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A Critical Approach

To the Kuwaiti Law of Judicial Arbitration No. 11 of 1995

With Reference to the UNCITRAL Model Law

On International Commercial Arbitration’¹

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Introduction:

Arbitration is an integral part of the Islamic Shariya’a system. Both the term and the concept were mentioned in the Qura’n, Muslims’ holy book, thus, it was traditionally practiced in the Arab world for more than 1400 years. During the last two decades, however, the Arab region witnessed an active legislative movement to modernize arbitral regulations to attract foreign investors and boost its economy through becoming a venue for arbitration. In a further step, many Arab countries joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Kuwait had its share of the aforementioned development. On the onset of this young country, and during the 1940s, oil started to flaw, bringing with it richness and prosperity, thus a persistent need for a legislative reform was felt to comply this new economic situation. Consequently, legislation governing arbitration was in a constant state of development.

This paper focuses on the notion of Judicial Arbitration system in particular (hereinafter referred to as J.A.), as presented to the Kuwaiti system, and investigates whether it achieved its targeted advantages. Limitations of this study are the relatively short period during which this law was implemented -which resulted in very few works of doctrine in this regard- and the prohibition over publication of arbitral awards.³

³Article 7.
I. Legal Frame Work for Arbitration in Kuwait:

Traditionally, the native population of Kuwait has resorted to arbitration for long in aspects related to commerce and property. The role of arbitrators was carried out by respected members of the society, e.g. rulers, men of religion, dignitary traders.4

Being a British protectorate for the period from 1899 to 1961,5 the era subsequent to Kuwait’s independence witnessed a comprehensive legislative revolution on many fronts. This was in conformity with the general principles introduced by the Kuwaiti Constitution which was promulgated on 11th November, 1962; it provided to guarantee the right of litigation, leaving to ordinary statutes the task of organizing the procedures and the formalities necessary to practice this right.6 This means that the state paves the road to justice for litigant parties, whether by means of a judicial or an arbitral award, which is enforceable in both cases.

In consequence, many statutes were enacted during the modern legislative phase, The first judicial arbitration duly provided for in Kuwait legislation comprises the stipulation of Article 39 of the Amiri Decree no. 19 of 1959. Civil and Commercial Procedures Law no. 6 of 1960 followed (hereinafter referred to as CCP), which included a section on Arbitration.7 With the continuous prosperity of business activities, a need was felt to introduce new approaches to deal with commercial arbitration, so Kuwait joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1978,8 and the new CCP Law no. 78 of 1980 was issued, dedicating a whole section to Arbitration.9 Still, the said new law

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6 Chapter V: the Judicial Power, articles 162-166.
7 Section 3.
8 Law no. 10 of 1978.
9 Section 12.
did not regulate arbitral relations which included foreign elements, i.e. international relations, except for one article that is related to the enforcement of foreign judgments.\textsuperscript{10}

Article no. 173 of the CCP Law stipulates that “agreement may be made on arbitration in a specific dispute and on arbitration in all disputes arising from the implementation of a certain contract. Arbitration may not be established save in writing”.

Although arbitration is considered to be an exceptional means of settlement of disputes,\textsuperscript{11} the Kuwaiti legislature did not overlook the its importance within its judicial system. Hence, various forms of arbitral procedures were incorporated into modern legislation that it has been truly characterized with a multiplicity of arbitration approaches. The practice with regard to commercial arbitration in Kuwait is regulated in four categories:

1. **Optional Arbitration**: Articles 173-188 of the CCP Law set a path that originates from the arbitration agreement or the arbitration clause between parties to submit all existing or possible disputes to arbitration, thus avoiding the complexity that marks the judicial practice. Advantages of this method are the freedom to choose arbitrators, pre-determined time limits and compression of expenses. However, this is naturally subject to availability of \textit{bona fide} and cooperation of both parties, otherwise the subject matter of arbitration would most likely resort to the courts.\textsuperscript{12}

2. **Permanent Institutional Arbitration**: examples are undertaken by the Chamber of Commerce, in accordance with the chamber law enacted in 28 June 1958.\textsuperscript{13} The Arbitral Panel is formed of merchants and its practice is conciliation-

\textsuperscript{10}Article 199.
\textsuperscript{11}Explanatory Memorandum of Civil and Commercial Procedures Law no. 78 of 1980.
\textsuperscript{13}Article 11. And on the role of Kuwait Chamber of Commerce, see generally: Makarim, Ibrahim Mustafa. \textit{The Role of Kuwait Chamber of Commerce & Industry in Domestic and International
oriented and restricted to commercial matters.\textsuperscript{14} Other examples of institutional arbitration reside in the Arbitration System of the Kuwait Stock Exchange Market\textsuperscript{15}, Conciliation and Arbitration System of the Collective Labour Disputes,\textsuperscript{16} and The Arbitration Committee of the Kuwaiti Engineers Society.\textsuperscript{17}

3. **International Arbitration:** Under Kuwaiti law, arbitration is considered to be foreign only if it was performed out of Kuwait. Otherwise, there is no distinction between national and international arbitration. Kuwait has acceded the New York Convention of 1957 Relating to the Recognition and Enforcement of Foreign Arbitral Awards in 1978.\textsuperscript{18}

4. **Judicial Arbitration by the Ministry of Justice:** Article 177 of the CCP Law no. 38 of 1980 regulated the J.A. system which was to be administered by the Ministry of Justice and Legal Affairs. However, the said article was abolished by law no. 11/1995, which has established a new Judicial Arbitration system. It is here where the topic of this paper arises, as we shall further explain.

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\textsuperscript{14}El-Ahdab, Abdulhamid. \textit{Arbitration with the Arab Countries}. Opero Citado. P. 366.

\textsuperscript{15}Article 13 of the Decree Law regulating the Kuwait Stock exchange Market, enacted in 14 August 1983. This article stipulates that: “An arbitration committee shall be set up within the market, by a resolution passed by the market committee, it shall be chaired by a member of the judiciary, to be selected by the supreme judiciary council, the committee’s duty shall be the settlement of all disputes relevant to dealings effected in the market, dealing in the market shall be deemed to be an acknowledgment of acceptance of arbitration, which fact shall be stated in the papers of said dealings. Awards made by the committee shall be binding on both parties to a dispute, the resolution setting up the committee shall lay down the proceedings for reference and settlement of the dispute”.

\textsuperscript{16}Article 87 paragraph (3) of Law no. 38 of 1964 pertaining to Work in the National Sector. This paragraph stipulates that the Arbitration Committee for Labour Disputes “ … shall be formed from the following: A. a department of the High Court of Appeal designated every year by the General Meeting of the said court. B. The head of a prosecution department delegated by the Attorney General. C. A representative of the Ministry of Social Affairs and Labour appointed by the Minister, the employer or his representative and the representatives of the workers may attend before the said committee, provided that the representatives of either party shall not be more than three. The award of the arbitration committee shall be final and binding on both parties”.

\textsuperscript{17}The Kuwaiti Engineers Society was established in 20 November 1962.

\textsuperscript{18}El-Ahdab. \textit{Arbitration with the Arab Countries}. Opero Citado. P. 366.
The Kuwaiti Law of Judicial Arbitration No. 11 of 1995: Conceptual Frame & Practical Problems
A Critical Approach With Reference to the UNCITRAL Model Law on International Commercial Arbitration
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II. Conceptual Frame of Judicial Arbitration as Regulated by Law No. 11/1995:

The new Judicial Arbitration Law aims to release the commercial sector from the complex and time-consuming procedures associated with the traditional state judiciary system and to assign a greater level of participation to technical expertise. To achieve this, the following concepts were incorporated into the law:

II.I Formation of Arbitral Panel. The Arbitral Panel (hereinafter referred to as A.P.) is of a mixed nature, as it is formed of three judges appointed by the Supreme Judiciary Council and two arbitrators, one of whom is selected by each of the litigants, so the majority will always be to the judicial element within this formation. Thus, this law saves the parties the effort of having to go through the normal troubles usually encountered when selecting a third arbitrator.

II.II Competence of Arbitral tribunal. The competence of the A.P. is extended to cover three categories. This could be attributed to the legislature being desirous of expanding the A.P.’s mandate in an attempt to have a larger control over the arbitration practice in the country. These categories are:

1. Voluntary Arbitration:
   The A.P. is competent to decide in disputes referred to it by the free will of litigant parties who agree to submit such disputes to its jurisdiction. This referral could take the form of a pre-existent arbitration agreement, an arbitration clause or a subsequent

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19 Article 1. And for the qualifications of the arbitrators, see article 2 of The Ministerial Resolution no. 43 Of 1995 on Judicial Arbitration in Civil and Commercial Matters, which has stipulated that the arbitrator “… shall as a condition satisfy the following: A. To be a Kuwaiti national B. To have good conduct and reputation C. He should not have been dismissed from service under a disciplinary decision, unless at least three years have elapsed from the date such a disciplinary decision was issued. D. He should not have been sentenced to a detentive penalty in an offence involving moral turpitude or integrity unless he has been rehabilitated E. To be a holder of appropriate academic qualifications and experience as duly approved by the committee specified in the following article”.

20 Article 1.
arrangement. The legal capacity of the parties may vary from natural to judicial persons.

2. **Compulsory Arbitration:**

The A.P. has a mandatory jurisdiction over two categories of disputes in which parties are obliged to resort to arbitration:

One. Contracts concluded after enforcement of the J.A. Law, which include provisions covering settlement of possible disputes through arbitration, but failing to specify an arbitral body to whom such disputes are to be submitted.

Two. Disputes arising between Governmental Bodies (Ministries, Public Authorities, Public Judicial Bodies, etc.) or state-owned companies or between all such institutions. This has been justified by the desire to lessen the burden on the judiciary since these disputes mostly revolve around public funds.

3. **Mixed Arbitration:**

Within the scope of the J.A. Law, a certain provision puts parties in contradictory positions, as it allows one party the liberty of resorting to arbitration, while depriving the other of this right. This is stipulated with regard to arbitration requests presented by individuals, natural and judicial persons of the private sector against any governmental bodies or state-owned companies, unless the dispute has already been filed and brought before the courts. The latter parties cannot object to arbitration.

**II.III Mechanism.** The arbitration proceedings begin with a party presenting an arbitration request to the court of Appeal’s Arbitration Department, free of charge. The department shall register it in the relevant roll, on the same day of submission. Arbitrators are chosen in the next step and parties are directed to deposit the

21 Article 2, paragraph (1).
22 Article 2 paragraph (1).
23 Article 2, paragraph (2).
25 Article 2, Paragraph (3).
arbitrators’ fees as estimated by the Head of the Department within the subsequent ten
days. 26

The arbitration request is presented to the Head of the Department within three
days of the submission of the arbitration request, to determine the date and location of
the session, and the Department will notify the parties with all relevant details within
the following ten days. During the sessions, parties will be allowed to submit their
documents, pleadings and defenses. 27

The A.P. will have jurisdiction over all primary and interim matters. 28 And
while the CCP Law has denied A.Ps the jurisdiction over urgent matters unless parties
explicitly agree on this, 29 the J.A. Law took a contradicting position and granted the
A.P.s the jurisdiction over such urgent matters, unless parties explicitly agree on the
opposite. 30 However, this could be explained in that the panel in the judiciary
arbitration is formed of judges mostly, and that it practices a compulsory jurisdiction
with regard to governmental bodies. 31

The A.P. has the authority to determine the period during which it shall render
its award without abiding to any specific period. This award is to be decided by the
majority opinion, and is to be pronounced in an open session, but is not to be fully or
partially published unless parties consent has been granted. 32 An award rendered by
the said arbitral panel enjoys the force of an adjudicated order, and is fully
enforceable in conformity with the proceedings prescribed in the CCP Law no. 38 of
1980. 33

26 Article 3.
27 Article 4.
28 Article 5.
29 Article 173.
30 Article 5.
31 Juma’a, Abdulaziz Taher. Interim and Provisional Measures in Arbitration and the Relation
32 Article 7.
33 Article 9.
II.IV Nature of the Arbitral Award. An award rendered by an A.P. is classified in a rank very close to its judicial counterpart. Thus, Kuwaiti courts seem to be tolerant with regard to drafting deficiencies which might mark an arbitrator’s award. In this regard, it has been decided that:

“... The arbitrator’s award is of a similar nature of that of a judge’s award, however, it is not evaluated with the same criteria that is applied to that latter’s decisions for many considerations, one of which is that the arbitrator, as chosen by the parties, often lacks the legal knowledge that is available to a court’s judge ...”.

This award could be challenged on specific grounds by any of the parties in front of the Court of Cassation within a period of thirty days determined from the date in which the arbitral award was rendered related to violation.

III. General Characteristics of the J.A Law No. 11/1995:

The J.A. Law no. 11/1995 is highlighted by the following characteristics:

1. The formation of the A.P. makes it an arbitration of a mixed nature, this is a feature that functions as a guarantee to provide parties with both legal expertise and professional knowledge of the subject matter of the dispute.

2. This law introduces a hybrid system with regard to parties’ free will to resort to arbitration, compromising elements originating either from party’s autonomy, i.e. arbitration agreement or arbitration clause, or from the direct wording of the law e.g. compulsory arbitration for governmental bodies.

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34 High Court of Appeal, administrative appeal no. 1230/82, rendered in 1/3/1983.
35 Articles 10 & 11.
36 Supra, p. 5.
3. The Arbitral Panels practices a gratuitous jurisdiction with regard to disputes brought before it by individuals or private sector firms to encourage this arbitration approach.\(^{37}\)

4. It is a system that promotes confidentiality, as the award rendered is only published with parties’ consent.\(^{38}\)

5. The desire to achieve promptness in deciding in the subject matter of the dispute is clear, as short periods have been determined for most procedures.\(^{39}\)

6. In an exception to the general rules of the CCP Law, the A.P. was assigned a wide jurisdiction that is parallel -in many cases- to that of state courts, due to the extent of intervention available to it, \(e.g\). authority to determine on all primary issues brought before it, which normally fall within the competence of civil and commercial judiciary, as well as determining on rebuttals and pleas relevant to its jurisdiction, including those grounded on nonexistence of an arbitration agreement, its lapse, nullity, invalidity, irrelevancy, non-joinder or non-inclusiveness of the dispute issue.\(^{40}\)

Another example of this panel’s wide jurisdiction is its authority to determine whether to accept a late plea raised by a party with regard to non-conclusiveness of the arbitration agreement of issues raised by the other party, even though such a plea

\(^{37}\)Article 2.

\(^{38}\)Article 7.


\(^{40}\)Article 5. This is an exception of article 180 of the of the Civil and Commercial Procedures Law, which stipulates that “… if within the arbitration process a primary matter out of the jurisdiction of the arbitrator is presented or an objection is made for forgery of a paper or criminal proceedings were already taken for such forgery, or in case of any other criminal occurrence, the arbitrator shall suspend his work until a final judgment is rendered in that respect”. See: Naqrish, Zakaria Jalal. *Reflections on Law no. 11/1995 on Judicial Arbitration in Civil and Commercial Matters*. Al-Muhami Journal. Kuwait. October/November/December. 1995. P. 36.
should have been brought before the Arbitral Panel during the hearing as soon as its reason has arisen.\textsuperscript{41}

Such authorities are not commonly granted to arbitrators, as they are usually left to state courts.\textsuperscript{42} However, this wide jurisdiction could be explained by the fact that a judicial majority prevails in the formation of the A.P.

\textbf{IV. Analysis of Problems Associated Law no. 11/1995:}

Over the short laps of time during which the new judicial law has been implemented, practice has shown that many procedural and substantive problems were incorporated within the J.A. Law. However, lack of published awards in this respect limits the possibility of recognizing many of these problems considerably. In the following section, we shall highlight a number of the most obvious problems.

\textbf{IV.I Procedural Problems.}

\textbf{(1) Unbalanced Formation of the A.P.:} the A.P. is composed of five members now, three judges and two arbitrators, when it has been three only after the abolished article 177 of the CCP Law. Thus, the judiciary is the dominant element in this new formation. This change triggers many questions:

\textit{First}, the domination of the judiciary contradicts with the very concept of arbitration, which is basically established on litigants’ free will to choose their arbitrators. Also, this could invoke concerns with regard to adhering to traditional formalities that mark the judicial practice, namely the time consuming procedures. This is in addition to the moral influence that this judicial existence may bring to

\textsuperscript{41}Article 5.
\textsuperscript{42}Raghib & Abdulfattah. Opero Citado. P. 427.
arbitrators, and the possible commitment by judges to pre-conceived legal principles adopted in previous awards.  

This disadvantage is further highlighted with regard to the rule that stipulate that the award is passed at the majority of the panel, as it is very likely that the majority would be formed of the three judges only, thus it would be an award in which the arbitrators did not contribute significantly.

The situation could be accepted with difficulty, especially since the position in Kuwaiti case law is that:

“…The arbitrator is but a judge whom the litigant parties have chosen to determine the subject matter of their dispute in lieu of the official state judge ....”

(2) Limitation of Parties Autonomy:

1st. This law submits all contracts concluded after its enforcement to its jurisdiction, if they compromise an arbitration provision but do not refer to a specific arbitration system. Although this might be considered as a solution for failure to agree on arbitration details, it has limited the litigants’ free choice of the arbitration authority they could resort to, thus inflicting their right to make a free decision, especially since they might prefer to resort to ordinary arbitration rather than the J.A. system.

2nd. In a similar note, It has also been stipulated that the A.P.s are exclusively competent to determine on the disputes arising amongst governmental bodies and State owned companies. This limits these bodies freedom to estimate their


44 Article 7.

45 Kuwaiti Court of Cassation, commercial appeal No. 48/75, rendered in 29/12/1976. However, this writer does not agree with this award on the notion that the arbitrator is a judge, for he doesn’t enjoy the powers of one, neither does he work within the judicial framework. Thus, arbitration is not a special form of the judiciary but merely substitutes it.

46 Article 2, paragraph 1.

positions extensively, by not allowing them to resort to other options in the light of their individual needs and nature of activity they practice.\(^48\)

3rd. Another criticism goes to the rule that obliges disputing parties to nominate one arbitrator only, even if one party consists of numerous persons, e.g. a consortium of companies.\(^49\) The said article assumes that persons forming one party of the dispute all share the same interest. This could be far from correct in many cases, and could end up in having another parallel dispute with regard to the arbitrator that is to be nominated. Such a hypothesis would require the interference of the Arbitration Department of the court of appeal to assign an arbitrator,\(^50\) thus imposing a person they did not choose, while the other party of the dispute had the full privilege of nominating his arbitrator. This is an awkward position that leads to imbalance between litigant parties.

4th. Obliging the government to submit all disputes to arbitration as soon as the other party resort to arbitration would prove to be very costly as it is committed to pay arbitrators’ fees, while under the regular judiciary system all disputes of which the government is party are exempted from fees.\(^51\)

For all the above mentioned reasons, it has been rightly argued that parties freedom of choice is very much restricted in this respect, as the said law pre-determines most of the arbitral issues, thus depriving the litigants of the true advantages of arbitration.\(^52\)

In consequence, It is quite worthwhile to wonder whether the word ‘Arbitration’ within the context of law no. 11/1995 could be deceiving, as the concept of arbitration is traditionally associated with parties freedom of choice on many levels, e.g. place of arbitration, arbitrators, procedural law, substantive law, language, etc.\(^53\) This is to be

\(^{48}\)Ibid. Loco Citado.
\(^{49}\)Article 1.
\(^{50}\)Article 1.
compared with the position of the UNCITRAL model law, which only functions with the existence of an arbitration provision.\textsuperscript{54} It is assumed that this matter is left to the arbitration provision.

(3) Deprivation of a Former Advantageous Status: According to the rules of the CCP Law, jurisdiction on matters of arbitrator’s recusation is normally assigned to the court originally competent to hear the dispute and not to a higher judicial body, \textsuperscript{55} which is also the position of the UNCITRAL Model Law.\textsuperscript{56} However, this gives rise to another procedural problem, since the Arbitration Law no. 11/1995 has stipulated that the Court of Cassation, which is the highest court in the judicial hierarchy, shall have jurisdiction to determine on matters related to recusation of any member of the A.P., that the judgment rendered rejecting the request for recusation may not be objected, and that submission of such request shall not result in the halt of the arbitral proceedings.\textsuperscript{57}

Thus, in not allowing the litigants to submit the recusation request to the A.P. first and then appeal to the Court of Cassation, the said law ended with a position that deprives the litigants from the two-stepped litigation advantage. Although this was justified by the desire to determine on the subject matter of the dispute within a reasonable time and not allowing it to elongate further,\textsuperscript{58} it is still quite unacceptable to sacrifice a litigation step to achieve this goal.

(4) Increase in Administrative Load: Since one of the main objective of this law is to lessen the burden on the High Court of Appeal, it is quite interrogating how this could be achieved while the law assigns such an arbitral role to the judges of the said court in addition to their regular judicial duties, and also assigns all administrative work to the Secretarial Office of this court. It is this writer view that the law should

\textsuperscript{54}Chapter II. 
\textsuperscript{55}Article 178. 
\textsuperscript{56}Article 13. 
\textsuperscript{57}Article 6. 
have established a separate administrative body for the work of the A.P.s, as the current situation could result in delay in this arbitration process, which is an outcome that is contrary to what was originally intended of this law.

(5) Adopting Contradictory Positions: The J.A. Law forbids full or partial publication of the arbitral award without the securing the consent of the litigant parties, this was justified to be “in appreciation to litigants’ privacy”. However, this stipulation contradicts with the wording of the first paragraph of the same article, which stipulates that the award shall be “duly pronounced in an open sitting”, i.e. a session that is open to the public. Thus, we find it quite odd that the element of privacy is stated and then wasted in the same article.

It has been argued that the pronouncing the award in a public sitting does not inflict parties’ confidentiality, as all what is published in the said sitting is the enacting terms of the judgment, without a detailed reference to the nature of the dispute or its merits, which can not be considered as an exposure to parties position. However, we find this opinion to be unacceptable because since arbitration is mostly conducted with regard to commercial disputes, the mere publication of the outcome of the award in a public sitting would necessarily involve exposure of parties status, which may be negatively reflected on the losing party’s commercial reputation. This is a classic shortcoming of the judicial system that normally motivates parties to resort to arbitration in an attempt to avoid it.

It is this writer’s view that the law should have taken an opposite position in this respect, as it would have been more acceptable if it forbade pronouncing the award in a public sitting, while allowing it to be published, without reference to litigant’s persons, naturally. Such a position would have guaranteed parties confidentiality, while allowing the general public of traders, legal scholars and other interested parties interested in commercial arbitration to appreciate the performance of these A.P.s, especially since lack of such publication resulted in difficulties to judge their

59 Article 7.
60Explanatory Memorandum.
efficiency so far. As for the position of the UNCITRAL Model Law, no reference was made regarding publication.

(6) Failure to Cover Specific Provisions:
1st. No time limit during which the A.P.’s award should be rendered was specified, so the A.P. renders its award without abiding by a certain period. The same could also be said with regard to the time during which the A.P. should rectify any material errors or miscalculations in the award. This -in our view- is criticized in that it puts arbitration in a similar position with that of the court in terms of delay, which is a major drawback of the judicial system, whereas time factor was an essential motive for parties resorting to arbitration.

2nd. The Arbitration Law does not contain any provision for termination of proceedings by conciliation or any other reason, whereas the UNCITRAL Model Law did not overlook this and regulates this by article no. 32.

IV.II Substantive Problems.

(1) Vague Approach Toward Definitions: There is a serious lack of definitions with regard to legal terms used in the J.A. Law, e.g. ‘arbitration agreement’, ‘court’, etc. whereas the UNCITRAL Model Law has an ample text on definitions. Such definitions are quite necessary in order for the parties to have a clear concept on the arbitration process beforehand.

(2) Lack of Unity and Coherence to Existing Legal Framework: the new law functions in a manner compatible with other arbitral regulations that complement it, which violates the unity of the law. Therefore, we think the legislator should have constrained the application of the CCP Law to ordinary arbitration, and enacted a separate and independent law for Judicial Arbitration.

62 Article 7.
63 Article 8.
64 See, for example, articles 2 & 7 of the UNCITRAL Model Law on International Commercial Arbitration.
(3) Boundaries to A.P’s Jurisdiction: many questions exist with regard to the extent of the of the A.P.’s jurisdiction to disputes arising between individuals on one side and a governmental bodies on the other, and whether it encompasses Administrative Decisions and Administrative Contracts, e.g. Public Works Contracts.

In practice, this ambiguity was reflected in many individuals resorting to these A.Ps with respect to their dispute with governmental bodies. However, it should be noted that a ground rule followed in Kuwait is that disputes that are suitable for composition are suitable for arbitration and vice versa. In addition, the CCP Law provides that no reference to arbitration may be made in respect of such matters, which may not be the subject of composition. Moreover, the jurisdiction of the A.P. is restricted by that of the Administrative Court, which has the sole jurisdiction over all administrative disputes. In this respect, it has been decided that:

“According to art. 2 of law no. 11 of 1995, arbitration panels are competent to rule on disputes related to civil and commercial matters only, whereas those in which the subject matter is related to an administrative contract are subject to the jurisdiction of the Administrative Circuit in the Court of First Instance, according to decree law no. 20 of 1981, as amended by law no. 61 of 1982”.

For all the above-mentioned argument, A.P.’s have no jurisdiction with respect to administrative disputes.
(4) The Problem of Connected Contracts: Another possible problem arises with regard to what could be called ‘connected contracts’ that are integrated to fulfill a common purpose, e.g. construction contracts where there is usually an underlying contract and several sub-contracts. Each of these contracts may enjoy their own existence, and each may contain its own arbitration clause, which may give rise to the question whether parties in all these contracts are submitted to the jurisdiction of the A.P. as regulated by law no. 11/1995.  

(5) Anti-Constitutional Dubiosity: Another problem is obligating all governmental bodies to submit to arbitration with regard to disputes presented by individuals or private firms, unless it was already brought before the judiciary. This is a very awkward rule that denies these bodies the right to choose arbitration, which is an optional path in the first place. Thus, there is a serious suspicion that this rule could be anti-constitutional as it contradicts with the right of litigation, which allows litigant parties the right of recourse to the courts. Not to mention what the constitution stipulates about the administrative judiciary being the natural judge for all governmental bodies.

(6) Position of Courts: It seems that Kuwaiti legislature did not fully absorb the concept of arbitration, this position lead to applying rigid judicial rules in the arbitration arena. A good example perhaps is the significant role that was assigned to Form in arbitral awards. With regard to the question whether an arbitral award should be rendered in the name of His Highness the Amir of Kuwait, the Court of Cassation answered positively, indicating the following:

"... Article 53 of the Constitution stipulated that the judicial power is carried out in the name of the Amir within the Constitutional limits, and article 16 of the Amiri Decree no. 19 of 1959 on the..."

73Article 2.
74Article 166 of the Constitution.
Regulation of Judiciary Law stipulated that ‘awards are rendered in the name of the Amir of the state’, this means that with regard to all awards -including those of arbitrators- failing to mention that they are rendered in the name of the Amir as the said article has stated is an omission of a substantial declaration that is essential to its validity, which results in its being absolutely void with regard to public order ... ”.76

On the other hand, the UNCITRAL Model Law seems to follow a pragmatic approach in this respect, as all what is requested with regard to the form and content of the arbitral award in general is writing, signature of arbitrators, reasons, date and place of arbitration.77

(7) Domestic Focus: in these times of globalization, no reference whatsoever was made within the stipulations of this law to disputes of international nature. As a result, there is a significant lack of solutions to difficulties normally associated with such disputes, e.g. definition of an international dispute, communication procedures, etc.

Nevertheless, the above-mentioned criticism of the J.A. Law should not lead us to overlook the positive provisions that is has incorporated. To give few examples, we refer to direct enforceability of the award as an adjudicated order after a brief procedure,78 whereas the UNCITRAL Model Law requires relatively extensive procedures,79 in addition to the limited grounds for setting an arbitral award aside,80 in comparison with the wide grounds that the UNCITRAL furnishes, which may be negatively reflected on the stability of the award.81

77Article 31 of the UNCITRAL Model Law on International Commercial Arbitration.
78Article 9.
79Article 35.
80Article 10.
81Article 34.
Conclusion

The commercial status of Kuwait requires a complete reform in arbitral regulation, especially since its current policy revolves around privatization and free market economy. Hence, it is quite a strange position of the legislature here to adopt a Judicial Arbitration system with wide compulsory jurisdiction, in a time during which many countries embark to renounce such a system in realization of the necessity of respecting investors' freedom to resort to different arbitration centres.

In addition, this system is practically functioning in a quite complicated environment; on one hand, procedural and substantive rules governing arbitration are scattered between many statutes and ministerial resolutions rather than being integrated within one law, a fact that has a negative impact on the unity of these rules. On the other hand, and within the framework of The J.A. Law, arbitration could not succeed in separating itself from the technicalities marking the practice of State Courts, it has always seemed to fall within an area that is not very far from the judicial practice.

Nevertheless, reform should not be regarded as a complicated measure. The commercial sector in Kuwait is well acquainted to arbitral practices, and the government has already taken significant steps towards acceding to major international and regional conventions related to commercial arbitration. It seems that a recommendation to approve the UNCITRAL Model Law on International Commercial Arbitration is in order here as a natural further step towards the modernization of this country’s arbitral regulation. However, this need not to be fully adopted; the mere reference to the UNCITRAL model law for guidance when drafting new Arbitration Laws may prove to be of great assistance to the Kuwaiti legislature, in addition to contributing to the unification of Arbitration Laws in the region, especially since a number of fellow Arab countries have already adopted the UNCITRAL Model Law, examples are Egypt, Tunis and Bahrain.  

82The Egyptian legal experience is of a paramount significance to Kuwait, as the Kuwaiti Law of CCP was patterned after its Egyptian counterpart of 1968. Moreover, the legal practice here is -until today- very much influenced by the teachings of Egyptian jurists and a reflection of Egyptian doctrine and judicial precedents. See: Amin, S. H. Legal System of Kuwait. Roystone Publishers. Glasgow. 1991. P. 259.
Tables of cases and statutes

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(1) Kuwaiti Court of Cassation, commercial appeal No. 48/75, rendered in 29/12/1976.
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