

Proper form: contract drafting essentials in Kuwait

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Disputes are the natural result of contracting parties intentionally, or unintentionally, departing from the perceived terms of an agreement. One of the greatest values of a written agreement, when prepared properly, is that it mitigates against circumstances where the contracting parties may have opposing interests in a particular contracting relationship. In most Civil Law jurisdictions, proper form and execution of an agreement is crucial to avoid uncertainties down the road. This is especially true when the law, for example, Kuwait Law No. 68 of 1980 (commonly known as the Kuwait Civil Code), is unclear as to the rights and obligations of a party or parties in a particular scenario. Coupled with the historically limited technical capacity of the Kuwait courts' system, enforceability of an intended agreement is often uncertain. This is a main reason why contracts in Civil Law jurisdictions, such as Kuwait, are less amenable to standard provisions.

Fortunately, the Kuwait Civil Code gives much deference to the terms agreed between or amongst contracting parties, and furthermore, Kuwait law regularly enforces an agreement to resolve disputes by way of arbitration or otherwise. However, as will be discussed below, it is vitally important that a party ensures that such agreements to refer disputes to somewhere other than the default jurisdiction, here Kuwait courts, are properly written and executed.

A number of principles of law give us a fundamental understanding on contract interpretation, which in turn, assist in preparing a proper, enforceable agreement.

First, a contract is the agreed set of laws that govern the contracting parties' relationship, subject to express provisions of the law (e.g., the Kuwait Civil Code) which govern particular rights and obligations (e.g., rights of sub-contractors, contractors, and employers of construction contracts). This means that, so long as a contractual provision is not expressly prohibited in the law, it is presumed to be enforceable.

Second, if the wording of a contract is clear, the plain terms of the contract govern the interpretation thereof. In other words, a court (or other tribunal applying Kuwait law) cannot look to other clues to understand to what the contracting parties agreed. This is similar to the *parol evidence* rule applied in Common Law jurisdictions, which, in short, tells us that, when interpreting a contract, you cannot look to evidence outside the four corners of the agreement to determine the contractual intent of the parties.

Where, however, there is room for interpretation of the contract, a court looks at the totality of the relationship to help it determine what the contracting parties intended when drafting the unclear provision subject to interpretation. If a court cannot clear the ambiguity surrounding a stipulation of a contract, the interpretation that protects a suffering party will apply. Whether a contractual provision is clear is often at the heart of any contractual dispute. Thus, it becomes essential that a provision is drafted with an understanding of various factors, including how it will be interpreted, under the applicable governing law, in the event of a dispute.

Third, a contract is not the only instrument which governs contracting parties' rights and obligations. In other words, any contract also inherently contains that which is deemed to be a requirement thereof in accordance with custom prevailing and rules of equity. This can be summarised as the unwritten rules that govern all contractual relationships. In short, all contracting parties are bound by the rules of custom (if any) and equity, regardless of whether such terms are expressly provided for in a written agreement. This principle often assists parties in understanding that, while it is impossible to account for every single

possible scenario, the law essentially requires contracting parties to act professionally and in good faith. But for this rule, the simplest of agreements may easily result in volumes of terms stipulating the result of any potential scenario that may arise.

There are other principles that may apply depending on the contract itself and/or the circumstances that develop following execution thereof. For example, the law accounts for the possibility of an unforeseen event that renders performance unduly burdensome or impossible.

In short, while Kuwait law provides some fundamental principles to guide interpretation of a contract, it is vitally important that a Kuwaiti contract is prepared properly and with an understanding of Kuwait law and practice.

It is common for parties engaging in a highly technical or high-value contract to opt to refer disputes to other means of dispute resolution, such as arbitration. Kuwait regularly enforces contracting parties' election to defer adjudication of disputes to foreign arbitration, so long as the tribunal is recognised by Kuwait (common examples include DIFC-LCIA and the ICC). Parties may also elect a foreign jurisdiction, such as those party to the New York Convention, to resolve disputes, so long as we have reciprocity (i.e., Kuwait recognises the foreign jurisdiction's judgments, and the foreign jurisdiction recognises Kuwaiti judgments).

One key issue, in particular when contracting with Kuwaiti entities, is the enforceability of an alternative dispute provision such as one that defers all disputes to an arbitration tribunal. Unless done properly, an agreement to arbitrate or defer disputes to a foreign jurisdiction may not be enforced. Kuwait law is strict when it comes to who is authorised to oblige another to certain things, here arbitration. Often, general managers of companies with limited liability (W.L.L.), or chief executive officers of shareholding companies (K.S.C.) are not inherently authorised to bind their companies to such provisions. Thus, their signature is usually insufficient to satisfy a counterparty that such a stipulation will be enforceable. As a result, there is more that is often needed to provide adequate comfort that a contract will be fully enforceable against a counterparty, such as, for example, express approval by the owners of the contracting entity. Law No. 1 of 2016, as amended most recently in 2019 (commonly referred to as the Kuwait Companies Law), provides guidance as to what is needed to ensure that a Kuwaiti entity is bound by an agreement to arbitrate disputes; however, a review of that entity's corporate documents (i.e. the Memorandum of Association, and Articles of Association (if applicable)) is often needed to confirm the extent of the signatory's authority to bind the entity s/he represents.

In summary, contract interpretation in Kuwait is heavily dependent on the quality of the agreement prepared. While Kuwait provides guidance on contract interpretation, much is left to the drafter to ensure that the parties' intentions are properly reflected in writing. A party to an agreement should be mindful of rights and obligations that may be inherently present, such as those that are a result of rules of custom and fairness, and should ensure that the entire agreement is enforceable as intended.

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