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# THE DISPUTE RESOLUTION REVIEW

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FOURTH EDITION

EDITOR  
RICHARD CLARK

LAW BUSINESS RESEARCH

# THE DISPUTE RESOLUTION REVIEW

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# THE DISPUTE RESOLUTION REVIEW

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Fourth Edition

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RICHARD CLARK

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# EDITOR'S PREFACE

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*Richard Clark*

Following the success of the first three editions of this work, the fourth edition now extends to some 56 jurisdictions and we are fortunate, once again, to have the benefit of incisive views and commentary from a distinguished legal practitioner in each jurisdiction. Each chapter has been extensively updated to reflect recent events and provide a snapshot of key developments expected in 2012.

As foreshadowed in the preface to the previous editions, the fallout from the credit crunch and the ensuing new world economic order has accelerated the political will for greater international consistency, accountability and solidarity between states. Governments' increasing emphasis on national and cross-border regulation – particularly in the financial sector – has contributed to the proliferation of legislation and, while some regulators have gained more freedom through extra powers and duties, others have disappeared or had their powers limited. This in turn has sparked growth in the number of disputes as regulators and the regulated take their first steps in the new environment in which they find themselves. As is often the case, the challenge facing the practitioner is to keep abreast of the rapidly evolving legal landscape and fashion his or her practice to the needs of his or her client to ensure that he or she remains effective, competitive and highly responsive to client objectives while maintaining quality.

The challenging economic climate of the last few years has also led clients to look increasingly outside the traditional methods of settling disputes and consider more carefully whether the alternative methods outlined in each chapter in this book may offer a more economical solution. This trend is, in part, responsible for the decisions by some governments and non-governmental bodies to invest in new centres for alternative dispute resolution, particularly in emerging markets across Eastern Europe and in the Middle East and Asia.

The past year has once again seen a steady stream of work in the areas of insurance, tax, pensions and regulatory disputes. Some insolvency and employment practitioners have had busy years with the fallout from the credit crunch beginning to trickle down into the wider economy. At the time of writing, dark clouds hang over the EU in

particular as the Member States strive to save the euro from collapse and prepare for a period of uncertainty and challenging circumstances. It is too early to tell what, if any, fundamental changes will occur in the region or to the single currency, but it is clear that the current climate has the potential to change the political and legal landscape across the EU for the foreseeable future and that businesses will be more reliant on their legal advisors than ever before to provide timely, effective and high-quality legal advice to help steer them through the uncertain times ahead.

**Richard Clark**

Slaughter and May

London

March 2012

## Chapter 30

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# KUWAIT

*Kaashif Basit and Basem Al-Muthafer<sup>1</sup>*

### I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

#### i Overview of dispute resolution in Kuwait

The Gulf Co-operation Council (‘the GCC’) is a political and economic union of six Arab countries, which includes Kuwait, Bahrain and the United Arab Emirates.<sup>2</sup> 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 might seem 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, at best, 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 having been formed as late as 1959; it is based on an amalgam of shariah law and the

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1 Kaashif Basit is the managing partner of KBH Kaanuun Limited and Basem Al-Muthafer is a partner of KBH Kaanuun at the Kuwait office.

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

Kuwaiti Civil Code, which in itself is a culmination of the best of the Egyptian and French models.<sup>3</sup> 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 courts of first instance, the Court of Appeal and the Court of Cassation. Appeals from the courts 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 by far less favoured than litigation procedures in the courts. This may be because of the fact that, as in the UK, the court remains the only forum 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 counterparts, 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 any awards.

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

# **II COURT PROCEDURE**

## **i Overview**

Judicature in Kuwait is an unusually unified system that functions in conformity with the Amiri Decree No. 19/1959. 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.

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



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.<sup>4</sup> The statement of claim should set out the grounds of the claim and relief requested<sup>5</sup> 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 its 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 ultimately 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 being a review of the accuracy of the judgment. In addition, in respect of the Court of Cassation, although technically not permissible, new evidence can be submitted by way of an 'engulfed' formal legal defence.

The courts 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 delegated 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 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' conducts to adversely

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4 Law No. 17 of 1973.

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

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 generally are 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.<sup>6</sup>

The above does not apply to certain court 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.

**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 exists<sup>7</sup> (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), not surprisingly, 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.

In general, Kuwaiti courts do not in practice enforce foreign judgments. Despite this, Kuwait is a party to two treaties that provide for reciprocity in enforcing judgments.<sup>8</sup>

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

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

8 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.

Both pieces of legislation are largely dormant and are fairly often disregarded when issues of enforcement are presented before Kuwaiti courts.

In the absence of a treaty providing for enforcement, the Kuwaiti courts may provide for enforcement of a foreign judgment where sufficient evidence exists to show that Kuwaiti judgments have historically been enforced in that country. This is a high threshold of evidential requirement and consequently the number of cases in which enforcement of a foreign order is enforced in this manner is negligible. Furthermore, Western countries have to date not been found to have reciprocal arrangements with Kuwait.

Historically, and in spite of the arguably fairly broad provisions in respect of enforcement of foreign judgments, only one non-GCC country has ever had an order enforced in Kuwait.

### 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 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.<sup>9</sup>

## III 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

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<sup>9</sup> Article 26, Act No. 17 of 1960 promulgating the Code of Criminal Procedure and Trial.

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 ('the Legislation') in force dealing directly with the issue of money laundering, which relates directly to lawyers and others in the legal profession.<sup>10</sup> 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.<sup>11</sup>

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 MENAFATF and FATF. The Report was considered and adopted by MENAFATF on 5 May 2011, and subsequently by FATF 24 June 2011. However, it has been stressed in the Report 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.

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

11 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.

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 that 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.<sup>12</sup>

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.

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 more than 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.

#### **IV 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 why 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.

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12 Article 11, Law 35 of 2002.

## V 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,<sup>13</sup> 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 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.<sup>14</sup> 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

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13 Articles 173–188.

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

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.<sup>15</sup> 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 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.

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



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.

## **VI 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,<sup>16</sup> it seems that Kuwait is following behind its GCC counterparts at a more leisurely pace. Furthermore, despite this codification and 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.

As 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 at some point, Kuwait will follow in the footsteps of Bahrain and the UAE and make efforts to overhaul some of its outdated practices and procedures.

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

## Appendix 1

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### ABOUT THE AUTHORS

#### **KAASHIF BASIT**

*KBH Kaanuun Limited*

Kaashif Basit has a broad-based contentious and non-contentious practice with particular focus on the media, financial services and real estate sectors. He has 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 specialises in commercial dispute resolution, international commercial arbitration, ADR and insolvency. He has particular expertise in relation to southern Asia and has 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 has 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 advises and manages cases in conjunction with UAE advocates, particularly property-related matters, in the UAE courts. He has represented parties in regulatory investigations by the DFSA, as well as the restructuring of regulated and non-regulated entities in the DIFC.

#### **BASEM AL-MUTHAFER**

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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, partnerships and shareholders' arrangement and capital management structures, acting for investment and commercial banks in Kuwait.

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