Judiciary and the Administration of Justice in Building and Construction Disputes under Kuwaiti Law

Mashael Alhajeri
Judiciary and the Administration of Justice in Building and Construction Disputes Under Kuwaiti Law

Mashael A. Alhajeri
Associate Professor of Private Law at the Kuwait University School of Law (KUSL), and is currently Head of the Centre for Court Decisions Archives (CCDA) in Kuwait

Introduction
This paper investigates Kuwait’s judicial system within the context of the building and construction industry in the country. Causes for disputes in such contracts vary. They usually revolve around unsatisfactory performance or defective works. Another cause is the inaccurate estimation of completion time, which could be a major cause for faulty performance, as contractors often find themselves confronted with unrealistic deadlines, which lead to hasty performance. On many occasions, such practice leads to quality problems. Also, excessive variation orders may cause contractors to save in other aspects of the project.

Constitutional Regulation of the Judiciary
The Constitution of Kuwait created three state authorities: the administrative authority; the legislative authority; and the judicature. The latter was granted specific powers based on its full legal independence from the other authorities and fulfills a vital role regarding the achievement of justice. This has been underlined by Art. 50 of the Constitution, which states,

The regime is founded on the detachment of authorities with their cooperation, in compliance with the constitutional provisions. None of these authorities may concede all or part of its powers as stipulated in this constitution.
And it has also been underlined by Art. 53 of the Constitution, which stipulates

Judicial power shall be vested in the courts, which shall exercise it in the name of the Amir within the limits of the constitution.

The Constitution also dedicates a whole chapter to outlining the judicial authority (Chapter V, Arts. 162-73), stipulating its general principles, organization of courts, and the relationship among the judiciary and other branches of the state. It entrusts the judiciary with the power to settle disputes in a binding manner, so awards rendered by courts are considered to be conclusive of the subject matter of the disputes and enjoy a *res judicata* effect (i.e. that a matter has already been settled). ¹ The Constitution inaugurated a new legislative era. Many statutes were enacted during this phase.

Courts in Kuwait were set up by Decree Law no. 19 of 1959 on the Regulation of the Judiciary, as amended in 1980. ² The era following the country’s independence witnessed a comprehensive legislative movement in many respects. This was in conformity with the general principles introduced by the Kuwaiti Constitution, which was promulgated on 11 November 1962. It guaranteed the right of litigation, leaving to ordinary statutes the task of organizing the procedures and the formalities necessary to practice this right. ³ This means that the state paves the road to justice for litigant parties, whether by a judicial or an arbitral award, which is enforceable in both cases.

In general, courts have jurisdiction over all civil, commercial, administrative, criminal, and personal status matters. They can also judge most of the disputes arising between the government and the individuals. However, they are restricted from judging matters of sovereignty, and from interfering with the operation of administrative orders.

Procedures of litigation before the judiciary were regulated by the Civil and Commercial Procedure Law No. 6 of 1960 (hereinafter referred to as the CCP Law). Twenty years later, calls for reform and modernization of the judicial system arose, so new laws for the CCP and for the Regulation

---

of Judiciary were enacted. These were Law No. 38 of 1980 and Decree Law No. 23 of 1990 respectively.

It remains to be said that a sophisticated system of court decision citation is lacking in Kuwait. Law reports, in the strict English sense, are not known to the legal practice in this country.4 Reference to court decisions is usually made by stating the full details of the case.5

Structure of the Court System in Kuwait

The Constitution adopts a basic principle calling for diversification of the court system. It entrusts to ordinary legislation the task of defining the details regarding court hierarchy. Article 164 stipulates

Law shall regulate the courts of various kinds and degrees and specify their functions and jurisdiction…

In conformity with the Constitution, Decree Law No. 23 of 1990 on the Regulation of Judiciary was enacted to classify the divisions of the courts. There are different types of courts in Kuwait. Focus in this paper, however, will be on ordinary court divisions, as this is the section of the judicature that is competent regarding actions in civil and commercial matters, of which building and construction contracts form a significant part. Therefore, no detailed discussion will be given for specialized courts.6

4  Case reporting is carried out through the Ministry of Justice and Legal Affairs’ Journal of Judiciary and the Law [Majalat Al-Qadha’a Wa Al-Kanoon] where selected decisions are published. Also, the Court of Cassation’s Technical Office issues a compilation of principles approved by this court on a periodic basis. This compilation is known as the Collection of the Principles Approved by the Court of Cassation [Al-Mabadi’ Al-Kanooniya Alati Kararatha Mahkamat Al-Tamiez], and is now available on CD format as well.

5  Driven by this shortcoming, this writer suggests a new form of citations to facilitate the task of finding cited decisions, eg. Com app no 307/87 (1986-91) 2.2.7 KCR 193, with the period of 1986-91 being the series date, and the number 2.2.7 standing for the rule's location in this order: Part.Vol. Rule number.

6  Specialized courts in Kuwait are: (1) Constitutional Courts (Al-Mahkamah Al-Disturiyah) (Act No. 14/73); (2) Military Courts (Al-Mahkamah Al-Urphiyah); (3) Martial Courts (created in the post-liberation era following the Iraqi occupation of Kuwait in February 1991, and abolished in June 1991); (4) Juvenile Court (Mahkamat Al-Ahdath) (Act No. 3/1983); (5) State Security Court (Mahkamat Amn Al-Dawlah) established by Law No. 26 of 1969 and abolished in 1995; and (6) Traffic Court (Mahkamat Al-Murour) established by Law No. 22/60).
Summary Courts (Al-Mahakim Al-Juz’iyah)

These were first introduced by Law No. 12 of 1965 amending the Regulation of the Judiciary Law No. 19 of 1959. There is a Summary Court situated in the centre of every Muhafatha, or governorate. Each of these courts is staffed with a single judge.

Summary Courts deal with small value claims and rent disputes. However, one of these courts’ main functions is to rule on urgent matters and to issue orders preventing parties from acting in a way that may cause harm to others, i.e. conservatory measures, such as injunctions. A further amendment by Law No. 61 of 1981 allowed this court to handle certain misdemeanors.

These courts are competent enough to hear all disputes within the limits, clearly stated in the law as including claims not exceeding KD 5,000. The decision is deemed final if the value of the claim does not exceed KD 1,000. Claims of higher values could be appealed to the Court of First Instance (Al-Mahkamah Al-Kulliya).

The Court of First Instance (Al-Mahkamah Al-Kulliya)

There is one Court of First Instance in Kuwait; its geographical jurisdiction covers all Kuwaiti territory. It is a first-degree court that exerts a comprehensive jurisdiction regarding claims exceeding KD 5,000 in value. The court hears and determines all disputes examined for the first time. It also comprises appeal chambers that are set up to practice a second level of litigation for awards rendered by Summary Courts. The Court of First Instance is divided into two divisions: the first is the Criminal Division,

---

7 For administrative purposes, Kuwait is divided into six governorates (muhafathat), the most recent of which was established in November 1999. These are are: Kuwait City, Hawalli, Jahra, Farwaniya, Ahmadi, and Mubarak Al-Kabeer. This administrative division dates back to a law promulgated in 1962, and has been amended several times. Each governorate is run by a Governor, who originally was subject to the Ministry of Interior Affairs, until Decree No. 21 of February 1992 made Governors directly responsible to the Council of Ministers. But they still lack authority, and the Governorate Councils for which the law provides have still not been formed. At a meeting of the Council of Ministers on 23 January 2000, a final formula was adopted to amend Decree No. 21, giving Governors powers that enable them to effectively assist the State’s administrative body.

8 The Kuwaiti Dinar (KD) is Kuwait’s official currency (1 Dinar = 1,000 Fils).
and the second is segmented into a number of circuits, being the civil, commercial, administrative, labour, lease, and personal status circuits.

Awards rendered by the Court of First Instance in disputes inferior in value to KD 5,000 are of a final nature and acquire the authority of *res judicata.* Awards exceeding this amount can be appealed to the Court of Appeal, and may be further appealed to the Court of Cassation.

It is convenient in this connection to mention that jurisdiction regarding urgent disputes within the hierarchy of the Court of First Instance normally rests with the Judge of Urgent Matters, who renders *pro tempore* (temporary) awards regarding technical evidence, inspection, urgent or preservative procedures, and provisional seizure, etc.

**The Administrative Court (Al-Mabkamah Al-Idariyah)**

The establishment of the Administrative Circuit is of utmost significance to the development of the judicial system in Kuwait. Prior to the creation of this court, Art. 2 of Law No. 19/59 on the Regulation of the Judiciary expressly deprived the courts of the right to resist, interpret, or stay with respect to administrative decisions. The said article limited the powers of courts to determining pleas ‘...without annulling any administrative order or halting its execution or interpreting it’.

This position was maintained for more than twenty years, even though the Constitution presented a legal foundation to establish an administrative court in 1962. This was clearly stated in Art. 169, which stipulates

> The law shall regulate the settlement of administrative disputes by means of a special chamber or court, and shall prescribe its organization and the manner of assuming administrative jurisdiction, including the powers of both annulment and compensation in respect to administrative decisions contrary to law.

Thus, this Article provides for administrative disputes to be dealt with by a special court and it specified the law under which the said court would be organized, and the code of practice to be followed.10

Subsequently, Decree Law No. 20 of 1981 (as amended by Law No. 61 of 1982) pertaining to the Creation of Division at the Al-Kulliya Court to
Hear Administrative Disputes, was enacted. It should be noted, however, that the Administrative Court is, indeed, only a circuit within of the Court of First Instance. The Kuwaiti legislator did not opt for the creation of a full-scale State Council (Conseil d'état) specializing in administrative disputes—as known to the French legal system—yet. This is the only circuit in the said court to be directly created by law, as the creation of other circuits was through inferior legal instruments, i.e. administrative decisions. The reason behind this exception could be attributed to the fact that while other circuits deal with matters regulated by codified legislation, such as the Civil Code or the Code of Commerce, for example, adjudication in administrative disputes was an appendage to the executive authority and not an independent judicial authority as it was to become. Thus, there was no administrative legislation according to which this circuit could render its awards. It was thought appropriate to incorporate administrative rules into this law.

The Administrative Circuit is entrusted with the task of the judicial review of administrative acts, except for those of which the state has defenses of sovereign immunity from suit or execution. It practices sole jurisdiction over all administrative disputes when the state or one of its institutions is party thereto. While conducting its role, it enjoys both an annulment and compensatory jurisdiction. It alone has the power to annul administrative decisions and to compensate the plaintiff for both direct and indirect losses sustained as a consequence of wrongful decisions. In addition, it has the sole jurisdiction to hear disputes arising between administrative authorities and other contracting parties in contracts of public works, supply, or any other administrative contract, including actions by a public body against a private contractor.11

This, however, does not affect the right of ordinary courts to continue to hear and determine contract disputes in which none of the parties is a public body. The reason to grant the Administrative Court this jurisdiction over administrative disputes was to encourage the finding of appropriate solutions for disputes between individuals and the administration, rather than a rigid application of a codified legislation. Therefore, the Administrative Court does not resort to a direct implementation of the Civil Code or the Code of Commerce, but rather to the general principles that inspire them.

11 Art. 2 of the Decree Law no. 20 of 1981 pertaining to the Creation of a Division at the Al-Kulliya Court to Hear Administrative Disputes.
However, this is not to say that this court is competent enough to hear all disputes pertaining to administrative contracts. Indeed, its competence is restricted to disputes arising between the administrative body and the party contracting with it only. Thus, regarding building and construction contracts, inasmuch as they are public works contracts, it does not hear disputes between third parties and the administrative body, or third parties and the contractor.

The Court of Appeal (Mahkamat Al-Isti’anaf)

All awards rendered by either the Summary Court or the Court of First Instance, whether final or interlocutory, may be appealed, if the value of the dispute falls above the minimum amount required to by this court. However, the law provides for some awards to be contested during the proceedings; examples are urgent awards, awards suspending the proceedings, and awards susceptible of enforcement.

The Court of Appeal functions as a second-degree jurisdiction. Its administrative structure could be divided according to need. It is currently divided into four circuits: Family, Civil, Commercial, and Administrative. Each circuit has three presiding judges.

After the Court of First Instance has rendered its award, the unsatisfied party may seek an appellate review within 30 days from the date in which the Court of First Instance has rendered its award, unless the law provides to the contrary. This period is reduced to 15 days in urgent matters. As a general rule, an appeal will involve a complete reinvestigation of the case. However, the request for such a review should be based on the ground that the Court of First Instance has erred in understanding the facts or in applying the law, or both. The Court of Appeal has the jurisdiction to hear appeals on grounds of new evidence, errors, and new developments to the subject matter of the award rendered by the Court of First Instance. It re-examines all facts and procedures that were subject to the appeal, including the report of the expert witness. New defenses and new evidence may be presented before it. However, new claims cannot be introduced. The appeal restores the case to its initial state that existed before rendering the appealed award, regarding the subject matter of the appeal only. When

---

12 Art. 141 of the CCP Law No. 38 of 1980.
13 Art. 144.1 of the CCP Law No. 38 of 1980.
the appellate award is rendered, it becomes final and enforceable. It could, nevertheless, be appealed to the Court of Cassation.

The Court of Cassation (Mahkamat Al-Tamyeez)

This Supreme Court stands at the apex of the country’s court system, with five judges presiding over a hearing. It is regulated by Law No. 40 of 1972, and is entrusted with the task of reviewing and examining court rulings of the immediately lower jurisdiction, within the limits determined by Art. 152 of the CCP Law. Thus, cassation is restricted to controlling the application of law, unifying its interpretation, and laying down principles guiding the judicature in general. It endeavors toward establishing a consistency of judicial positions, by preventing the rendering of overlapping or contradictory judgements in comparable cases. In performing this task, this court hears appeals against awards where it is claimed that the application or interpretation of the law was defective, or the award or proceedings invalid.

An application for cassation should take place within thirty days.14 Such action is restricted to awards rendered from the Court of Appeal:

a. Upon a claim that a given award is vitiated by a false interpretation of the law, deviation, or error in the application of the law;
b. If there is a reason for nullification in the award or in the procedures followed in rendering it; or
c. When there is a contradiction between two awards rendered between the same litigants.15

In theory, awards rendered by the Court of Cassation are not binding for inferior courts in future cases, but are highly respected as precedents of the Supreme Court. Nevertheless, reality reveals that lower courts closely follow them when deciding on similar disputes and are therefore rarely being contradicted.

14 Art. 153 of the CCP Law.
15 Art. 152 of the CCP Law.
The Constitutional Court (Al-Mahkamat Al-Dustouriyah)

Article 173 of the Constitution lays down the foundation for a judicial body for constitutional disputes, which is assigned the task of judicial review of the constitutionality of legislation. This Article states

The law shall specify the judicial body competent to decide upon disputes relating to the constitutionality of laws and regulation and shall determine its jurisdiction and procedure. The law shall guarantee the right of the government and concerned parties to challenge the constitutionality of laws and regulation before the body. In the event where this body decides on the unconstitutionality of a law of a regulation, it is considered invalid.

The existence of this court is justified by the requirements of both policy considerations and centralization, urging that if judicial review were dispersed among the various courts it may lead to conflicting awards. However, eleven years passed between the promulgation of the Constitution and the establishment of the Constitutional Court. It did not actually begin operating until 1973, when Law No. 14 of 1973 instituted the Constitutional Court with the task of supervising the constitutionality of laws, law decrees and regulations, interpreting constitutional stipulations, and pursuing disputes concerning the election of members of the parliament and validity of their membership. This court is formed of five judges.

Procedures Observed in Building and Construction Disputes

With respect to proof, no specific rules were introduced for proving aspects of default or negligence in building and construction contracts; general rules of evidence are applicable in this regard.

It is worth mentioning that building and construction contracts are usually subjected to the Civil Code. However, there could be instances where such contracts would fall under the ambit of the Code of Commerce. Article 4 para. 16 stipulates,

Activities relevant to the following matters shall be deemed commercial activities, without regard to the capacity or intention of the person carrying them out: . . . 16. Contracts of erection of, effecting changes to, renovation, and demolishing properties where the contractor undertakes to provide the raw materials or labour.

16 The Explanatory Memorandum of the Constitution.
This Article indicates that a building contracting act is deemed commercial only when the contractor provides the material and/or labour and not only executes the work. So, if he were assigned to manage works only with no other obligation, then it would be a civil contract for the contractor.\textsuperscript{17} Significance of subjection to the Code of Commerce lies in the particularities of this Code, such as the granting of periods of grace (\textit{délai de grace}), the requirement of notice of default or notice to pay (\textit{mise en démeur}), in addition to certain rules of proof which are considerably different from those usually adhered to under the Civil Code.\textsuperscript{18}

Most of the building and construction disputes that are presented to courts involve determining technical aspects that judges are not familiar with. Such issues are often decided with expert assistance. In Kuwait, the task of expert appraisal is entrusted to the Department of Experts, which is a division of the Ministry of Justice and Legal Affairs. The role of the Department is outlined by Law No. 40 of 1980 pertaining to the Regulation of Expert Testimony.\textsuperscript{19} This Department comprises individual specialists qualified to give expert opinions before the courts of law. It has two subdivisions: auditing and engineering, with about fifty engineers in the latter subdivision.\textsuperscript{20} In 1996 alone, courts referred 3,398 engineering tasks to the Department of Experts.\textsuperscript{21}

All experts are sworn, i.e. bound under oath.\textsuperscript{22} An expert’s authority to conduct the task with which he was entrusted is guaranteed by the law. His decision to inspect sites and premises under dispute could be enforced.\textsuperscript{23}

Upon a judge’s decision, a session would be assigned for parties to present their documents in front of the expert. The expert’s report will be dedicated to investigating the technical aspects of the disputes and is not

\textsuperscript{17} Muhsin Shafiq, \textit{Al-Qanoon Al-Tijari Al-Masri} [The Egyptian Commercial Law] (Alexandria: Dar Nashr Al-Thaqa, 1949), 201.


\textsuperscript{19} Previously, the rules pertaining to the regulation of expert witnesses were dispersed between Decree Law No. 19 of 1959 on the Regulation of Judiciary (Art. 23 to 26), Civil and Commercial Procedure Law No. 6 of 1960 (Art. 118 to 133), and Decree Law on the Regulation of Expert Testimony, promulgated on 6 October 1971.

\textsuperscript{20} Centre of Information Systems, \textit{The Statistical Yearbook} (Kuwait: Ministry of Justice and Legal Affairs, 1996), 103.

\textsuperscript{21} Ibid.

\textsuperscript{22} Art. 31 of Law No. 40/1980.

\textsuperscript{23} Art. 50 of Law No. 40/1980.
binding to the judge. This report is of a mere consultative value; it is up to
the judge’s discretion to adopt it fully or partially, or to disregard it. Parties
are also entitled to challenge this report. Should the judge find that a cer-
tain criticism on the report is substantiated, he may decide that the report
needs to be returned to the expert for a further review of the subject mat-
ter. In this case, a second report should be submitted. Again, this report is
not binding to the judge, who may rule against its findings. Its main task
is merely to ‘enlighten’ the court; it is not binding to the court, which
will be disposed to accept its findings. But this is in theory only. The fact
is, the report carries a considerably persuasive influence on the court and
one often finds that decisions are based upon the conclusions drawn by the
expert.24 At any rate, once the award is rendered, it could be appealed to
the higher court.

It should be noted here that it is common for cases referred to the
Department of Experts to take a long time. After that, the case is returned
to the court with the expert’s report. Parties have the right to object to this
report, and the judge could return the report to the expert to answer these
objections.

It is relevant in this connection to mention that recourse to the court
entails paying expenses. In addition to lawyers’ remuneration, the law
imposes a fee of one percent of the amount claimed. When added to
experts’ fees, among other miscellaneous fees, the total could amount to
considerable sums in building and construction disputes.

The Arbitral Framework

Many procedural difficulties are usually associated with conventional litiga-
tion in Kuwait, such as unfamiliarity with the complex and time con-
suming measures. Another major drawback is that disputes should be
submitted in Arabic, the official language of the country. This is regarded
as a formidable barrier for foreign litigants, as construction disputes usu-
ally involve a significant number of documents, which entails substantial
translation costs.25

406. (West Law dbase).
25 For examples of major Kuwaiti arbitration cases, see: J. Al-Sabah, S. M. Fereig, &
D. J. Hoare, ‘Construction Claims: Results from Major Tribunal Findings in Kuwait’,
Arbitration 68 (1 February 2002), 11-16.
The first judicial arbitration duly provided for in Kuwaiti legislation comprises the stipulation of Article 39 of the Amiri Decree No. 19 of 1959. The CCP Law No. 6 of 1960 followed, which included a section on Arbitration (Section 3). With the continuous prosperity of business activities, a need was felt to introduce new approaches to deal with commercial arbitration, so in 1978, Kuwait ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), and the new CCP Law No. 78 of 1980 was issued, dedicating a whole section to Arbitration (Section 12, as amended in 2002 and 2003 respectively). Still, the said new law did not regulate arbitral relations which included foreign elements, i.e. international relations, apart from only one article that is related to the enforcement of foreign awards.

Article no. 173 of this new CCP Law stipulates

Agreements 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 an exceptional means of settlement of disputes, the Kuwaiti legislator did not overlook its importance within the judicial system. Thus, various forms of arbitral procedures were incorporated into modern legislation that has been truly characterized with a multiplicity of arbitration approaches. The practice regarding commercial arbitration in Kuwait is regulated in four categories:

**Optional Arbitration**

Articles 173-188 of the CCP Law No. 78 of 1980 sets 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

---

26 Law No. 10 of 1978, promulgated in March 26, 1978, published in Al-Kuwait Al-Yaum (The Official Gazette). Kuwait acceded to the New York Convention subject to a reservation that the recognition of arbitration and enforcement of awards would only apply to awards given in the territories of the contracting states.

27 A committee has now been set up by the Ministry of Justice and Legal Affairs to study and propose aspects of possible reforms for this Act.

28 Art. 199.

29 Explanatory Memorandum of the Civil and Commercial Procedure Law No. 78 of 1980.
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. This, however, is naturally subject to the bona fide and co-operation of both parties, otherwise the subject matter of arbitration would most likely resort to the courts.\(^{30}\)

**Permanent Institutional Arbitration**

Examples are undertaken by the Chamber of Commerce, in accordance with the Chamber Law enacted on 28 June 1958.\(^{31}\) The Arbitral Panel is formed of merchants and its practice is conciliation-oriented and restricted to commercial matters. Other examples of institutional arbitration reside in the Arbitration System of the Kuwait Stock Exchange Market,\(^{32}\) Conciliation and Arbitration System of the Collective Labour Disputes,\(^{33}\) and The Arbitration Committee of the Kuwait Engineers Society.\(^{34}\)

---


\(^{31}\) Art. 11. And on the role of the Kuwait Chamber of Commerce, see generally: Ibrahim Mustafa Makarim, ‘The Role of Kuwait Chamber of Commerce and Industry in Domestic and International Commercial’ [in Arabic], *paper presented to the Kuwait Conference on GCC and International Arbitration* (Kuwait, 25 March 1998).

\(^{32}\) Art. 13 of the Decree Law regulating the Kuwait Stock exchange Market, enacted on 14 August 1983, published in *Al-Kuwait Al-Yaum* (The Official Gazette). This article stipulates: ‘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 affected in the market, dealing in the market shall be deemed to be an acknowledgment of acceptance of arbitration, the facts of which 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.’

\(^{33}\) Art. 87 para. 3 of Law No. 38 of 1964 pertaining to Work in the National Sector, published in *Al-Kuwait Al-Yaum* (The Official Gazette). 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.’

\(^{34}\) ‘The Kuwait Engineers Society was established in 20 November 1962.'
International Arbitration

Under Kuwaiti law, arbitration is considered foreign only if it was performed out of Kuwait. Otherwise, there is no distinction between national and international arbitration.

Judicial Arbitration

Article 177 of the CCP Law No. 38 of 1980 regulated the judicial arbitration 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.35

Despite the wide range of arbitration options within the Kuwaiti legal framework, as indicated above, attention should be drawn to the fact that MPW conditions for public works contracts do not embody any arbitration clause and specifically refer to disputes of Kuwaiti courts which enjoy an inherent jurisdiction in this regard. To overcome this difficulty, parties have to go through an arbitration agreement that is separate in form from the building and construction contract document.

It is relevant in this connection to mention that despite the readily available arbitration mechanisms provided by the Kuwaiti legal system, international arbitration is said to be distrusted by Kuwaiti jurists and businessmen.36 Conversely, numerous arbitration clauses and agreements suggest that domestic arbitration is popular in Kuwait, which seems preferred over conventional judicial approaches.

Enforcement of Foreign Judicial Awards and Arbitral Awards in Kuwait: Foreign Judicial Decisions

The CCP Law No. 38 of 1980 forms the statutory basis for the recognition and enforcement of foreign awards. Art. 199 of this law provides that foreign awards and court orders may be enforced in Kuwait under the


36 Yunus Asaad, Commercial Arbitration and Legal System in Kuwait [in Arabic], 4-5.
same conditions as are laid down under the laws of that foreign country for the enforcement of Kuwaiti awards and court orders. Application for the order of enforcement will be submitted to the Court of First Instance (Al-Mahkamah Al-Kulliyah) in accordance with the procedures normally applicable to the initiation of a lawsuit. An order of enforcement will be issued after four conditions have been ascertained by the court, namely that:

a. The foreign award or court order was issued by a competent court in accordance with the law of the country of issue.
b. The parties in the lawsuit were duly summoned and were properly represented.
c. The foreign award or court order enjoys a final and conclusive res judicata effect in accordance with the law of that country.
d. The foreign award is not contrary to a previous Kuwaiti court award, and does not contain matters which are contrary to public policy in Kuwait.

The provisions of Art. 199 of the CCP Law are to be applied only in the absence of a bilateral treaty or convention relating to the enforcement of foreign awards and court orders to which Kuwait may be a party.

**Foreign Arbitral Awards**

Kuwait is signatory to the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958. As a party, Kuwait will enforce arbitral awards rendered in member countries in accordance with the rules and procedures laid down in the convention. However, when the foreign award in question is issued in a country that is a non-member of the said convention, then the foregoing four rules required for the encroachment of foreign awards and court orders shall be applicable.

**References**


Al-Sabah, S. M. Fereig, & D. J. Hoare, ‘Construction Claims: Results from Major Tribunal Findings in Kuwait’, *Arbitration* 68 (1 February 2002), 11-16.

Explanatory Memorandum of the Civil and Commercial Procedure Law No. 78 of 1980.
Ibrahim Mustafa Makarim, ‘The Role of Kuwait Chamber of Commerce and Industry in Domestic and International Commercial’ [in Arabic], paper presented to the Kuwait Conference on GCC and International Arbitration (Kuwait, 25 March 1998).
The Explanatory Memorandum of Law No. 20/1981.
The Explanatory Memorandum of the Constitution.
The Kuwait Engineers Society was established in 20 November 1962.
Yunus Asaad, Commercial Arbitration and Legal System in Kuwait [in Arabic], 4-5.