Arbitration at QICCA: Update

The Two Agreements included arbitration clauses. The arbitration clauses were identical as to the scope of matters subject to arbitration, but they differed as to the arbitration forum. The arbitration clause inserted in the Articles of Association provided for an ad hoc arbitration, while the arbitration clause inserted in the Shareholders Agreement provided for an institutional arbitration under the auspices of Qatar International Center for Conciliation and Arbitration ("QICCA").

In relation to a dispute that arose between the partners, the local Qatari partner of the Company ("the Claimant") filed a claim before the Qatari Court of First Instance requesting the said court to appoint an arbitrator, on the basis that the foreign partner ("the Defendant") failed to agree on an arbitrator. Accordingly, the Claimant submitted that this triggers the application of Article 195 of the Qatari Civil and Commercial Procedure Law. The Claimant relied on the ad hoc arbitration clause in the Articles of Association, but disregarded the institutional arbitration clause in the Shareholder's Agreement. Al Tamimi represented the Defendant before the Qatari Court of First Instance.

The Defendant pleaded that the mechanism agreed upon between the parties, as per the arbitration clause inserted in the Shareholders Agreement – with regards to the appointment of the arbitrators – should be duly respected. The Defendant argued that arbitration is of a consensual nature and that all elements of the same should be subject to the mutual agreement between the concerned parties. Given that the parties had agreed on the rules applicable on the procedures of the arbitration proceedings, including the mechanism of the appointment of the arbitrators, then their agreement must be adopted and adhered to. The Defendant argued that based on such analysis, the court is not competent to decide in this case. The Court of First Instance upheld the defense and rejected the case.

The Claimant challenged the case before the Court of Appeal based on the same arguments submitted to the Court of First Instance. In addition the Claimant argued that he had tried to effectuate the institutional arbitration clause by filing a case before the QICCA, but the Defendant did not cooperate with the former in appointing an arbitrator and refused to comply to the arbitration proceedings.

The Court of Appeal reversed the judgment of the Court of First Instance in turn cancelling such judgment, and appointed an arbitrator. The Court of Appeal ignored or overlooked the institutional arbitration clause and consequently failed to rely on the mechanism of appointment of arbitrators determined in the procedural rules agreed upon between the partners. The Court of Appeal instead relied on Article 195 of the Civil and Commercial Procedures Law. Article 195 of the Civil and Commercial Procedures Law provides that the scope of its application extends only in the case of ad hoc arbitration, and not institutional arbitration which was not the case at hand.

The Defendant challenged the judgment rendered by the Court of Appeal before the Court of Cassation based mainly on the aforementioned argument. The Defendant argued that the conditions enumerated in Article 195 are that there must have been an absence of any agreement between the concerned parties as to the mechanism of appointment of the arbitrator(s), as well as the failure of the concerned parties to reach an agreement as to the name of the arbitrator.

The Court of Cassation, in applying such conditions to the case at hand, found that the Claimant had failed to reach an agreement with the Defendant as to the name of the arbitrator and had instead directly filed the case before the court to appoint an arbitrator. The court stated that this was done by the Claimant despite the terms of the arbitration clause in the Shareholders Agreement, which states that the arbitration proceedings shall be subject to the rules of QICCA. The QICCA rules address the mechanism of appointment of an arbitrator(s) where parties have failed to do so, under Article 9.

Accordingly, on February 7, 2017, the Court of Cassation cancelled the judgment of the Court of Appeal and upheld the judgment rendered by the Court of First Instance.

It is noteworthy that this judgment was rendered before the promulgation of the New Arbitration Act No. 2/2017 in Qatar, which was promulgated on 7 February 2017. Article 195 of the Civil and Commercial Procedures Law and the other articles governing arbitration under the Civil and Commercial Procedures Law, were cancelled upon the issuance of the New Arbitration Act. However, the judgment of the Court of Cassation establishes the principle that the Court has no competence in appointing an arbitrator in lieu of an agreement by the concerned parties as on a certain mechanism for such purpose. Otherwise, this would be considered a contradiction to the will of the parties, and a violation of the principle of pacta sunt servanda.

Al Tamimi & Company's Dispute Resolution team regularly advises on arbitration matters taking place in QICCA. For further information please contact Dr. Hazem Hussien (h.hussien@tamimi.com) or Hani Al Naddaf (h.alnaddaf@tamimi.com) of our Qatar office.