

Arbitration in Kuwait: Time for Reform?

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The oil and gas sector constitutes one of the most important and competitive markets in Gulf countries and despite the recent slide in oil prices, the majority of the Gulf Cooperation Council (GCC) members have reserves and savings from the boom period of 2003-2014 that can underpin spending programmes. It is sensible, however, in light of recent events, for governments throughout the region to use this opportunity to undergo reforms and take the necessary measures to decrease habitual oil dependency and increase private sector development and productivity. As the Gulf ventures beyond the traditional oil and gas production, demand for international investment is expected to increase. One of the central issues that investors may face is the settlement of disputes arising from contracts through binding arbitration or other ADR. For this reason, it is essential for the region to pro-actively take measures promoting effective mechanisms of dispute resolution that are in line with modern international standards.

An Overview of the Region

As a gateway to attract trade and investment, GCC members have taken positive steps forward by enacting more 'arbitration friendly' laws, as well as the establishment and development of new arbitration hubs. For instance, all members of the GCC have acceded to the New York Convention and are able to position themselves as the most attractive venue for arbitrations. Moreover, the modernization of domestic arbitration laws is evidence that Gulf States have taken their pro-arbitration policy one step further.

By way of example, the collaboration between the Dubai International Financial Centre (DIFC) and the London Court of International Arbitration (LCIA), allows international parties the option to submit their civil or commercial contractual disputes to the DIFC-LCIA with an agreed seat in the DIFC thereby allowing clients to avoid any unconventional arbitration laws (although any arbitral rules may be used with the DIFC as a seat). The DIFC Arbitration Law No. 1 of 2008 is based upon the UNCITRAL Model Arbitration law which makes it more familiar to clients. Following this trend, on 11 January 2010, the Kingdom of Bahrain, partnering with the American Arbitration Association (AAA) created the BCDR-AAA. The BCDR-AAA created an arbitration "free-zone" by ensuring an arbitral process with jurisdictional and legal certainty through exclusion of any judicial review and minimal court intervention.

Most recently, in 2012 the Kingdom of Saudi Arabia adopted a new arbitration law generally based on the UNCITRAL Model Law. The law recognizes international arbitration proceedings in line with international customary practice, provides rules to govern arbitration proceedings, and deals with the enforcement of foreign arbitral awards.

The above demonstrates the region's predominant involvement and commitment to international arbitration. Unfortunately, Kuwait has been somewhat slow to show similar initiative in this respect. The legislative framework that governs arbitration in Kuwait is codified under Law No. 11 for the Year 1995 Concerning Judicial Arbitration in the Civil and Commercial Matters (the "Judicial Arbitration Law") and Law No. 38 of 1980 Promulgating the Civil and Commercial Procedures Law (the "Procedures Law" or "Optional Arbitration") which repealed article 177 of the Procedures Law and is replaced with the Arbitration Law. Seemingly drafted with domestic arbitration in mind, the aforementioned laws governing Kuwaiti arbitration, in particular that of Judicial Arbitration Law are composed of a series of what some may call 'arbitration-unfriendly' provisions that neglect to distinguish between the domestic and international

arbitration. In sum, the arbitral mechanism is overshadowed by local judicial concepts, which to a great extent enable Kuwaiti courts an intrusive scale of influence.

In view of the fact that a large volume of cases governed by arbitration law would be of a domestic character, the practical outcome is that traditional local concepts are being forced on international disputes, which can frustrate the needs of international contracting parties.

Arbitrating in Kuwait: Does it Curtail International Businesses?

Deviating from the core characteristics and norms of modern practice, the governing arbitral regulations of Kuwait, in particular that of Judicial Arbitration Law, are seen to be a little out of line in attempting to fully capture the essence of arbitration as an effective tool of dispute resolution. It may draw a closer resemblance to the practice of litigation.

The somewhat intrusive role of the judiciary in arbitration could stem from the feelings of distrust arising from the determination of arbitral awards rendered in the 1950s and 1960s against the Gulf region. While for the majority of the GCC, the feelings of distrust are now in the background of this new initiative aimed at encouraging international arbitration, it is perhaps taking longer for international arbitration to present itself as a viable option in Kuwait.

A recent example of an unfavourable award against Kuwait is the 2012 case of Petrochemical Industries Company of Kuwait v. the Dow Chemical Company where Kuwait was ordered to pay over \$2 billion in damages. Such awards are not likely to endear Kuwait to arbitration despite the rapid growth of international arbitration in the Gulf region.

It is this author's view that Kuwait should reconsider its arbitration laws in order to fall in line with the rest of the initiatives adopted by its neighboring GCC member states. This will enhance Kuwait's attractiveness for foreign direct investment.

The Current Arbitration Law in Kuwait

Article 173 of the Procedures Law confers on the parties the power to submit their dispute to any arbitral procedure provided that the contracting parties agree to it in writing. If parties fail to express in their contract their choice of any other system of arbitration, the Judicial Arbitration Law shall apply by default and the contracting parties will be subject to the jurisdiction of the arbitration board of the Court of Appeal

The Judicial Arbitration Law applies to three distinct procedures. First, it allows an arbitral tribunal to exercise jurisdiction over disputes referred to it by the free will of the parties. The consent of the parties may be either in the form of a clause or subsequent agreement, to submit such disputes to the tribunal's jurisdiction. The second category mandatorily enforces jurisdiction over disputes concluded after the enforcement of the Judicial Arbitration Law, which include provisions concerning the settlement of possible disputes through arbitration, but neglected to stipulate an arbitral body to which such disputes are to be submitted. The third category, falling under mandatory arbitral jurisdiction, are disputes arising between Governmental bodies such as Ministries, Public Corporations and the Companies whose capital is fully owned by the State-Government or between all such institutions. This has been rationalized by the need to reduce the burden on the judiciary since these disputes typically concern the issue of public funds. In addition, the arbitration board will only hear matters whose value does not exceed five hundred thousand Kuwait Dinars (KD 500,000), including those financial conflicts arising from administrative contracts.

The appointment of the members of a tribunal under 'Optional Arbitration' enables parties to exercise the greatest level of autonomy. A tribunal can be constituted in three ways: a) by direct nomination, b) by referring such a nomination to a third designated person such as an arbitral institution, c) the parties can also agree to refer their dispute to the arbitration board established in Kuwaiti courts in accordance with the Judicial Arbitration Law. In the event that the international parties subject themselves before the arbitration board of Kuwait, the parties should first have knowledge of the relevant provisions existing

under Procedures Law.

In the case that the parties refer the dispute to the arbitration board, the construction of the arbitral panel under Judicial Arbitration Law comprises of three male judges appointed by the Supreme Judiciary Council and two arbitrators, one of whom is selected by each of the litigants. Although some commentators argue that this hybrid system saves the parties the effort of having to go through the normal troubles usually encountered when selecting a third arbitrator, it also ensures that the judicial element of this formation will always hold the majority.

In fact, the position of the presiding arbitrator belongs to a judge.

Providing for a fixed number of arbitrators not only produces an unbalanced formation of the arbitral panel but it also fails to account for multi-party disputes. For instance, if one party were to consist of several individuals (e.g. a group of companies), the restriction imposed on the nomination of a single arbitrator per side wrongly assumes that persons forming one party of the dispute all share the same interest. What is more, the Judicial Arbitration Law stipulates that the administrative secretary must be a staff member of the Court of Appeal and the hearing should take place at the Court of Appeal, unless the presiding arbitrator (a member of the judiciary) decides otherwise. Also, the Judicial Arbitration Law restrains the parties to opt for a procedure other than that applied before state courts; to refer the dispute to arbitrators chosen by the parties; and to decide on a place of arbitration isolated geographically from the local courts.

Although the Judicial Arbitration Law prohibits the publication of an arbitral award, there is no express statutory provision for confidentiality. According to the Judicial Arbitration provisions, the arbitral award (in whole or in part) shall not be published without securing the consent of the two disputing parties (Article 7). The Explanatory Memorandum of the Judicial Arbitration Law clarified that this is to be done in appreciation of the disputants' privacy. However, this provision challenges the wording of the first paragraph of the same article, which provides that the award shall be pronounced in an open session.

Conclusion

The enactment of a new law will not automatically bring an end to the existing problems in Kuwait; however it would demonstrate a positive change in the right direction. The judiciary and relevant arbitral bodies should be encouraged to unite with the common goal of improving and promoting the changes to the system in order to reassure and uphold the interest of an investor. Only then would it be reasonable to assume that legislative reform will progress in the direction of preserving the efficacy of the arbitral process.

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