

Arbitration and its roots in the state of Kuwait

Abstract

Arbitration is a preferred alternative resolution to settle down the disputes, conflicts, differences, discrepancies in international contract between or among the parties, while saving the time, money, energy, skill and litigation under normal domestic or foreign Laws of the parties towards the developments of the Business.

Amicable solution by the parties or special negotiators settlement or reconciliation, or Experts opinion, or mediations and/or the Arbitration through entity are normally called the alternative means of the disputes settlements.

Keywords: arbitrage, amicable solutions, international contracts, reconciliation, alternative means

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Mini review

Arbitration is a preferred alternative resolution to settle down the disputes, conflicts, differences, discrepancies in international construction contract between or among the parties, while saving the time, money, energy, skill and litigation under normal domestic or foreign Laws of the parties towards the developments of the Business.

The conflicts or disputes are inevitable in construction, may be with the reason of conflicting contract documents, changes to the original scope of work, purchase order and or the violations & breaches of the contract between the parties.

Amicable solution by the parties or special negotiators settlement or reconciliation, or Experts opinion, or mediations and/or the Arbitration through entity are normally called the alternative means of the disputes settlements.

Arbitration has had its roots of early times of Arabs as they were used to settle down their disputes under the umbrella of the local honorable heads of elders of the local tribes and with the passage of time it became the custom and culture, which is a source of law in jurisprudence. The Holy Prophet (Peace be Upon Him) has decided some cases after being appointed ARBITRATOR by the elite head of the vicinity, wherein He pronounced the AWARDS and those awards became very famous having its acceptance by all and appreciation thereupon as well. The Helab-ul-Fazool and the fixation of the Hajjar-i-Aswad (Black Stone)¹ are the remarkable examples.

The Alternative means are derived from the modern history from the Jay Treaty of 1795,² thereafter the tensions of US civil war resolved in 1872 Alabama Claims thereafter a systematic plan was tried to be developed in 1890. The powers of the glove agreed on a plan for Arbitration in Hague Peace Conference 1899³ and a court of Arbitration has been created. The new fisheries dispute between USA and Great Britain resolved in 1910 through Arbitration. The Arbitration treaties have been signed by USA, France and Great Britain 1911. Thereafter the energetic services had been made towards the mechanism of Arbitration.

After the WWI and in 1919 the negotiations for peaceful resolutions of the trade disputes has resulted and thereafter issues have been resolved in accordance and it is called merchant peace

award. In 1923 starting from 1921 an international body under ICC has been established to resolve the disputes of and between the states and private sector as well, called as International Court of Arbitration.⁴

FAA (The Federal Arbitration Act) 1925 has developed the USA state policy for Arbitration.

After a long history of exercises for the enforcement of the Awards of the Arbitration globally and the end in 1958 has been drafted and accepted at NY Convention on Recognition and enforcement of Foreign Awards, wherefrom the UNCITRAL Arbitration Rules⁵ has been enacted as well.

The Arbitration in Kuwait holdings its grounds since Islam, therefore, they are very much familiar with Arbitration since centuries and it is being practiced by forefathers and generated by generation to generation till the modern time developed and enriched the mechanism with process, rules & regulations as well as the enforcement.

Kuwait has the history of sports since its land for her people and their disputes as well in that chapter. After the liberation and evolution with recognition or rectifications of the international agreements or treaties based from modern education, developed the methodology of settlements of the disputes, the national committees have been formulated with international standards. Kuwait became a part & member of The International Olympic committee in 1964, The Asian Olympic council (in Kuwait) in 1982 and the Arab federation for the sports games in 1974.⁶

There are so many entities are working for the settlement of the disputes in commercial side as like Arbitration Committee at Kuwait Stock Exchange, Judicial Arbitration in Courts, Arbitration Committee inside the Kuwait Bar Council, Arbitration Board at Kuwait Chamber of Industry & Commerce and one in Engineering Council of Kuwait in the name of Kuwait Mediation & international Arbitration. Those said entities are rendering services and contributing their services in the field of the Arbitration adhering at the international rules.

The enactment of the modern education 1936, liberation in 1961, more so, the invention of the Oil & gas helped the revolution,⁷ which developed the commercial activities on the soil e. g. trade, investments, imports, exports, more specifically two major industries are taking growth rising day by day.

Kuwait is a small country with big recourses attracted the international investments and commercial skill to its land, which is counted as 2.4 million are the expatriates wherein the 1.4 million are the national including Badoon (non-national residents), Kuwait entered in all international treaties on each area to enhance and boost the commercial activates and invited the international Companies to start business and their commercial activities herein Kuwait. The Oil & gas recourses led to construction industry and the close eyes of the state made Kuwaiti currency as the highest currency over the globe, which attracted the international investors across the board. There are the special boards, or sections, commissions or independent entities have been established by the international world in Kuwait to share the fruits through the business in Kuwait e.g. American Business Association, Canadian Commercial Circle, Australian Trade Commission, Taiwan Trade Center, Swiss business Hub GCC, KOTRA⁸ and others.

Kuwait developed its rules and regulations towards the Arbitration as well as enforcement of the orders, decisions, judgments or verdicts. The Civil and Commercial Procedure Law No. 38 of 1980 provides the basis of the law governing the arbitration process in Kuwait. Articles 173 to 188 of the said law deal with arbitration and the Law No. 11 of 1995 on Judicial Arbitration in Civil and Commercial issues has been promulgated by the state of the Kuwait. It has been tried to develop the Arbitration through this law a culture inside the Kuwait towards the commercial activities between and among the companies to feel safe, save and protecting their right in health business environment as well as tried to meet and adhere the international standers of Arbitration. More so, it has been to meet the requirements of the NY Convention 1958⁹ for enforcement of the Foreign awards in Kuwait, which has been accepted the NY Convention 1958 on 28th April, 1978, effected in Kuwait on 27th July 1978 to get the Enforcement of Foreign Arbitral Awards. Kuwait is also trying to abide and adhere the mandatory clause of Arbitration as in United Nation Commission of International Trade law called as UNCITRAL. The judiciary herein does hold the skill of international commercial laws, whereby the Kuwait has become member of GATT since 1963 and joined the WTO in January 1995, International Center for the settlement of Investment Disputes (ICSID), the Washington Convention, which was ratified on January 14th, 1979 (Decree Law No. 1 of 1979) The scope of the ICSID is limited to legal disputes arising directly out of an investment between a contracting state (or any constituent sub-division or agency of a contracting state designated to the ICSID by that state) and a national of another contracting state. Further, a reservation in the ICSID states that a signatory may not be compelled to mediate or arbitrate a dispute by its mere ratification of the ICSID.¹⁰

The Gulf Cooperative councils has been formulated and the rights has been given to the extent of the national of the GCC Countries only in early nineties.

The reciprocal treaties give the power of enforcement of foreign decisions or judgments in the state of Kuwait. The first is the Convention of League of Arab States on the Enforcement of Judgments (1952) and the second treaty is Law No. 44 of 1998 ratifying the Agreement for the Enforcement of Judgments and Judicial Notices in the Member States of the GCC.¹¹

The judiciary of the state of Kuwait may pass the orders in absence of a treaty for reciprocal in the absence of a treaty providing enforcement of the foreign judgments, orders, decisions and verdicts while considering and meeting the cretin conditions, so much so, if there is sufficient evidence to show that the country in which the

judgment was rendered has enforced Kuwaiti judgments in the past, but only in accordance with the same terms and conditions.

The Kuwaiti judiciary may drive the power of the enforcement of the foreign awards in Kuwait with the intuition and opinion on the bases of the laws of the land to meet the justice, fairness imparity as it is believed the natural justice system as driven by the injunctions of the Islam as well.

Foreign judgments may be reciprocally enforced in Kuwait by the orders issued by the local judiciary enabling the justice taking and considering hypothetically similar Kuwaiti judgment. However, no Western countries have been found to have reciprocal relationships with Kuwait with respect to enforcement of judgments.

A Kuwait court will not review the substantive or procedural aspects of the foreign case but will require evidence that the judgment satisfies the above criteria. Despite the provisions within the CCPL allowing for foreign judgments to be enforced in Kuwait, there has only been one case where a foreign (Western/non-GCC)¹² judgment was recognized and enforced in Kuwait. In that instance, a letter from a prosecutor in the United Kingdom (“UK”) was offered to support the UK’s reciprocal enforcement of Kuwaiti judgments. However, such evidence is considered weak by the Kuwaiti courts and their practice is to deny issuance of enforcement of foreign judgments.

The foreign investors and international commercial entities are to face the miseries of the Kuwait commercial law before to start investment or business in Kuwait as there is a corporate contractual legal provisional obligation that no foreign company can get the percentage of more than 49% in establishing a company herein Kuwait. More so, foreign investor cannot enter into business in Kuwait without a Kuwaiti partner under Article 24 of Kuwait commercial law. But as a foreign agent one foreign investor may initiate business in Kuwait as per Contracts proxy (Article 271 of the Kuwaiti Commercial Code¹³) or Distributorship (Article 286 of the Kuwait Commercial Code) or Commission agency (Articles 287 -296 of the Commercial Code.) and or Commercial Representative (Articles 297-305 of the Commercial Code). Though the Capital markets Authority (CMA) is consideration the legal procedure of its Arbitration system developing it more pro justice and transparent as the process setting or resolving the disputes in Kuwaiti legal system takes years due to complexities, whereas the Kuwaiti courts are not very liberal in the practice of enforcing foreign judgments.

Kuwait and the public authorities do speak and do rely on the documents as well as the language for the communication Arabic, which of course is not healthy sign and mark for those, who are interested or are serving through their business in the state of Kuwait as like the Public Expert departments and the Ministry of trade and commerce and the offices for labor affairs and residency. In all such proceedings the foreign entities have to hire one-person Arabic speaking as a representative (مندوب) of the that foreign entity in order to submit, send, take and represent and some have to rely on that person only as foreign entities do work with confidentiality and some are secret and top secrets but they have to disclose before a representative. Sometimes it becomes a problem for the said entities.

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Conflicts of interest

The author declares that there is no conflict of interest to declare.

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