidate prorogation clauses conferring jurisdiction on foreign state courts over Jordanian courts, this however does not extend to conferring jurisdiction on arbitral tribunals. (ii) Article 16 (a) of the Commercial Agency Law is not a mandatory provision given that in contrast to its predecessor under the old commercial agency Law it does not include the wording “*Notwithstanding any agreement to the contrary*”. (iii) Given that Jordan is a contracting state to the New York Convention, Jordanian courts are obligated pursuant to Article II of the New York Convention to refer disputes arising from distribution agreements which contain arbitration clause to arbitration. This obligation supersedes Article 16 (a) Commercial Agency Law.

Contradictory Case Law of the Court of Cassation

Contradictory case law of the Court of Cassation further contributed to this controversy.

The Court of Cassation repeatedly has ruled that arbitration clauses in distribution agreements are invalid because the jurisdiction of Jordanian courts over disputes arising from distribution agreements cannot be derogated. However, over the last 20 years there are at least two decisions issued by the Court of Cassation in which the court upheld arbitration clauses in distribution agreements. Yet, in these two decisions the Court of Cassation either did not provide reasoning for its ruling or provided faulty reasoning.

In both decisions the Court of Cassation was required to decide challenges lodged by distributors against decisions of lower courts which referred a dispute arising from a distribution agreement to arbitration in accordance with arbitration clauses agreed therein. The distributors in both cases challenged the decisions claiming among others that the arbitration agreement in the distribution agreement is substantially invalid because Article 16 (a) Commercial Agency Law (and Article 20 of the Old Commercial Agency Law) confers the jurisdiction solely to Jordanian state courts and that it is a matter of public policy in Jordan that disputes arising from distribution agreements are not arbitrable.

The Jordanian Court of Cassation rejected the challenges and confirmed the decisions of lower

courts.

However, in the decision issued on 2 August 2011 ([Decision in case no. 2002 of 2011](#)) the Court of Cassation neither responded to the merits of the challenge nor did it rule on whether Article 16 (a) Commercial Agency Law renders arbitration clauses in arbitration agreements invalid.

In the second decision issued on 26 May 2000 ([Decision in case no. 2486 of 1999](#)) the Court of Cassation based its decision on the argument that the arbitration clause does not deprive Jordanian courts of their jurisdiction. This means the Court of Cassation mistakenly assumed that a valid arbitration agreement does not exclude state courts' jurisdiction on that matter.

The arbitrability of disputes arising from distribution agreements thus remained controversial.

The latest decision issued this year, which is discussed below, is the first upholding the validity of the arbitration clause in a distribution agreement and thereby confirming that Article 16 (a) Commercial Agency Law does not render an arbitration clause invalid.

The Background to the Latest Decision

In the underlying dispute, a Jordanian distributor brought compensation claims against a German supplier before the courts in Amman, Jordan, alleging that the supplier unlawfully terminated their long-standing sole distribution agreement that had lasted approximately forty years.

As of 2011 the relationship between the parties was governed by annual condition agreements which, in addition to setting prices, referred to the supplier's general terms and conditions retrievable on the supplier's website. These general terms and conditions superseded all previous agreements and contained an arbitration clause which referred all disputes arising from or relating to agreements with buyers outside the EU to arbitration in Germany under the German Arbitration Institute (DIS).

As a reaction to the proceedings initiated in Jordan, the supplier – in addition to initiating arbitration proceedings in Germany – successfully argued before the Jordanian Court of First Instance and Court of Appeal that the arbitration clause in the agreement exclusively provided jurisdiction to the arbitral tribunal.

The distributor challenged the decisions before the Court of Cassation arguing, among other things, that pursuant to Article 16 (a) of the Commercial Agency Law, disputes arising out of distribution agreements cannot be submitted to arbitration.

The Decision of the Court of Cassation

The Court of Cassation dismissed the appeal and upheld the decisions of the lower courts. It rejected the distributor's grounds of challenge. In terms of the arbitrability of disputes arising from distribution agreements the court argued that Article 16 (a) Commercial Agency Law does not render the arbitration agreement invalid because of the following two reasons:

First, Article II of the New York Convention obligates the contracting states to recognize a written

agreement under which the parties undertake to submit to arbitration any disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not. And in case of an action initiated before a court of the contracting state concerning an agreement that included an arbitration clause, the court must refer the dispute to arbitration. The Court then goes on to conclude “*given that an international treaty overrides national law*” regulations of the New York Convention should be applied and not Article 16 of the Commercial Agency Law.

Second, the arbitration clause referring disputes to the DIS does not contradict laws or public order in Jordan. This arbitration clause that deprives Jordanian courts of their jurisdiction does not grant jurisdiction to a foreign (state) court but rather to an arbitration institution as agreed upon between the parties.

Concluding Observations

While I concur with the ruling of the Court of Cassation, the first reason is not convincing.

It is true that under Jordanian law an international treaty, once ratified, overrides national laws. However, under the New York Convention, in particular Article II (1), national courts are obliged to recognize an arbitration agreement **only** if the court found that the subject matter is capable of settlement by arbitration. If the Court of Cassation in this case were to conclude that based on Article 16 (a) Commercial Agency Law disputes arising from distribution agreements are, as a matter of public order, not arbitrable, it would be free not to recognize the arbitration clause. Such outcome would not have been in violation of the New York Convention.

Notwithstanding the above, the Decision is a positive development illustrating the arbitration friendly tendency of the Jordanian courts. It is hoped that it will bring the long-standing dispute on the arbitrability of distribution disputes to an end.

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