
THE DISPUTE RESOLUTION REVIEW

SIXTH EDITION

EDITOR
JONATHAN COTTON

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

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THE DISPUTE RESOLUTION REVIEW

Sixth Edition

Editor
JONATHAN COTTON

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EDITOR'S PREFACE

Building on the previous five editions under the editorship of my partner Richard Clark, I am delighted to have taken on the role of editor from him. *The Dispute Resolution Review* has grown to now cover 54 countries and territories. It is an excellent resource for those, both in-house and in private practice, whose working lives include involvement in disputes in jurisdictions around the world.

The Dispute Resolution Review was first published in 2009 at a time when the global financial crisis was in full swing. Against that background, a feature of some of the prefaces in previous editions has been the effects that the turbulent economic times were having on the world of dispute resolution. Although at the time of writing the worst of the recession that gripped many of the world's economies has passed, challenges and risks remain in many parts of the world.

The significance of recession for disputes lawyers around the world has been mixed. Tougher times tend to generate more and longer-running disputes as businesses scrap for every penny or cent. Business conduct that was entrenched is uncovered and gives rise to major disputes and governmental investigation. As a result of this, dispute resolution lawyers have been busy over the last few years and that seems to be continuing as we now head towards the seventh anniversary of the credit crunch that heralded the global financial crisis. Cases are finally reaching court or settlement in many jurisdictions that have their roots in that crisis or subsequent 'scandals' such as *LIBOR*.

The other effect of tougher times and increased disputes is, rightly, a renewed focus from clients and courts on the speed and cost of resolving those disputes, with the aim of doing things more quickly and for less, particularly in smaller cases. The Jackson Reforms in my home jurisdiction, the United Kingdom, are an example of a system seeking to bring greater rigour and discipline to the process of litigation, with a view to controlling costs. Whether such reforms here and in other countries have the desired effect will have to be assessed in future editions of this valuable publication.

Jonathan Cotton
Slaughter and May
London
February 2014

Chapter 30

KUWAIT

Kaashif Basit and Basem Al-Muthafer¹

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i Overview of dispute resolution in Kuwait

The Gulf Cooperation Council (GCC) is a political and economic union of six Arab countries, which includes Kuwait, Bahrain and the United Arab Emirates.² Despite this union and resulting common policies, the legal systems of the member states remain entirely independent and in many cases have very little similarity at all.

Historically, litigation in the GCC countries, and particularly in those that do not operate a precedential system, has been the subject of much criticism – some warranted, some perhaps not – in respect of the decision ‘lottery’ taking place in each case. Kuwait is also not a jurisdiction in which significant new awards and court judgments appear on a weekly or even monthly basis and Kuwait often seems like a stagnant pool of conflicting decisions. This is, however, far from the true position.

Since being granted independence in 1961, Kuwait has endeavoured to develop an integrated and modern legal system and in doing so has evolved, rather dramatically in some cases, from the shariah-based Islamic system into the system found today.

Similarly to most of the other GCC countries, Kuwait is a civil rather than common law jurisdiction. All laws and regulations are codified and precedents play a minor role in the system. However, it would be wrong to assume that precedents play no role at all as in practice the lower courts do take the decisions of the Court of Cassation into account despite the fact that they are not bound to do so.

It is also a common misconception that Kuwaiti laws are derived entirely from shariah Islamic law. Kuwaiti law is in fact of recent origin, with the Court of Appeal

1 Haifa Khunji is a partner at KBH Kaanuun Ltd. Kaashif Basit (1969–2013) was a partner at KBH Kaanuun Ltd.

2 GCC Charter: www.gcc-sg.org/eng/index895b.html?action=Sec-Show&ID=3.

having been formed as late as 1959; it is based on an amalgam of shariah law and the Kuwaiti Civil Code, which in itself is a culmination of the best of the Egyptian and French models.³ This modernity and selection of the best parts of other systems, in theory at least, gives Kuwaiti law a distinct advantage over that of other jurisdictions.

ii Court overview

There are three tiers of courts for all cases, irrespective of the value or nature of the dispute: the court of first instance, the Court of Appeal and the Court of Cassation. Appeals from the court of first instance are made to the Court of Appeal and may be brought on the basis of either errors of fact or law. In contrast, appeals to the Court of Cassation may only be made on a point of law.

Disputes in Kuwait may be litigated publicly in the courts or privately using alternative dispute resolution (ADR) procedures such as arbitration. Despite the arguable benefits of utilising ADR procedures, it is fair to say that such methods of dispute resolution remain less favoured by far than litigation procedures in the courts. This may be because of the fact that, as in the UK, the court remains the only form in which a claim may be determined without the agreement of the other party to the dispute.

The entire judicial system in Kuwait is, like the French system, essentially inquisitorial in nature, with judges taking a very assertive role in questioning witnesses and asking for any evidence they believe may assist in the matter. This is an interesting position given that the rules on disclosure of documents align more neatly with an adversarial court system.

iii ADR Overview

The most common form of ADR in Kuwait is, like its UAE counterpart, arbitration. Arbitration in Kuwait is regulated by the Civil and Commercial Procedure Code, which addresses the validity of each aspect of arbitration, including the enforcement of foreign awards.

Both arbitration and mediation in Kuwait fall within the jurisdiction of the Kuwait Mediation and International Arbitration Chamber.

II THE YEAR IN REVIEW

ii Petrochemicals Industries Company v. US Dow Chemical

In May 2012, the Kuwaiti government launched a probe into a ruling issued by international arbitration ordering the government to pay more than US\$2.16 billion in compensation to US Dow Chemical (Dow) for a scrapped project, a failed plastic venture between Kuwait's state-owned Petrochemicals Industries Company (PIC) and Dow. The ruling was issued by the International Court of Arbitration of the International Chamber of Commerce (ICC) to whom Dow and PIC agreed to refer the dispute. Arbitrators

3 *Doing Business in Kuwait*, Practical Law Company.

should order Kuwait to pay the compensation later this year now that appeals have been exhausted and the dispute is over.

The ICC is expected to issue a final order for the US\$2.16 billion plus substantial interest and arbitration costs over the course of 2013. The High Court of Justice in London on 19 October 2012 denied Kuwait's final appeal to reconsider the size of the award.

The foreign arbitration ruling where issued will be enforced in Kuwait against the state-owned company.⁴

III COURT PROCEDURE

i Overview

Judicature in Kuwait is an unusually unified system that functions in conformity with the Amiri Decree No. 19/1959, later modified by several laws. The procedure and principles contained in the Decree govern the separation of powers between government and the judiciary and the process under which dispute resolution should be handled. As one would expect, any documents presented to the court must be filed in Arabic.

ii The courts and case management

The civil courts in Kuwait have three distinct levels. When a case is brought before the civil courts, it is commenced by the claimant filing a statement of claim with the clerk's department at court together with the relevant fee.⁵ The statement of claim should set out the grounds of the claim and relief requested⁶ together with other information, for example the location of the defendant for service of documents. The claim form is then served on the defendant by a process server, at which point the court sets a hearing date and the defendant submits his or her defence and supporting documents. The court also sets a timetable for managing the case, although this is not as rigidly kept to as in other jurisdictions.

Once a judgment has been passed, if necessary, the case will proceed to the Court of Appeal and then to the Court of Cassation, which ultimately presides over the entire hierarchy. The Court of Cassation is essentially looked upon as a Supreme Court, which undertakes a supervisory role over the entire system and, in doing so, reviews the decisions of the lower courts without hearing new evidence in the matter.

Where a judgment is issued in respect of a dispute in the sum of 1,000 dinar or less, the judgment cannot be appealed.

Interestingly, where an appeal is made to the Court of Appeal, new evidence may be used and new arguments may be utilised. The appeal therefore essentially amounts to a rehearing of the matter rather than a review of the accuracy of the judgment. In addition, in respect of the Court of Cassation new evidence can be submitted by way of an 'engulfed' formal legal defence, although this is technically not permissible.

4 Source: Al Arabiya News, <http://english.alarabiya.net/articles/2012/05/28/217092.html>.

5 Law No. 17 of 1973.

6 Civil and Commercial Proceedings Law No. 38 of 1980.

The court of first instance and the Court of Appeal comprise a bench of three judges per case and are divided into a number of circuits. Each circuit is dedicated to a specific branch of law, for example, the Commercial Circuit and the Family Law Circuit. Despite this, there is only one track in each circuit irrespective of merit or the quantum claimed. The only exception to this is the existence of three courts in the provinces of Kuwait, which do not hear claims in excess of 5,000 dinar. The net effect is that in theory cases worth the smallest amount possible can ultimately take the same time, if not longer, to be decided than cases that have much higher value.

Furthermore, despite the Constitution permitting a separate administrative court system, without requiring the same, Kuwait has retained a unified system within which sections of existing courts have been established to deal with administrative disputes. This is in direct contrast with the vast majority of other judicial systems in which, for example, entirely separate systems exist for chancery or other matters.

Perhaps this lack of segregation goes some way towards explaining why litigation in Kuwait is infamous for being a drawn-out process. Claims have been known to last for periods of four to five years and the parties have very limited control over the court timetable once documents are submitted. The courts, as noted above, have exclusive control over case management schedules but seem to allow parties' conduct to adversely affect the progress of a case by failing to impose punitive measures on parties who refuse to abide by case procedural requirements.

iii Interim applications and remedies

The courts' powers in respect of remedies are generally very broad and allow the courts to award damages, together with an array of interim remedies provided for by the Civil and Commercial Procedural Laws.

The interim remedies available to preserve parties' interests pending litigation include:

- a* preventative attachment orders to secure monetary judgment;
- b* provisional orders to preserve assets; and
- c* prohibitory orders, such as travel restrictions on defendants.

When applying for an interim order, the applicant must establish that the situation is urgent and that there are serious risks involved for the applicant if the order is not granted.

In limited circumstances summary judgments are also available to claimants, most of the time in straightforward debt cases where a party holds a document evidencing a debt. In these circumstances the court has the power to grant the claimant a payment order without the need to engage in a full trial.

iv Class actions and group litigation orders

Class actions and group litigation orders are readily available to litigants in Kuwait, for example in respect of labour disputes. However, although the ability to bring a class action exists, it is not commonly used. It appears that such actions are not favoured by claimants because of the potential for conflict between the members of the group and the

likelihood of a change in their respective positions as the litigation progresses. Litigation involving groups or classes is also perceived to be difficult to manage in practice.

v Representation in proceedings

Parties in Kuwait can represent themselves in certain proceedings. This is the case whether the party is a natural person or a legally recognised entity. Clearly, however, in the case of a non-natural person a representative must be used for representation purposes. In this case, the individual appointed must be duly authorised to act on behalf of the entity either by virtue of a power of attorney or the entity's documentation (for example, company memorandum or board resolution).

In the case of individuals, persons may represent themselves or a blood relative with an affinity to the fourth degree without holding an attested power of attorney. In situations where an individual in proceedings elects to be represented by an agent other than one with a blood affinity, the court will require a power of attorney duly signed by the individual and attested. This allows the agent to act on behalf of the appointer, including making decisions on his or her behalf.

Notwithstanding the above, in certain courts, only those with certain rights of audience will be permitted to speak in court, and consequently a lawyer with the correct qualifications must be instructed.⁷

The above does not apply to certain courts where only counsel with the correct qualifications and with rights of audience will be permitted to address the judge and present pleadings.

vi Service out of the jurisdiction

The jurisdiction of the Kuwaiti courts is very limited. In summary, the Kuwaiti courts will accept jurisdiction where a property dispute arises in Kuwait and the property is located within the Kuwaiti jurisdiction. In addition, where a dispute arises between two parties, one of whom resides in Kuwait, the Kuwaiti courts will accept jurisdiction. In cases like this, of course, it is possible for one party to be based in Kuwait and for the other to be outside the Kuwaiti jurisdiction.

Where the above scenario occurs, the statement of claim will be lodged by the claimant and sent to the Public Prosecutor. The Public Prosecutor will then issue the claim at the Ministry of Foreign Affairs who will, via diplomatic channels, arrange for service of the claim form. If the defendant's country of residence is unknown at the time the statement of claim is filed, the statement of claim may be filed either on the legal representatives of the defendant or any of its shareholders, should this be applicable. In addition, service at a branch of a company as opposed to its headquarters allows for deemed service to take place.

7 Law No. 42 of 1964 on Regulating the Legal Profession.

vii Enforcement of foreign judgments

Generally, enforcement of orders is taken very seriously in Kuwait and there are various methods of enforcement such as fines for non-payment, sale of assets by auction and, in serious cases, imprisonment.

Notwithstanding the seriousness of enforcement, or possibly as a result of it, in order for foreign judgments to be enforced in Kuwait, a recognition and enforcement order must be obtained from the Kuwaiti court. Such an order will be granted only where reciprocity exists⁸ (i.e., the court that issued the judgment recognises Kuwaiti decisions and would similarly enforce them). A number of further conditions must be fulfilled in order for a foreign judgment to be enforced in Kuwait including (among others), that the judgment must have been issued by a court of competent jurisdiction, and that the judgment must not contradict any prior judgment made by the Kuwaiti courts or general morals in Kuwait.

Kuwait is a signatory to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters concluded on 1 February 1971 and incorporated it via Law No. 6 2002. Kuwait has also entered into bilateral treaties with Egypt, Tunisia and the GCC countries.⁹

In general, Kuwaiti courts do not enforce foreign judgments.¹⁰ Legislation is largely dormant and is quite often disregarded when issues of enforcement are presented before Kuwaiti courts.

In the absence of any bilateral or multilateral treaty between Kuwait and another country, a judgment may be enforced in Kuwait by commencing new proceedings (*de novo*) before the court of first instance in Kuwait. The party seeking enforcement must file a petition before the court in Kuwait in accordance with the rules as prescribed under the Civil and Commercial Procedures Law for initiation of suits. The foreign judgment may be used as documentary evidence in such case before the Kuwaiti courts.

All procedures required for initiating a suit in Kuwait including legal notice, services of summons, filing memoranda of defence, submission of evidence etc. must be taken by the party seeking enforcement of the foreign judgment. The courts will examine the pleadings and the documents filed by the parties and render judgment.¹¹

viii Access to documents in proceedings

Where a case has been filed in Kuwait, the parties have access to all relevant documents filed in respect of their matter. However, the documents are not publicly available where proceedings are ongoing.

When a dispute is resolved by the court, the court may publish the outcome in the local gazette or otherwise; however, this will be a very brief summary and will not

8 Article 199, Law No. 38 of 1990 or the Civil and Commercial Procedures Law.

9 International Enforcement of Foreign Judgments, by Paul Hopkins.

10 Convention of League of Arab States on the Enforcement of Judgments (1952) and Law No. 44 of 1998 Ratifying the Agreement for the Enforcement of Judgments and Judicial Notices in the Member States of the GCC.

11 International Enforcement of Foreign Judgments, by Paul Hopkins.

include details in respect of the parties. Details of the matter, once resolved, will generally be made public unless there is a reason for not doing so.

ix Litigation funding

Contingency fees, conditional fees and other fee arrangements that depend on the outcome of litigation or arbitration are allowed under Kuwaiti law.

Disinterested third parties in Kuwait are currently free to provide funds in respect of litigation, irrespective of whether they are doing so for profit or altruism. This is true whether the funding is provided by way of contingency or conditional fee or any other fee arrangement.

Despite the lack of regulation in this area, third-party funding in Kuwait is not a common occurrence. This may be attributable to the fact that, upon request from the Legal Aid Commission or the court, the Association of Lawyers and Jurists may appoint a commercial lawyer for the defence of those who cannot afford court fees or representation free of charge, and therefore third-party funding as a necessity becomes a moot point.¹²

IV LEGAL PRACTICE

i Money laundering and proceeds of crime

In Kuwait, the profession of lawyers is regulated by the Kuwait Lawyers Association (KLA). Like the Solicitors Regulation Authority in the UK, the KLA is a self-regulating body and is a representative body for lawyers and those providing legal advice. Interestingly, though, the KLA is not involved at all in enforcing compliance with anti-money laundering (AML) regulations, which possibly indicates the view of the profession in respect of AML.

For the past 10 years, Kuwait has had legislation in force dealing directly with the issue of money laundering, which relates directly to lawyers and others in the legal profession.¹³ The legislation is broad but is arguably not very far-reaching in practice. This is despite the existence of additional tranches of legislation dealing directly with money laundering.¹⁴

Kuwait is a member of the Middle East & North Africa Financial Action Task Force (MENAFATF) and a member of the GCC, which is a member of the Financial Action Task Force (FATF). These bodies have adopted a mutual evaluation report on Kuwait conducted by the International Monetary Fund for the MENAFATF and the FATE. The Report was considered and adopted by the MENAFATF on 5 May 2011, and subsequently by the FATF 24 June 2011. However, it has been stressed in the Report

12 Article 26, Act No. 17 of 1960 promulgating the Code of Criminal Procedure and Trial.

13 Law Regarding Combating Money Laundering Operations, Law No. 35 of 2002 implemented by Ministerial Order No. 9 of 2005.

14 Law No. 5 of 2006 Ratifying the United Nations Convention Against Transnational Organized Crime and Its Protocols and Ministerial Order No. 9 of 2005 Regarding the Procedures and Controls of the Execution of Provisions of Law No. 35 of 2002.

that the current AML framework has many shortcomings, as it does not provide for effective, dissuasive or proportionate measures and there is a lack of effective supervision of lawyers. Legal professionals, primarily covered by Resolution No. 9 of 2005, remain unsupervised with respect to AML, as the KLA appears unaware of the fact that lawyers are subject to any provisions regarding AML. The Report also notes that lawyers on an individual basis are unaware that AML laws apply to their profession. This is not surprising, given the KLA's lack of knowledge in this area.

The Report recommends that lawyers should be subject to effective systems for monitoring and ensuring compliance with AML requirements and that guidelines should be established to assist lawyers to comply with their AML obligations. The Report further recommends that legislation be passed to strengthen Kuwait's AML procedures, which are currently very weak both in scope and enforcement.

While the definition of 'money laundering' under the legislation is loosely drafted, the wording of the legislation requires actual knowledge of money laundering or the fact that monies being utilised are monies derived from the proceeds of crime, in order for the act or omission in question to come under the scope of the legislation. This provides for an easy defence that the lawyer did not know about any money laundering that may have taken place.

In summary, the legislation provides that lawyers and others within the legal profession should always carry out identity verification on their clients, in common with most other developed legal systems. However, the legislation does not provide for enhanced due diligence at all in respect of clients, irrespective of their background or how risky the work to be undertaken may be.

Lawyers in Kuwait must not open or keep any unidentified accounts, rent safes or keep bonds, financial or commercial bills, notes, precious jewels or metals in anonymous code or fake names. Prior to verifying the identity of a client, lawyers must not open any account or perform any transaction that amounts to more than 3,000 dinar except after verifying the identity and capacity of the client.

In common with most other AML legislation, the legislation provides that lawyers in Kuwait must report any suspicious financial transaction that may come to their knowledge and staff must be trained on a regular basis about new developments in the field of fighting money laundering transactions. Hand in hand with this comes the requirement to establish and consolidate internal control regulations to ensure that checks are in place to prevent money laundering.

Further, any person who in good faith reports information according to the provisions of the law is protected from any criminal, civil or administrative liability, whether or not the reported activities were lawful. Tipping off is a criminal offence in Kuwait much like in most other jurisdictions.¹⁵

Under Law 35 of 2002 the court may, at its own discretion, relieve any person from penalties prescribed by the law who, on his or her own initiative, informs the authorities of a crime and those committing it before the authorities have discovered it.

15 Article 11, Law 35 of 2002.

Lawyers are under the obligation to report suspicious transactions as soon as they become aware of them. The penalty on conviction is imprisonment not exceeding three years or a fine of between 5,000 and 20,000 dinar, or both. Additionally, the culprit will be dismissed from his or her job. Despite this, there are no records of any lawyer in Kuwait having been jailed or prosecuted for money laundering activities. Whether this is an indication of the complete lack of money laundering activity aided by lawyers or the inefficiency of the legislation is debatable.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

There is no requirement in Kuwait for pretrial disclosure, or indeed any disclosure. Evidence is ordinarily only presented at trial or attached to the statements of claim or defence. Witness evidence documents that are produced need only assist the party relying on it. There is no express or implied requirement to provide information that may assist the opposing party. Kuwait is possibly a novel jurisdiction in this regard, as the lack of a disclosure requirement results in a lack of necessity for privilege in respect of documents, as essentially all documents are classified as confidential or privileged (hence the reason there is no obligation to disclose the same). It also means that the onerous obligations faced by parties in civil cases in other jurisdictions are not felt in Kuwait, because the requirement for electronic (or any other type of) disclosure does not exist.

There is no indication that any changes are to be expected in this area, so for now at least, parties to litigation in Kuwait do not have to concern themselves with issues arising out of disclosure or privilege.

VI ALTERNATIVES TO LITIGATION

As in most other jurisdictions, ADR has increased in Kuwait over recent years as a result of commercial relations becoming more complex; arbitration especially has become a necessity in the global commercial climate and it is the most common form of ADR in Kuwait.

The contribution of Islamic law to arbitration is negligible, notwithstanding Article 2 of the Kuwaiti Constitution, which provides that shariah is a primary source of law. Arbitration in Kuwait is regulated by the Civil and Commercial Procedure Code,¹⁶ which came into effect in 1980. Prior to this, practically every case ended up in the courts after the arbitral decision at the insistence of the dissatisfied party. Consequently, arbitrations took as long to settle as litigated disputes.

The Code provides for two types of arbitration: commercial arbitration at law and commercial arbitration *ex aequo et bono*. It addresses the validity of arbitration agreements, the eligibility of the chosen arbitrator, the powers of the arbitrator, the liability of the arbitrator and the enforcement and annulment of awards.

The statutory regime is not based upon the UNCITRAL Model. Arbitration in Kuwait is governed by traditional provisions, although this does not necessarily result

16 Articles 173–188.

in a traditional (and perhaps synonymously rigid) system. By and large, the arbitration process in Kuwait is similar, and in many cases identical, to the arbitration process in other Arab and foreign jurisdictions.

The laws governing arbitration do not discriminate between international and domestic arbitration.¹⁷ Contracting parties are free to accept provisions in respect of arbitration and to negotiate and include their own rules, and consequently to include in their agreement such arbitration terms as they deem appropriate in the circumstances.

There are no restrictions on who can represent a party in arbitration; it can represent itself or be represented by any other person of its choosing, whether legally qualified or not. Practically, however, parties are more often keen to instruct lawyers to speak on their behalf in arbitration proceedings, despite the fact that it is cheaper for each of the parties to act on their own behalf.

The court will appoint the arbitrator or arbitrators if a clause is silent on this point. The parties may grant the powers of 'amiable composition' to the arbitrator; this allows the arbitrator to decide the case in equity and fairness without complying with the strict rules of law. In such case, the arbitrator is termed '*Mohakam Bil Solh*' (an 'amiable compositeur').

The rules relating to evidence and disclosure in arbitration hearings are as per the rules of the Kuwaiti courts.

Kuwait has adopted legislation regarding judicial arbitration with respect to civil and commercial matters; such legislation states that one or more arbitration panels consisting of three judges and two arbitrators shall be formed at the Court of Appeal headquarters. The party (or parties) to the dispute shall select one of the arbitrators listed on the respective rolls of the arbitration department of the Court of Appeal or elsewhere.

Judicial arbitration applies in cases where the state is trading in a commercial capacity. The Law of Judicial Arbitration in Civil and Commercial Matters delineates the terms on which arbitration tribunals are constituted from two arbitrators appointed by the parties, and three judges appointed by the Supreme Judiciary Council. Pursuant to this Law, a permanent arbitral tribunal is formed by the High Council of Judiciary. Article 3 of this Law provides that among the jurisdiction of this permanent tribunal is:

(2) Exclusively to settle disputes which arise between the ministries, governmental bodies, public persons and the companies owned by the government. (3) To settle the disputes which are reverted to it by individual or corporate private persons against ministries, governmental authorities or public corporate persons...

In order to bring some clearer regulation to ADR, the Commercial Arbitration Centre of the Kuwait Chamber of Commerce and Industry was set up in 2000.¹⁸ Thereafter, specialised bodies with particular expertise have also been set up in certain areas; for example, the Kuwait Society of Engineers has established its own rules and procedures. Despite the Kuwaiti Chamber of Commerce essentially taking on the role of arbitration

17 As governed by the Kuwaiti Law of Judicial Arbitration No.11 of 1995.

18 Articles 6 and 11, Chamber of Commerce Law 1959.

centre, it has in practice focused on achieving settlements by way of conciliation rather than arbitration.

The likely costs of arbitration depend on which centre is used, and costs can vary greatly from case to case. Arbitration brought before the Commercial Arbitration Centre will cost between 1,000 and 10,000 dinar. There are no specific rules dealing with recovery of costs, but in practice the successful party will often recover the costs of the arbitration (but not fees for lawyers or other expenses).

Despite the reticence shown in respect of enforcing foreign judgments, Kuwaiti courts actively enforce foreign arbitral awards. This is notwithstanding that the legislation utilised to enforce arbitral awards is the same as that used in respect of enforcement of foreign court judgments. Kuwait has signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

The enforcement of a foreign arbitral award in Kuwait is started by commencing a claim in the Kuwaiti courts. The award from the foreign court must at this stage be in Arabic or have been translated into Arabic by a Kuwaiti translator, which should be authenticated by the Kuwaiti Ministry of Justice. The award must then be consularised by the Kuwaiti consulate in the relevant country and legalised by the Ministry of Foreign Affairs in Kuwait. Any award filed with the court must be accompanied by a copy of the arbitration agreement.

There is a perceived tendency in Kuwait for the chair of three-member arbitration tribunals to be from a developed country, even if the law underlying the contract is that of a developing country. This has led to commentators concluding that the interests of parties from developing countries may not be served in arbitration.

Arbitral awards cannot be appealed to the Kuwaiti courts unless there is express agreement between the parties to do so. However, domestic arbitral awards may be set aside in certain circumstances (e.g., if there is fraud or dishonesty that affects the award, or one or more parties were not correctly represented in the arbitration).

Arbitration agreements must be in writing.

In respect of arbitration proceedings, the Judicial Arbitration Law prohibits the publication of an arbitral award, or part thereof, unless the parties agree.

Only recently the Court of Cassation in Kuwait has decided that for agreements with an arbitration clause to which a Kuwaiti company is a party and where any arbitral award may need to be enforced in Kuwait, a special approval from the shareholders or a power of attorney that refers specifically to the arbitration must be sought. The effect of this ruling is to invalidate any agreement entered into by a Kuwaiti company where a special approval for submission to arbitration was not sought. The Court of Cassation has stated that this rule is a matter of public policy and, therefore, if an international arbitral award is made that needs to be enforced in Kuwait, the Kuwaiti execution courts may reject the enforcement (using an exception to the New York Convention to which Kuwait is a signatory) on public policy grounds.

VII OUTLOOK AND CONCLUSIONS

The UAE as a whole has adopted a progressive approach to reforming and developing its legislation, and the procedures outlined therein to successfully deal with the array of cases over which it now presides. However, despite the major trend across the Gulf being towards greatly increased codification of law and increasing substitution of institutionalised procedures instead of the traditional informal, discretionary exercise of authority,¹⁹ it seems that Kuwait is following behind its GCC counterparts at a more leisurely pace. Furthermore, despite this codification and the introduction of more defined procedures, in many areas the old discretion is still favoured, and in many cases what is written in the law and what actually happens are two very distinct matters.

At the time of writing, it appears unlikely that there will be any significant reforms in the area of Kuwaiti dispute resolution in the near future. However, it would seem likely that in the long run Kuwait will follow in the footsteps of Bahrain and the UAE and make efforts to overhaul some of its outdated practices and procedures.

19 An Overview of Legal Structures in the GCC Countries – Issues of Risk and Strength; Afridi & Angel, 2006.

Appendix 1

ABOUT THE AUTHORS

KAASHIF BASIT

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Kaashif Basit (1969–2013) had a broad-based contentious and non-contentious practice with particular focus on the media, financial services and real estate sectors. He had strong commercial and DFSA-centred regulatory focus with a range of US, far eastern, subcontinent, European and UAE financial institutions and insurance companies as clients.

Mr Basit particularly specialised in commercial dispute resolution, international commercial arbitration, ADR and insolvency. He had particular expertise in relation to southern Asia and advised a number of Indian blue-chip corporations as well as acting for multinational – particularly UAE companies doing business in India. The litigation and arbitration practice has covered issues as diverse as explosions at petrochemical plants, oil production-sharing contracts, aircraft leases, insurance coverage cross-border partnerships, joint venture and shareholder (including institutional and offshore investor) matters. He had been involved in a number of the early litigation and arbitration cases in the DIFC, including undertaking the advocacy on behalf of the appellant in the first ever appeal before the DIFC Court of Appeal. Mr Basit also advised and managed cases in conjunction with UAE advocates, particularly property-related matters, in the UAE courts. He had represented parties in regulatory investigations by the DFSA, as well as the restructuring of regulated and non-regulated entities in the DIFC.

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Basem was called to the Kuwaiti Bar in 1992 and has extensive litigation experience in the areas of corporate finance and banking, arbitration, bankruptcy and debt recovery. He advises on project finance transactions, tax structures, acquisitions, private equity transactions (including acting for various funds and target companies), joint ventures,

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