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Does the Alternative Dispute Resolution Have a Role to Play in the Construction Industry in the State of Kuwait

(Look into the most appropriate methodology that may be taken in Kuwait in comparison with what are available in the English legal system)

By

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Abstract

Spending almost two decades of experience with one of the largest oil and gas production company in the Middle East namely "Kuwait Oil Company" as a Team Leader and Senior Counsel for the Projects and Claims Team under Legal Affairs Department has undoubtedly inspired me the notion the essence of this thesis alongside with that sort of eagerness to research in quest for the knowledge which man has always and still run after but the least nevertheless only acquired!

Before I join the company in late eighties, and on my graduation I found myself in cross roads, become a lecturer and embark on the academic career and satisfy my desire for research or fight my way in the legal profession as practitioner? I walked the second route in the hope of gaining the legal experience with the thought of grapping the research route in a later stage in which I now do enjoy and live.

Working with KOC, I have been involved up to teeth in different areas of law since a project documents is governed and regulated not only by contract law but commercial law, companies law, patent law, labour law, construction law and tax law are also incorporated. The dispute resolution methods are addressed as well since local litigation is the main method and international adjudication, mediation and arbitration are exceptional but used and applied in particular on LSTK, EPC, EPF and Technical Service Agreements TSAs.

Negotiation rounds which were entered with international oil companies on new projects and contracts gained me skills and exceptional knowledge in applying law and practice as well as sharing expertise not only in law function but in commercial and technical angles of the project bearing in mind the diversified expertise representing all aspects of business and the approaches followed to successfully accomplish a project.

In the thesis, I've opted to deal with the elements of dispute resolution in the construction industry on the international scale and on the local or national level

choosing State of Kuwait's legal system and enhancing the research with the practical work experience in the Kuwait Oil Company extending seven chapters for this aim.

I fully hope with my humble efforts exerted in this thesis that something valuable is added to the endless and depthless ocean of legal knowledge.

In addition to the introductory section, the analysis of the thesis subject will be split into and developed through seven parts.

Chapter one will define the construction contract, the field of the study subject, which will be followed by the mechanism of formation of the contract subject matter in chapter two. Then, the next four chapters, the means of the most common alternative dispute resolution; namely arbitration, adjudication, expert determination and mediation will be examined respectively. Chapter seven will mainly focus on the evaluation of the Kuwaiti national oil producer (Kuwait Oil Company "KOC") as a case study and eventually will come up with the recommendations. Then, the mission of the thesis would reach the Conclusion being the final destination of its journey.

Acknowledgement

It would not have been possible to write this doctoral thesis without the help and support of the kind people around me, to only some of whom it is possible to give particular mention here.

My first debt of gratitude must go to my supervisor, Prof. Rob Merkin. He patiently provided the vision, continued encouragement and invaluable advice for me to accomplish the thesis, not to mention his unsurpassed knowledge of the subject of the thesis. His kind feelings and support during my sickness are so unforgettable. In this I would also like to include my gratitude to my second advisor, Prof. Renato Nazzini, for his good advice, support and help. Special thanks to Dr. Emma Laurie, for her warm encouragement and constructive feedback during the upgrading.

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I would like to thank my wife Mashael for her personal support, dedication to our seven children (all of whom are students) and great patience at all times. Also I would be remiss not to mention my brothers, sisters and friends who have given me their unequivocal support throughout, as always, for which my mere expression of thanks likewise does not suffice. Last but not least I thank my mother, the great person in my life who took care of me since I was young and especially during my sickness while I was preparing this thesis and has provided me with happiness throughout my life.

Above all, I owe it all to Almighty God for granting me the wisdom, health and strength to undertake this research task and Who ultimately enabled its completion.

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DECLARATION OF AUTHORSHIP

I, Abdulaziz K. SH. Alfadhli,

declare that the thesis entitled

[Does Alternative Dispute Resolution Have a Role to Play in the Construction Industry in the State of Kuwait?

-A look into the most appropriate methodology that may be taken in Kuwait in comparison with what is available in the English legal system]

and the work presented in the thesis are both my own, and have been generated by me as the result of my own original research. I confirm that:

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Introduction

In this thesis I will examine the most common forms of dispute resolution in the construction industry as it is practiced internationally and in the State of Kuwait. Each selected method of dispute resolution will be analyzed theoretically and empirically according to the most essential factors that influence disputants' needs, interests and concerns, such as cost, time and finality.

The study uses the Kuwait Oil Company (KOC) as a case study, and demonstrates the process of dispute resolution for the most renowned state company in Kuwait.

Feedback of the thesis analysis, in addition to comments from experts in this area, provide a non-conventional and constructive approach to customizing and resolving pitfalls of the dispute resolution process in the Kuwaiti construction industry.

In this thesis, the task of overcoming the alternatives to dispute resolution leads to conclusions and recommendations which may help customize manners of conflict management. Such conflict management may be implemented when carrying out a construction contract through setting out a mechanism that assists in tackling the obstacles of a project according to a proper schedule.

In recent decades it has become obvious that the most desired structure for construction contracts' parties to manage a major construction project through a lump sum turnkey agreement for engineering, procurement and construction (the so-called EPC contract) is for it to be rendered by the contractor on a fixed price that covers all works.

Such a manner of running major projects has been positively responded to by the related markets and is widespread in the construction industry. However, managing risk in such a project whilst allocating it appropriately becomes a crucial matter that is to be handled carefully - particularly in the early stage of the project.

Recently in the state of Kuwait - in both the public and private sectors – the adopted approach has been of large-scale infrastructure and EPC projects; consequently, it has become undeniable that the needed approach is one which develops a form of construction contract that addresses rights and responsibilities and re-allocates risk amongst the parties in the agreement. Such a contract would enhance and encourage the achievement of fairness and justice to the extent that it could be done.

Techniques for solving a conflict or dispute, which might arise out of the EPC contracts, would be regarded as fundamental, and contracts are required to be thoroughly examined and decided upon by both parties' senior management including their legal consultants or lawyers. In order to ensure a steady stream of cash flow for a project, a dispute that may arise out of a project should be resolved in a cost-efficient and timely manner.

The aims and objectives of the thesis

The thesis mainly revolves around the technique of dispute resolution in the construction industry through examining various developed means of alternative dispute resolution. Put simply, the objective of the thesis will be carried out through two phases. To monitor a common existing mechanism of dispute resolution in construction industry in UK and to explore to what extent that it can be developed and applied in the construction industry in the State of Kuwait in particular in Kuwait Oil Company (KOC) contracts. Therefore, special attention should be drawn to the Kuwait Oil Company's practice as a case study in light of the entire thesis outcome and to recommend a most appropriate and workable manner that can be adopted. Having about seventeen years of experience with the Kuwait Oil Company as a Team Leader and Senior Counsel for the Projects and Claims has definitely helped me in analysing and developing the thesis as well as in devising the most appropriate solutions.

It is essential that a field which shall be assessed within this task, should be defined from the outset of this thesis. Therefore, it is a prudent approach to start

our mission with a definition of a construction contracts under both Kuwaiti law and English law.

Further, construction projects, mainly large-scale infrastructure projects, are usually formed and conducted on the basis of a chain of contracts and sub-contracts, therefore, a doctrine of privity of contract will be discussed thoroughly to draw lines among the parties' overlapping relationship.

Consequently, it becomes necessary to depict a regular way to form a construction project, particularly in terms of public procurements, which is often done through a tendering process.

Next, I will evaluate the most common method of alternative dispute resolution in the construction industry in both Kuwait and the UK.

In terms of an alternative dispute resolution to litigation, arbitration has become a common name and has been inserted into construction disputes in the State of Kuwait, particularly after publishing the Arbitration Law of 1995 which was added to the Civil and Commercial Procedure Code No. 38 of 1980 and incorporated to the arbitration chapter which can be found in Articles 173 to 188. As a result, fundamental dimensions of the Arbitration Law of 1995 will be examined thoroughly, both individually and in connection with a case study (Kuwait Oil Company "KOC" as the example).

Adjudication has produced a revolution in alternative dispute resolution, and recent legislation been amalgamated in the UK (which came into force at the end of the 1990s). The objectives of the Act were mainly to rectify some pitfalls that had been observed by concerned parties and commentators during previous decades as reflected in the Latham Report. This is a new approach in managing the ramifications that come out of the construction contract, such as controlling a method of payment and protection of sub-contractors via restrainment of the pay-when-paid concept as well as providing a statutory right in the construction contract to proceed an adjudication as an interim, provisional and speedy dispute

resolution mechanism. Regarding the latter, the statutory adjudication will be discussed thoroughly in the thesis, showing its pros and cons and to examine to what extent such a means of dispute resolution are to be adopted in the construction industry in the State of Kuwait.

Expert determination would be considered as a unique and most recent development of an alternative dispute resolution, which has begun to be put in use, and will be examined carefully to see to what extent it could be adopted in construction disputes.

Mediation will be described and examined as a non-binding way of resolving a dispute. Mediation is a most common way to facilitate and assist parties resolving their dispute amicably in the construction arena.

Finally, Kuwait Oil Company (KOC) will be taken as an example and case study to be presented with an assessment to end up with the recommendations that, as far as we are concerned, may optimize the alternative dispute resolution in the construction industry in the State of Kuwait.

The thesis consists of seven chapters:

Chapter One: Definition of the construction contract. In this chapter the main field of the research will be discussed. The construction contract will be specified according to its definition both in accordance to the Housing, Grants, Construction and Regeneration Act of 1996 as well as according to the Kuwaiti Civil Law Code of 1980.

The principal of privity of contract will be discussed and analyzed to the extent that may affect the construction contract itself as well as the alternative dispute resolution agreements.

Chapter Two: Formation of the construction contract. In this section special attention will be given to the tendering process.

The pre-tender stage will be examined with referring to the "agreement to agree" as well as the enforceability of the negotiation phase.

Chapter Three: Arbitration. Arbitration is usually at the top of alternative dispute resolution techniques; however, as it is organized and ruled by lawmakers, it has evolved during recent decades to become a traditional private alternative to the court and ultimately would be regarded as a private litigation rather than a sort of ADR.

Kuwaiti arbitration law will be described and examined in details with some references to the English law. The question of enforceability of foreign award in the State of Kuwait will be discussed as well.

Chapter Four: Adjudication. In the construction industry, adjudication is the most likely way of dispute resolution during the operation of a project. Adjudication has been recognized and arranged thoroughly and introduced by the Housing Grants, Construction and Regeneration Act 1996 (the Act); therefore, it will be presented and argued in light of the Act.

The relevant amendments to the adjudication by the Local Democracy, Economic Development and Construction Act 2009 (LDEDC Act) will be discussed as well.

Chapter Five: Expert determination. This type of methodology has been developed in the UK and Australia and has become a decisive and prompt method that focuses on technical matters rather than legal issues.

Expert determination is not recognized widely in the State of Kuwait. The distinction between expert determination and the arbitration not accurately blurred. Reference to the expert witnessing must be presented precisely to clear any confusion that may be occurred between them.

Chapter Six: Mediation. Mediation is the most central technique in alternative dispute resolution, and due to its nature as a non-binding means it is based on a compromising solution rather than a judgment.

Types of mediation will be displayed. The enforceability of mediation as well as the concept of “without prejudice” will be deeply examined. Furthermore, we look at the Med-arb as a combination between mediation and arbitration.

Chapter Seven: Kuwait Oil Company (case study). In this chapter of the thesis, the existing practice of the Kuwait Oil Company will be examined carefully in light of the most appropriate recommendations. Thereafter, according to the outcome of the thesis journey we will recommend the best options that may customize the alternative dispute resolution in the Kuwaiti construction industry.

Does Alternative Dispute Resolution Have A Role to Play in the Construction Industry in the State of Kuwait?

-A look into the most appropriate methodology that may be taken in Kuwait in comparison with what is available in the English legal system.

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The construction industry is one of most dynamic sectors of the Kuwait national economy. Construction has been described as a risky, competitive and litigious business. Construction often involves hundreds of parties who are strangers to each other. Ordinarily, the parties to a construction project live with uncertainty of many elements. This uncertainty means that the parties must deal with issues of risk. One of the most important risks inherent to a construction project is the risk of dispute resolution as it is notoriously time consuming and expensive. Therefore, this research is concerned with the best practice and mechanism of resolving the construction contract disputes under the Kuwaiti law in comparison with English law.

As this is the focal point of the subject of the research, we will start with the definition of the construction contract and the means of forming the contract, and then move on to deal with the main subject of this thesis.

CHAPTER ONE

Human beings all over the world, everywhere on earth, in any community or society, and in any moment or second, have or may have been a party in a deal or bargain, either orally or in writing with a contractor being an entity or individual. These deals in fact are agreements, and if emptied into a written form, this form would be termed a construction contract.[1] The construction contract in general does not have any specific rules or regulations for being formed other than that required for any contract.

Nevertheless, due to the nature of the construction contract, it is needful, to some extent, to review the formation of the contract and to identify the moment the construction contract has been made.

With that said, I shall begin to identify the definition and then the formation of the construction contract under Kuwaiti law and English law.

Definition of Construction Contract under Kuwaiti Law

In addition to the general rules that apply to any contract, the Kuwaiti Civil law has a special chapter dealing exclusively with rules of the construction contract.

Under Article (661) of Chapter One of the second part of the Civil Law No. 67/1980, the contract of work is defined as the following:

"A craftsman's (work) contract is that pursuant to which a party undertakes to do work for the other party in exchange for payment without being his follower or acting for him. In general, and as the construction contract is a contract of work

[1] Would not prefer to go into details about the differences between the agreement and the contract.

and due to its importance, there are special rules that organize the building and construction contracts in the second part of this chapter" (Articles 689-697).

Although these civil law rules are applied to any construction contract whether it is an administrative contract, commercial contract or civil contract, the special rules of either administrative law or commercial law may apply in addition to the said general rules if the construction contract falls within its ambit.

This notion is based upon the principle where provisions of particular application apply to amend or exclude provisions of general application, and is a fundamental and valid principle of Kuwaiti law.

Therefore, it is essential to determine whether the respective construction contract falls under the administrative contract or commercial contract. Such determination must be undertaken in accordance with specific rules and principles that have been set by the administrative judicial.

Under the Kuwaiti law, the Kuwaiti court of cassation in its capacity as the primary source of the administrative law has held that the administrative law can only be applied to the construction contract if the following provisions are all available:[2]

- If the construction contract is signed with one of the state ministries, government department or authorities, but not with companies that are owned by the state either totally or partially.[3]

- The government department has a mandate position in the contract that allows or authorizes them to change, modify or verify the conditions of the contract or even to terminate the contract for the benefit of the state while paying a fair compensation to the other party.

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[2] Kuwaiti Court of Cassation decisions (254/95, 160/96 session 7/4/1997 Administrative), (43/97 session 8/12/1997 Administrative),(79,85/97 session 18/5/1998 Administrative), (368/99 session 19/12/1999 Administrative).

[3] Majed Raghib Alhelo, (*Alokod Aledariya wa Altahkeem) Administrative Contract and Arbitration* (Dar Aljameah Aljadeedah 2004) 18.

- The contract has extraordinary terms and conditions that may be considered or construed as unfair, rigid or stringent conditions against the other party who enters into the contract with a government department.

- The contract is for the purpose of the public utilities such as running, operating or any such activities required for operating public utilities. The public utility is an expanded term that includes any public services or public or natural resources.

On the other hand, the commercial law can be applied to the contract in specific situations such as the following:

- First of all, and pursuant to Article (96) of the Kuwaiti Commercial law, the provisions of the Civil law would be applied to any commercial contract or bargain if the Commercial law did not have any particular provision to this case.

- Article (9) of the Commercial law says that as a general principle, any bargain or contract that has been made with a merchant or if one involved in that bargain or contract is a merchant, then this relationship must be subject to the Commercial law regardless of the other party's entity, unless it's proven that such a deal is not for commercial purposes, and only for civil activity.

- Furthermore Article (12) counts any bargain or contract that has been made with a merchant as a commercial bargain or contract even though the other party was a non-merchant.

This principle is also applicable to the contract that has been made with the government department or authority as long as the other party is a merchant as per the court of cassation decision.[4]

Furthermore, a special situation has been brought by Article (5) of the Commercial law which contemplates the construction contract of a commercial contract when the contractor is obliged to supply a raw material by him and on his

[4] Kuwaiti Court of Cassation decision (244/2000, 268/2000 session 4/12/2000 Administrative).

expense, or supplies labour. Hence, any construction contract made between the government department and a merchant who promises to supply a raw material or labour would be regarded as a commercial contract.[5]

- The characters of the commercial law make it obviously different from the other laws and especially from the civil law which is counted as a general law for the matters that are subject to the commercial law.

- The commercial law is characteristic to flexibility of forming and proving the contract.

- The commercial contract can be made through any means or ways that parties agree with, such as through telephone, telexes, faxes, and email, except for a certain limited type of contract due to its nature and importance. This can include a contract for establishing a company and the contracts regarding the sale, building and the lien of the vessel as well as the sea insurance.

However the civil contract, as per the Kuwaiti law, for sake of evidence needs to be in writing if the deal exceeds 1000 Kuwaiti Dinar.[6]

- Contrary to the Civil law, there must be 'consideration'[7] within the commercial contract. Absent consideration of any contract will either exclude the commercial provisions and refer this contract to the civil law provisions or regard it as a worthless contract which cannot be enforced or performed.

- The time bar concept in commercial law is enormously different from the civil law since its length, in general, is much shorter than the length of the time bar in civil law due to the nature of commercial contracts, which are required to be stabilized and finalized very rapidly.

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[5] Kuwaiti Court of Cassation decision (512/96 session 22/3/1998 Commercial).
[6] One Kuwaiti Dinar is approximately equal to two Pound sterling.
[7] Consideration is the thing which is rendered in exchange between the contract's parties.

- Judicially, in terms of civil law cases a creditor or a claimant is not allowed to start proceeding or filing a case against his opponent before he notices him judicially to perform his obligation with giving him a reasonable time limitation, although in a commercial case he does not need nor is required to do the same.

- In general, and contrary to the court verdicts, in all matters that have been issued by the Court of First Instance, the court verdict in commercial matters are enforceable immediately due to the urgency of the commercial matters unless otherwise decided by the competent court.

- This is how the Kuwaiti legal system run in terms of distinguishing between the matters that subject to the administrative law and the others that subject to the civil and commercial law.

Under English Law

The definition of the construction contract under the English law has been given very special treatment and consideration for the purpose of the Housing Grants, Construction and Regeneration Act 1996 (HGCR 1996), which precisely provides a limited list of works that can be identified as a construction contract, including those excluded; however, they are not excluded in other legal systems, e.g. the Kuwaiti legal system.

Before the Housing Grants, Construction and Regeneration Act of 1996 came into existence, there had been no specific statutory governing the construction and engineering industry. The rules and principles had been devoted by the court cases' principles, and the standard forms of contracts had been published for relative organizations.

Such description to the construction contract "building contract" was made while discussing some forms of building contracts such as JCT in terms of examining the legitimacy of the provisional payment, prior to the HGCR Act 1996 comes

into exist. This is because there was no specific rules that may govern the construction contract other than the general principles of the law of contract.

As a construction contract may comprise concepts like the sale of goods and work and labour for a lump sum prices, the rules of the supply of goods Act had applied to the provision of commodities and the common law was maintained to apply for work and labour. Therefore, such type of contract does not resemble the order of manufacturing goods as it was described in the case of *Emson Eastern v EME Developments*.[8]

The construction contract was described as a chain of various operations and bargains that are necessary and required to be undertaken by the contractor(s) against a sum of money that has to be paid by the employer.

For example in Keating, which is one of the most renowned and most reputed references in the construction industry, the definition of construction was also extracted from the judicial definition. In the case of *Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd,*[9] Lord Diplock specified a construction contract as 'A building contract is an entire contract for the sale of goods and work and labour for a lump sum price payable by installment as the goods are delivered and the work is done'.

At that time, and to some extent until now, a building contractor is a construction contract that was part of the law of contracts in general, and was not governed by any special codified statute, but only was subject to the general rules of the law of contract and the sale of goods including some special rules and regulations.

Construction Contract under the Act of HGCA 1996

Under the English legal system, the only contract that is subject to the Act of 1996 of HGCA is the "construction contract". Prior to defining the construction

[8] (1991) 55 BLR 114.

[9] [1974] AC 689 (HL).

contract as per the Act of 1996, as a new method of approaching and specifying the construction contract which is subject to rules of the HGCA 1996, it would be worth pointing out diversions to the rules governing the construction contract.

In brief, the reasons that make it so important to identify the construction contract (that is subject to the provisions of the HGCR Act of 1996) can be illustrated by the following:

- Per section (105) of the Act of 1996, the construction contract parties have the right to resolve any disputes arising out of such contracts through an interim and provisional way of resolving a dispute which is called an "Adjudication" (as will be illustrated very broadly later on in Chapter 4).

- Usually in the execution of any contract a party does not have to pay money until the work is completed and a contractor will not be entitled to make any payment until he fulfills his obligations.

But in accordance with the compulsory provisions of section (109) of the Act of 1996, a construction contract has to have a mechanism for stage payments, unless the agreed work will not take more than 45 days; otherwise the Scheme will be applied in order to fill the gaps in this respect.

- Also, construction contract parties are obliged, pursuant to section (110) of the Act of 1996, to provide an adequate mechanism for determining what payments become due and when, including a final date for payment, otherwise the provisions of the Scheme will be applied.

- In accordance with section (111) of the Act of 1996, the owner/employer in the construction contract has no right to withhold any due payment unless he serves a notice within a certain amount of time as agreed in the contract. In the absence of such an agreement the notice period that is specified in the Scheme will be applied, giving details of the amount that is proposed to be withheld and

the justifications for such action. In connection with the adjudication a contractor has the right to argue for the release of such money.

- Prior to the enactment of the Act of 1996, and as is still the case in most of the common law and civil system countries, a contracting party was not allowed to stop his work merely because the other party did not perform his obligations under the contract. However, in certain cases, the former party proceeded to terminate the contract. But under the Act of 1996 section (112) comes a new mechanism that can put pressure on the party acting in bad faith to fulfill his obligations in a timely manner with no chance to delay his performance. This is done by granting a right to either contracting party to suspend his duties/works if the other party has not fulfilled his obligations provided that the former party serves notification at least seven (7) days before the proposed time for such suspension. However, as the right to suspend work is an exception to the general rule, such right will cease as soon as the disputed amount is fully paid.

Therefore, and in order to be considered as a construction contract, the contract itself has to consist of or at least relate to, in certain cases, a "construction operation".

Subsection 104(1) of the Act defines the "construction contract" as a contract that has been made with a person, either an individual or a body corporate, to carry out, arranging to carry out or supplying labour for the carrying out of a construction operation.

Subsection 104(2) goes further to add another work that has been agreed to be done for the purpose of construction operations, such as an architectural work, design, surveying, engineering, interior or exterior decoration, laying-out of landscape or even giving advice on construction operations.

All the above mentioned type of works would be counted as a construction contract and will be subject to Part II of the HGCR Act 1996 which applies the

adjudication to disputes that may arise out of these contracts provided that these contracts are related to the construction operations as is defined in Section 105 of the Act 1996.

Therefore, the scope of work of any construction contract must be figured out to assure that it falls within the definition of construction operations as the latter is defined by section 105 of the Act of 1996.

Subsection 105(1) of the Act of 1996 defines in considerable detail the term "construction operations" for which the provisions of the Act apply.

It was noted by some authors and observers that the basis of the definition of "construction operations" has been taken from section 567 of the Income and Corporation Taxes Act of 1988 with a slight change.[10]

As per section 105(1) all the construction and engineering works that are required for building or forming a structure which is going to be part of land permanently or even temporarily will be counted as construction operations.

In addition to the latter works, there are also many other works which would be considered as "construction operations" if they are required for the purpose of such works.

This is formed to include maintenance, painting or decorating internally or externally, building cleaning, designing or even giving advice or project management would be included in the definition of "construction operations". Also included are a number of civil engineering works[11] and mechanical and electrical works.[12]

Furthermore, in the case of *Palmers Ltd v ABB Power Construction Ltd,*[13] Thornton J also considers that the work of fabrication or erection of a plant before

[10] Richard Wilmot-Smith*, Construction Contracts Law and Practice* (2nd edn, OUP 2010) 450.
[11] Housing Grants, Construction and Regeneration Act 1996 (HGCR 1996), s 105(1)(b).
[12] HGCR 1996, s 105(1)(C).
[13] [1999] BLR 426.

it is shifted to a final position on the site would be included in the construction operations.

On the other hand, in sub-section 105(2) the Act excludes certain operations from the definition of "construction operations" due to its special nature that requires other special rules and regulations, such as:

a) Drilling for, or extraction of, oil or natural gas;

b) Extraction of minerals or tunneling; and

c) Assembly, installation or demolition of plant or machinery on a site where the primary activity is nuclear processing, power generation or water or effluent treatment; or, the production or processing of chemicals, pharmaceuticals, oil, gas, steel or food and drink.[14]

Equality and Freedom of Contract

In old societies and especially under Islamic law, which was set by Prophet Mohamed (PBUH) as a messenger from Allah fourteen centuries ago, and also under the English law since the nineteenth century and under the Kuwaiti law in its new modern laws, the parties are free to enter into a contract with full authorization to introduce qualifications and exceptions to the other contracting party's liabilities or responsibilities. If the parties have done so, then the contacting parties will be subject to such agreement.

The contracting parties are equal and free to form any non-prohibited agreement and also are free to choose with whom to contract, as Sir G. Jessel M.R said in the case of *Printing and Numerical Registering Co v Sampson*[15] that 'Men of full age and competent understanding shall have the utmost liberty of contracting and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice'.

[14] HGCR 1996, Sub-s 105(2).
[15] (1874-75) LR 19 Eq 462.

This doctrine has been reflected under the Kuwaiti Civil law Code while it insists that a contract is the law of the contracting parties and neither party thereto may separately rescind it or amend its stipulations except to the extent of the limits allowed by the agreement or where the law provides otherwise.[16]

These principles are concerned with the extent of protection of the equality of the parties and the economic interests of the community.[17] However, in certain bargains linked with public utilities, the party that desires the services is not in a position to negotiate terms but is forced to "take it or leave it". Such deals are still counted as agreements despite the lack of freedom of one party. These agreements are known in our civil law systems as a "contract of adhesion". In essence, this is one of the major concerns that have led the legislators to introduce an interventions statute to protect the weaker party. As a result, some new statutes have been enacted in this regard as well as protecting the economic interests of the community in general as they are affected by social and commercial transactions.[18]

Privity of Contract

Under civil law, the principle of privity in broad means that the contract only produces its effects towards its parties once the contract properly raised and constituted. The parties to a contract, other than any parties, are the sole obligated parties to perform the contract and the sole obligated parties to discharge whatever obligations contained under a contract. Where the parties are the sole obligated to perform the contract, this is the privity of contract with respect to persons and it is termed as the Subjective Privity of Contract; and where the parties are the sole obligated to discharge whatever obligations contained under a contract, this is the privity with respect to the object in the contract and it is termed as the Objective Privity of Contract.

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[16] Article 196 of the Kuwaiti Civil Law Code No 67/1980.
[17] *Chitty on Contract* (31st edn, Sweet & Maxwell 2012) vol 1, 21-23.
[18] See for example the Misrepresentation Act 1967 and Unfair Contract Terms Act 1977.

Under English law, privity of contract is a fundamental principle where rights and obligations created by a contract were only enforceable by and against the parties to that contract. The principle though evolved in the middle of the 19th century and continued to apply up to nowadays was not saved from comment and subjected to heavy criticism. That heavy criticism resulted in an act issued in the 20th century which substantially overturned the principle (Act 1999). Under Section 1 of the Act it provides that, in respect of contracts made after 11 May 2000, a third party may enforce a term of the contract if either:

- the contract expressly states that the third party may enforce the term in question; or

- the term 'purports to confer a benefit on him' and the contract does not make clear that the parties did not intend the third party to have a legal right to enforce it.

Therefore, a third party is not entitled to enforce a contract term unless he or she is expressly identified in the contract; identification can be by name, by description or by reference to a class to which the third party belongs. Moreover, enforcement by the third party is subject to all other relevant terms of the contract in question.

Back to the principle under the civil law, the binding force of a contract therefore has a privity in the two aspects mentioned above, and we will illustrate both aspects somehow in some details as follows:

Subjective Privity of Contract

In general, a contract only affects the parties thereto entered, and this effect does not exceed them to a third party unless otherwise expressly stipulated for the benefit of the designated third party. In this context we will deal with two aspects: first the effect of contract on its parties and second the effect of contract on third party.

Effect of Contract on its Parties

When we explain that the principle of privity only produces the effects of the contract towards its parties, it is worthy clarifying what the contracting parties mean since the contracting parties are not only limited to these very parties. The word "contracting parties" meaning comprises not only these parties themselves but also the persons representing them under the contract or what is termed by as the successors under the civil law concepts. In this sense, the Court of Cassation in Egypt held that, 'the contract is only binding and produces its effects towards its parties and their universal successors whether it was formal, informal or registered'.[19]

The successors are either universal successors or particular successors, and principally the contract affects the universal successors but the effect may also extends to the particular successors. It would be of necessity under such chapter to illustrate and explain in brief who those universal successors and particular successors are. Universal successors are those who succeed a person for his or her entire financial patrimony as to the rights and obligations, or in a part thereof such as the heirs and the devisees for a part of the heritage while particular successors are those who succeed a person for an identified real estate or a right in rem thereon such as the buyer who succeeds the seller in terms of a sold thing, and a devisee for a real estate in a heritage who succeeds a de-cujus, and a usufructuary who succeeds an owner in a right to usufruct. As the successors under a contract, being universal or particular, are not counted of the third party the effects of the contract pass to them as it will follow below.

Universal Successors

Under Kuwaiti civil law article 201 paragraph (1) provides that 'the effects of the contract shall pass to the contracting parties and to the universal successors without prejudice to the law of inheritance'.

[19] Civil challenge of 21 Feb. 1977 Judicial Year 28 No. 94 page 491.

Also, article 145 of the Egyptian civil law provides that, 'the effect of the contract shall pass to the contracting parties and to the universal successors without prejudice to the rules pertaining to inheritance unless the contract or the nature of transaction or the provisions of law otherwise state that such effect does not pass to the universal successor'.

Contemplation of the aforementioned civil law articles reveals that the effect of the contract passes to the universal successors and this means that the rights generated by the contract pass to the heir after the death of the contracting de cujus. As for the obligations against the estate, the principles of Shari'aa provide that no estate passes to heirs before settling the debts.

As a result of passing the effect of the contract to the universal successor, the successor becomes entitled to all what was entitled by its predecessor. The Court of Appeal in Assiut, Egypt assured this notion when it held that,'the heir is a universal successor to the de cujus and shall not be deemed a third party in terms of the contract that is entered into by the de cujus'.[20]

Exceptions on Contract Effect Passage to Universal Successor

The general principle as has been already explained is the passage of contract effects to the universal successor. Since, as known, every rule has exception the foregoing principle has its exceptions as well. The universal successor being and still in such capacity may not be passed the effects of the contract. Articles 201 & 202 of the Kuwaiti civil law brought three exceptional cases in this sense:

- where the contracting parties agreed not to pass the effects of their contract to the universal successor. This applies since the contract is the law of

[20] Appeal judgment dated 5 March 1961, Official collection Year 60 No. 7 Page 53.

contracting parties and if so stipulated it becomes valid so long as it does not contradict or conflict with the public order and morals.

- where the nature of the right or obligation arising under of the contract is impassable from the contracting party to its universal successor. The impassability might be substantial or legal e.g. if a person is entitled to the usufruct right by virtue of a contract, such right shall not be passable to his or her heirs when deceased because the legal nature of the usufruct right is bound to its enjoyer i.e. the contracting party and pass away by the death of him or her.

- where there is a provision in the law provides that effects of the contract shall not pass to the universal successor e.g. article 27 of the Kuwaiti Company Law which provides that a partnership is deemed terminated when one of the partners deceased, article 612 of the civil code which provides that the tenancy contract is deemed terminated by the death of the tenant if the reason of entering into the contract was based on the tenant's profession or any other considerations relate to him or her as a person.

Under the three exceptions shown above, despite the contract effects shall not pass to the universal successor he or she would maintain the capacity as a universal successor.

Impassability of Contract Effects to Universal Successor being a Third Party

There are cases where a universal successor is deemed to be in a capacity of a third party. One of such cases is imposed by the law i.e. the law directly entitles a heir some rights which are not vested in to him or her by inheritance by his or her de cujus in the purpose of protecting the heir against the potential imprudent behavior of his de cujus. Under such cases the heir is deemed to be a third party in terms of this behavior. The law gives the de cujus the right to dispose of the entire of his or her monies and property during his or her life either by selling or donation even if such disposition negatively affected the heirs. Nevertheless, the

case is different if the de cujus disposed of all of his or her monies or property as a will for a beneficiary after his or her death. This behavior though being a right for the de cujus, endangers a perspective right for the heirs which is in controversy with the public order and consequently deemed void in case his or her disposal exceeds one third (1/3) of the monies or property. The disposal shall be also void in entirety if it is excercised during the illness of death and it is meant to be a donation.[21]

The Particular Successors

Article 202(1) of the Kuwaiti civil law states that, "where the contract establishes obligations and rights in personum related to a thing passed thereafter to a particular successor, these obligations and rights shall pass to this successor concurrently with the thing if they are a pre-requisite thereto, and the successor is aware thereof at the time the thing is passed".

The above provisions were a mere confirmation to the applications adopted by French and Kuwaiti judicature in this aspect. The French jurisprudence is approximately in common consensus that a particular successor shall not be passed the obligations related to the property inherited unless a law rule so provides or the successor expressly or impliedly accepts passing the obligation thereto.

At any rate, what is important under this part is that the effect passing to a particular successor is different from that passing to a universal successor. We've already defined and have shown who the particular successors are, and now we shall deal with the effects of contract and when these effects pass to the particular successors.

Passing of Contract Effects to Particular Successor

[21] Article 224 of the Kuwaiti Family Law 51/1984.

Kuwaiti civil law code has set a criterion that indicates when the effect of a contract shall pass to a particular successor when provided under Article 202 that they shall pass if they are pre-requisite thereto. As we mentioned earlier, this criterion is a translation of what the judicature in Kuwait and in France adopted under the court judgments even before the issuance of the new Kuwaiti civil law code. The rights are deemed a pre-requisite of a thing if they are complementary thereto as well as the obligations, they also deemed a pre-requisite of a thing if they are definitive thereto. Therefore complementary rights to a thing are in a matter of fact a follower to this thing. For the obligations, if they specify a thing they should pass with also therewith for a predecessor cannot pass to a successor more than he or she owns thus, the rights completing a thing and the obligations thereof specifying are a pre-requisite for a thing and pass therewith to the particular successor.

Applications of the Rights Passable to Particular Successor

- The rights in rem set for the benefit of a thing. If a contracting party established by virtue of a contract a corporal right for the property then the particular successor to whom the property was passed receives it with such right.

- The right which secures a thing whether in rem or in personum and because security is completing and enhancing the thing, then if a creditor assigned his or her right to the assignee, the right altogether with its securities passes to the assignee.

- The rights in personum the purpose of which protecting the thing e.g. a house insured against fire, if it is sold then the insurance passes with the house to the buyer.

Applications of the Obligations Specifies a Thing

- The obligation which restricts the usage of a thing. If the contracting party is originally obligated to use a thing for a specified usage the very obligation passes to the particular successor.

- The right of servitude which is notarized by virtue of law stipulations, therefore if a contracting party established a right of servitude as per a contract on a real estate then such real estate passes to the particular successor accompanied by the servitude.

Privity of Contract towards Third Party

We mentioned that the rule is that the successor be not of the third party. In certain cases a successor whether universal or particular becomes of the third party and consequently the effects of a contract normally do not pass thereto or exceptionally passes thereto on basis of a will.

As for the third party who is not a party to a contract and not a successor of both parties to a contract, the effects of a contract do not pass thereto so long as he or she is outside the contracting circle. Nevertheless and for considerations of justice and business tranquillity the effects of a contract may be passed to the third party. Justice may rule that a third party is entitled to initiate the (direct action) which is originally the action of one of the contract parties versus the other under a contract whom this third party of course is not a party thereto. The foregoing proposition shall not be real unless it is specially provided under the law. Here comes Article 662 of the Egyptian civil law code to provide that' Sub-contractors and labourers work for a contractor each has the right to directly claim on owner in no excess than the amounts credited to the Contractor in time of bringing the law suit'.

Under Kuwaiti law, Article 682 of the civil law provided that 'A sub-contractor as well as workers who are employed by the original contractor to execute the work, may claim directly from the employer that which accrues to them from the

contractor to the extent of that which is due to the latter from the employer at the time of commencing proceedings'.

Another image for the third party in a construction contract where a sub-contractor is a party to a contract with a contractor and the latter does not fulfill its obligations towards it, the sub-contractor can recourse directly to the employer whom no direct contractual relationship bind them e.g. in terms of accrued consideration owed by the contractor, in this example the sub-contractor is vested in the right by virtue of law to go directly and sue the employer for any dues accrued (Article 682 Kuwaiti civil and Article 662 Egypt civil cited supra).

Privity of Arbitration Agreement

We hereunder shall deal with a sort of absolute privity where the binding effect of an agreement would not be passable to successors or a third party but only bind the parties to this arbitration agreement. When parties agree to arbitrate their disputes, they give up the right to have those disputes decided by a nation court. Instead, they agree that their disputes will be resolved privately, outside of any court system. The arbitration agreement thus constitutes the relinquishment of an important right- to have the dispute resolved judicially – and creates other rights which may not be acceptable by any other parties. The rights it creates are the rights to establish the process for resolving the dispute. In their arbitration agreement, the parties can select the rules that will govern the procedure, the law governing the arbitration, and frequently, the arbitrators, whom the parties may choose because of their particular expertise in the subject matter of the parties' dispute. The parties' arbitration agreement gives the arbitrators the power to decide dispute, and defines the scope of that power. In essence, the parties create their own private system of justice.

The parties' arbitration agreement is frequently contained in a clause that is embedded in the parties' commercial contract. The agreement to arbitrate is thus entered into before any dispute had arisen, and is intended to provide a method of resolution in the event that a dispute will arise. However, if there is no arbitration

clause in the parties' contract, and a dispute arises, at that time the parties' can nonetheless enter into an agreement to arbitrate, if both sides agree. Such an agreement is generally referred to as a submission agreement. However, submission agreements are much less the parties' often cannot agree on anything. For that reason, it is generally better for the parties to agree to arbitrate at the beginning of the relationship, when they are still on good terms.

Even though the arbitration clause is most often contained within the contract between the parties, under most laws and rules it is nonetheless considered a separate agreement. It thus may continue to be valid, even if the main commercial contract where the arbitration agreement is found may be potentially invalid. In most jurisdictions, this doctrine of separability permits the arbitrators to hear and decide the dispute even if one side claims, for example, that the contract is terminated, or never existed in the first place, or is invalid because it was fraudulently induced. Such claims would not deprive the arbitrators of jurisdiction because they pertain to the main contract and not specifically to the arbitration clause, because the arbitration clause is considered a separate and distinct agreement, it is not impacted by claims of invalidity of the main contract, and still confers jurisdiction on the arbitrators to decide the dispute. The separability is adopted in many arbitration laws and rules.

In light of the important rights that are relinquished when the parties agree to arbitrate, the question of the arbitration agreement's validity is critical. Arbitration is a creature of consent, and that consent should be freely, knowingly, and competently given. Therefore, to establish that parties that actually consented, many national laws, as well as the New York Convention, required that arbitration agreement be in writing. In addition, the Convention required that in some circumstances, the written agreement be signed by both parties.

The issue of whether the agreement was in writing, signed, and therefore valid, is likely to arise when one party seeks to renege on its agreement to arbitrate. Although the party may have agreed to arbitrate, after a dispute arises it may

decide that it would rather go to court, and will therefore commence litigation. In addition, the issue of the arbitration agreement's applicability to specific parties may arise when one party asserts that it never signed the agreement, or when non-signatory tries to enforce the agreement against a signatory. In these situations, the privity of the arbitration agreement appears.

Article II of the New York Convention provides that Contracting States must recognize arbitration agreements in writing. If the local court is seized of a matter that is in fact the subject matter of a binding arbitration agreement, the court must stay the proceeding and refer the parties to arbitration. This is an image where even the court respects the privity principle as to the parties consent to arbitrate not litigate.

Although the privity of arbitration agreement is absolute as we mentioned supra, and although there is a trend today toward finding an arbitration agreement enforceable even if not all formalities are strictly met, courts still have justifiable concerns about requiring a party to arbitrate if it appears that the party did not agree to do so. The question of whether a party signed a contract containing an arbitration clause can raise issue of intent as well as formal contract validity. Moreover, in some instances, the privity question may arise about a third party who did not sign a contract that was valid between at least two other parties. In this case, validity of the contract in not an issue; rather the question is whether a non-signatory can compel arbitration with signatory.

Because consent to arbitration is fundamental, courts have asserted that 'arbitration agreements apply to nonsignatories only in rare circumstances'. Increasingly, however, there appears to be a trend among tribunals and courts to extend the obligation to arbitration to nonsignatories. The issue arises in many different contexts. Frequently, there is an attempt to bind a parent company of a subsidiary that is a signatory, or a manufacturer.

With respect to s. 8 of the Contracts (Rights of Third Parties) Act 1999, the contracting parties may confer to non-signatory party a right to compel arbitration provision stipulated in their contract.

S. 8 states:

1) where-

a) a right under section 1 to enforce a term ("the substantive term") is subject to a term providing for the submission of disputes to arbitration ("the arbitration agreement"), and

b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996,

the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.

2) where-

a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration ("the arbitration agreement").

b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, and

c) the third party does not fall to be treated under section 1 as a party to arbitration agreement,

the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to

which the right is exercised, and be treated as having been so immediately before the exercise of the right.

Once the contracting parties did so and confer a certain right to a third party and this received by the third party, then they may not be allowed to rescind or change this provision without the third party consent.

This is, in fact, on contrary to the general principles of the doctrine of privity of contract.

In the case of *Nisshin Shipping Co Ltd v Cleaves and Co Ltd,*[22] an agent of the ship-owners did negotiate on behalf of the ship-owner with a charter parties for a certain commission to be paid by the ship-owner (principal). The agreement that then held between the ship-owners and the charter parties which referred to such commission has an arbitration agreement.

A dispute regarding the commission had been arisen between the ship-owner and its agent who is a non-signatory party to the chartering parties. The agent referred the dispute to arbitration in accordance to the arbitration provision in the chartering parties although he was not involved as a party to these agreements.

The ship-owners resisted such action on the basis of the privity of contract doctrine. The court rejected this contention and accepted the arbitration proceedings taken by the agent on the grounds that the contract must precisely show that the parties do not intend to confer the benefit under their contract to any third party or expressly exclude the application of the provision of the Act 1999.

This is an exception to the rules of the privity of contract related to the arbitration process which to be considered and figure out carefully by the competent court/tribunal unless the parties clearly defined their intention.

[22] [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38.

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CHAPTER TWO

Formation of Construction Contract

In general, every construction contract is governed by the general law of contracts. Nevertheless, both in Kuwaiti law and English law there are special and particular rules and regulations that only apply to construction contracts. Due to the complications which are required to set the law, either statutorily or judicially, such special rules in addition to the general rules are required for the law of contracts. This means that special rules of the construction contract will be applied first, and then in the absence of such rules, the general rules of the law of the contract will by default be applied. Or in other terms, the priority will be given to these particular rules in case of any contradiction between them. This principle was more or less adopted in the common law systems, as explained by Holmes in the Nineteenth century when he talked about the law of the sale of goods and the law of contracts:

'The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depends very much upon its past'.[23]

As a general principle of formation, a binding and enforceable contract has to be by an exchange of mutual intention and agreeing to create legal obligations and rights between the parties themselves.

So, the essential elements in a legal binding and enforceable agreement pursuant to the civil law legal system, in general and with Kuwaiti law in particular definitely is not different from what exists in a common law system - in general and in English law in particular. This issue will be elaborated in this chapter. In

[23] Oliver Wendell Holmes Jr, *The Common Law* (Dover Publications, 1991)1-2.

essence, there will be a difference in terminology only in terms of the same concepts and rules.

CONSENT TO CONTRACT

Consent to contract in plain language is an agreement of the parties to express their intention to bind and oblige themselves with certain matter(s) that maybe reflected in doing or performing work; paying a sum of money; supplying materials; delivering a property; etc.

This consent can be shown in any way that expresses the intention of parties, whether it is done by writing, orally or even by gesture in some small bargains, such as by a newspaper or something from the newsagent.[24]

The way to form a construction contract is no different from forming any other contract since the same elements and basics of formation are required to exist. The construction contract is formed by mutual exchange of intentions between two (or more) parties with the intention of creating legal obligations and rights between themselves.

As a result, the contractual liability is raised when one party fails to perform, or did not perform properly in an undertaking or promise.

Such intentions that were exchanged between parties are categorized into two steps: the first step is an offer made by one party, and the second step is an acceptance to the offer made by the other one.

Offer

Under the Kuwaiti law, as well as the common law, whatever expression is made first is counted as an offer - and the person who issues it as an offerer - is called as an offeree, while the second expression is considered an acceptance.

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[24] Abdel Razzaq Al Sanhoury, *Al Waset in Alqanon Almadani:Civil law* (Monshaat Almaarif 2004) vol I, 146. Article (34) of the Kuwaiti Civil Code No 67/1980.

Examining the expression of the offeree is a matter of fact and subject to the court judgment, both in the Kuwaiti legal system and in the English legal system. If there is any doubt or dispute regarding the certainty of the offer, then when the case comes to his custody the judge will have full authority to figure out the facts and conditions surrounding the case and will decide on it.[25] For example, under the English law, in the case of *Spencer v Harding,*[26] the court held that the invitation tender was only a circular to negotiate for the sale of goods and did not amount to an offer.

The offer, in essence, is a clear and absolute promise that is expressed from one party to be legally binding on specific terms and conditions.

Treitel counts that an offer is *'An expression of willingness to contract on certain terms, made with intention that it shall become binding as soon as it is accepted by the person to whom it is addressed'*.[27]

As a result the words that are used in the language of expressing the offer ought to be strong and clear, reflecting that a party who issues the offer is committed to what he offered.

Generally the offer does not come into effect until it reaches the offeree. But the question that is usually raised is how to define "reaches", and how to identify the time that the offer, acceptance or even the revocation has been communicated to the opposite party.

Under the English law, the definition of "reaches" depends upon the means of communications. And to specify the point that the expression from one party (either it is an offer, acceptance, or revocation) has already reached the other, requires a difference between postal communications and instantaneous

[25] All the cases that have dealt with offer and acceptance both in Kuwait and UK give a power to the court to evaluate the existence of offer and acceptance.
[26] [1869-70] LR 5 CP 561.
[27] *Treitel on The Law of Contract,* (13th edn Sweet & Maxwell, 2011) 8.

communications (e.g. contacting by face to face negotiations, telephone or telex messages).

During the recent decades, the ways of communication have rapidly developed. Since the middle of the last century the use of telex has been greatly scaled-up, and the argument regarding the formation of contract by telex has been raised and discussed by the British courts. In the case of *Brinkibon Ltd v Stahag Stahl,*[28] Lord Wilberforce remarked that due to the absence of the universal rules that can cover all the concerns that could be raised regarding the exchange of the telex between dealers, any contention must be resolved based upon the parties' intentions in the light of the business practice, or in some cases, by a judgment where the risks should be allocated. However, the method suggested by Lord Wilberforce has been rejected by the House of Lords, and the rules of *Entores Ltd v Miles Far East Corpn*[29] were applied.

This is a general rule for forming a contract, including a construction contract. But what distinguishes a formation of construction contract is a competitive tendering process. In recent decades, competitive tendering became very common in the construction field and is preferred in most procurement regulations, either nationally or internationally, as a best mechanism for awarding a construction contract at a lowest price. So, in terms of forming a construction contract in the tendering process, the question may be raised as to whether the tendering process could be discerned as an offer to the tenderers.

Tendering process under the Kuwaiti Law

The philosophy of the tendering process is slightly different under the Kuwaiti legal system, being a civil law system from the English law.

In general any negotiation or an invitation to negotiate between the employer and the contractor does not constitute any obligation to end up with an agreement, and

[28] [1983] 2 AC 34 (HL).
[29] [1955] 2 QB 327.

contracts do not automatically spring into existence upon the making of tender. Both parties are free to negotiate and are not liable to break down, or to cut off the negotiation at any stage without reaching an agreement. However, the only exception to this principle in the Kuwaiti law which requires the parties to negotiate in good faith is, when the employer requests a specified bidder, or bidders submit their bid that the costs are due to the work done by him, such as studies, drawings, measurements etc. In this case the parties should negotiate the bargain in good faith, and any failure to reach an agreement because of bad faith or negligent conduct of either one will make him liable to compensate the opponent for the loss and damage that he caused. This doctrine finds its basis in the general principle of the Kuwaiti law of Tort, where the party who suffered from the loss or damage due to the negligence of the other party's conduct will bear the responsibility to prove all the elements forming the paradigm of tort, such as the fault (bad faith) and the damage and the causation.[30]

Nevertheless, under Kuwaiti law, during the negotiation stage each party must be cautious about his/her words and language as it may constitute a certain level of obligations. Such activities may be taken as evidence that give the court an exceptional authority either to complete the contract or at least interpret the contract.[31]

Hence, as the tendering process is the most common way to form a construction contract, it is pivotal to consider such stage carefully since it may have an impact on the agreement as whole and the dispute resolution provision in particular.

Kuwait Oil Company tendering process

Kuwait Oil Company (KOC) is very cautious about its contracts and strictly does not enter into any agreement before it has had all required internal or external approvals in accordance with its rules and regulations. KOC usually, during the

[30] Mohamed Labeeb Shanab, (*Okod Almoqawalah) Construction Contract* (2nd edition Monshaat Almaarif, 2004) 87-93.
[31] Egyptian Supreme Court case 21/18, June 9 1949.

negotiation phase, insists that such negotiation should not constitute any binding agreement or obligation to enter into any contract and expressly states such steps are merely a negotiation and are under no circumstances considered as an offer.

For example, such a cautious approach is reflected in section (9) of KOC's Policies and Regulations for Contracts which governs the letter of intent. In this regards, KOC clearly narrows the usage of letter of intent to a very limited situation. The letter of intent can only be issued in the case where it is imperative that mobilization for works or services commences immediately. It is strictly required to submit justifications of why the contract cannot be immediately finalized, as well as why commencement of works and services cannot be delayed pending signature of the contract. A prior approval of Chairmen of KOC and other concerned departments are obligatorily required.

Pursuant to the Kuwaiti Law of General Tenders No. 37/1964, any state department, authority or oil Company[32] shall not have any procurement or construction agreement except by way of public tender through the Central Tenders Committee (CTC).

In general, and to ensure fairness, real competition and equality, the main principle that governs the tender process under the Kuwaiti law is called the "Mechanism of Tender", which means that the CTC should award the tender to the lowest price tender submitted in conformity with the invitation.

In essence, although that the law CTC 37/1964 is an old law issued about 50 years ago, it is absolutely of the benefit of the clients, and its financiers as their main objective and goal of having an optimum combination of good quality services in a low cost as a value for public money.[33]

[32] Resolution No.5/1979 of Petroleum Supreme Council.
[33] John N Connaughton and Stuart D Green, *Value Management in Construction: A Client's Guide* (London: CIRIA, 1996) at 18.

Kuwait Oil Company (KOC) will be a case study in this regards as it is totally owned by the state and subject to the Law of 37/1964 as a general rule in addition to its particular rules.

KOC is a closed public limited company that is subsidized and totally owned by the state as the Kuwait Petroleum Corporation (KPC), a state department headed by the Oil Minister, and owns all its shares. KPC also carries out the role of the general meeting in accordance with its law[34] and the Kuwaiti Company law; however, the role of the extraordinary general meeting was given to the Supreme Petroleum Council which is chaired by the Prime Ministers.

KOC has highly developed rules and regulations governing the process of tendering, handling and administration of contracts, which is named KOC Policies and Regulations for Contracts[35] and which have been prepared in conformity with Public Tender Law No. 37/1964, Resolution No. 5/1979 of the Council of Ministers (Supreme Council for Petroleum), and amended by Resolution No. 1/2005.

The Kuwait Oil Company (KOC) divides its contracts into various categories. These categories are based on the price and nature of the required work. It is split into contracts that have to be issued, received and awarded by the Central Tenders Committee, where its estimated value would exceed 5,000,000 Kuwaiti Dinars (K.D.), and the other contracts can only proceed within the company (KOC) and its subsidiary KPC. This is because it is required in certain cases due to the value of the contract, i.e. it does not exceed 5,000,000 K.D, or, seeks special services or works such as those related to drilling, production operations or medical equipment, etc. The latter type of contracts can be formed and proceed via a normal negotiation in case of "direct contracting" or negotiable in competitive terms and bid prices (Mumarasa), or non-negotiable competitive terms and bid prices. This is contrary to the former type of contracts which must be formed via

[34] The Decree Law of Establishing of the Kuwait Petroleum Corporation No 6 /1980.
[35] The latest version, 4th edition, was published in 2006.

the CTC, and which usually proceed in a way of normal competitive terms, and bid prices are not negotiable.

The tender process for KOC's projects involve a request for a proposal to the involved bidders, and a pre-tender meeting must be held for every request for a proposal, unless otherwise agreed in writing between the contracts team and the concerned department[36] . The pre-tender meeting includes a site visit that will acquaint the bidders with the project. All questions and queries raised by the bidders pursuing clarification of the scope of work, or highlighting areas of ambiguity or risks, would be answered and clarified by the KOC. A supplementary letter involves any change to the scope of work or technical specification that will be distributed to the bidders in a sufficient time, and will be considered as a part of the tender documents.

In essence, in lump sum turnkey projects, although KOC prepares the front end engineering design (FEED) that comprises all the technical documentation and information provided to the bidders prior to the date of bid, it the responsibility of the bidders to verify and scope the FEED and to base their bids on it.[37] However, after the tender stage and during the contract stage, if the contractor identifies any technical inaccuracy in FEED, then he is required to notify KOC immediately (within 7 days) with details and alternative proposals; if accepted by KOC, the resultant changes are treated as variation[38]. Also, with respect to the site information and data, the contractor is required, within (120) days of the date for commencement or within (120) days after receipt of further data, to use its best endeavor to verify the accuracy and sufficiency of such data and to notify KOC with any inaccuracy, discrepancies or errors. Such notification will be subject to

[36] Section 7 of the KOC's Policies and Regulations for Contracts.
[37] Clause 3.4 of KOC's General Conditions of Contract for Lump Sum Turnkey Projects.
[38] Clause 2.2 of KOC's General Conditions of Contract for Lump Sum Turnkey Projects.

the negotiation and discussion between KOC and the contractor and any required amendments to the contract will be handled as a variation.

This is, to some extent, similar to clause 5.1 of FIDIC (Silver Book), Conditions of Contract for EPC and Turnkey Projects, which says:

"The Contractor shall be deemed to have scrutinized, prior to the Base Date, the Employer's Requirements (including design criteria and calculations, if any). The Employer shall not be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements as originally included in the Contract and shall not be deemed to have given any representation of accuracy or completeness of any data or information, except as stated below…"

Nevertheless, and as an exemption from the principle of non-negotiable, the Kuwaiti Court of Cassation[39] confirmed that the Central Tenders Committee shall award the tender to the bidder who submitted the lowest lump sum price; if his tender meets with the pre-requisites of the tender documents, nevertheless, the court is also compelled by all government departments to negotiate with the lowest bidder regarding his reservations or conditions on the tender. If there are any, before it proceeds to the second lowest bidder - and if the government department did not do so - it would be considered as a breach of the rules of protection of the public interest. KOC by default is subject to such a principle.

Generally, the Commercial Group is the only body that represents KOC in any negotiation with the bidders. In some special services or works an ad hoc team will be formed to represent KOC in such a negotiation.

Furthermore, and other than the request for a proposal, section 25 of KOC's Policies and Regulations for Contracts allows KOC to issue an invitation for the proposal (IFP) to either a single source or selected companies to assess the technical feasibility and the estimated cost based upon the information contained in the document. Such an invitation is issued to enable KOC to determine whether

[39] Kuwaiti Court of Cassation judgment No. 81/1992commercial, session 28/2/1993.

or not it is reasonable to proceed with a project when the nature of the work is different from KOC's usual work. KOC must state in such an invitation that it is not a request for offers to perform work or services and neither KOC nor the invited companies will be bound to enter into a contract.

With respect to KOC's projects that are approached via CTC, the following issues must be taken into consideration.

There is no exemption from this principle except to the three cases that are specifically mentioned in Articles (43) and (44) of Law of 37/1964 as follows:

- The CTC would award the tender to the second lowest bidder if it found that the first lowest bidder has reduced his tender to an unreasonable price which may cause a very strong doubt about the bidder's assurance or capability to perform the tender in a proper way.

- Only to the supplying of commodities tender, the CTC shall give the priority when awarding such tenders to the lowest tender, which is supplying local products and complies with document requirements - provided that the price should not exceed other than the lowest tender of similar products from abroad by 10% (ten percent).

These two cases fall within the authority of the CTC and are subject to reconsideration and scrutinization by the competent court which means that the CTC decision must prove that it is eligible and is in conformity with the rules of the Law 37/1964. Otherwise, the lowest bidder who lost the tender will have the right to be compensated for all the damages and losses, and even the economic losses he incurred.[40]

The third case which needs special treatment is as follows:

- In the case that the CTC believes that strong justifications are available for preferring a bidder who submitted a high price without falling into the previous

[40] Kuwaiti Court of Cassation decision no 225/2002 Administrative.

two exemptions, they shall refer this matter to the Council of Ministers for a decision in connection therewith.

The Council of Ministers shall not be obliged to accept the lowest price tender nor the technical recommendations without having to produce any reasons for its decision.

This is a very critical and complicated issue that has been discussed and examined by the Kuwaiti case law. In fact, there are no cases for dealing directly with the power or authority of the Council of Ministers. When failing to reason its decision in the case of rejection of the lowest price offer, however, neither the government department nor the CTC is authorized to do the same without any reasonable justifications. So, the Court of Cassation[41] states that pursuant to the general principles of the mechanism of the tender the government department is obliged to accept the lowest tender whose offer meets the entire tender requirements on the basis that the rules of the public tenders are not optional rules that can be taken or left by the government department. It is a strict rule that has been enacted for both public and individual interests to ensure fair competition, and to maintain the public funds with good services and projects.

In this case the Court of Cassation concluded that although the court, while it weighs the legitimacy of the government department resolution, is limited with legality of such a resolution, it has the authority to examine and look into the facts that lead the government department to reach its resolution.

However, in another case[42] the court of cassation considered that the Cabinet or Council of Ministers' approval to the CTC decision of dismissing the lowest tender is a way to legitimate it, and cannot be overturned by the court, even though it was not a reasoning decision.

[41] ibid.
[42] Kuwaiti Court of Cassation decision no 152/1996 Commercial.

Nevertheless, in practice, for some major turnkey projects for the Kuwaiti state companies, and with the objective of enhancing participation and achieving competitive bidding, it started to have the initiative to compensate the bidders (usually short-listed or selected companies) for their cost for estimation of the bids. This is usually a fixed sum of money offered voluntarily by the employer in the invitation for bidding. This step by the state companies expresses its absolute good faith and leads the bidders to come up with a genuine bid, as the bidder will be confident about the seriousness of the employer, and they will not at least lose any cost during the negotiation or bidding period. In accordance with section 11(b) of the KOC's Policies and Regulations for Contracts, in certain cases, bidders may be reimbursed for their incurred considerable cost in preparing their bid submission. Prior approval for such reimbursement must be taken internally, in accordance with the KOC's financial delegation authority with all bases and justifications. Furthermore, the following provisions must be incorporated in the tender document before closing the bid:

- Necessary provisions covering criteria for selection, number and ranking of entitled unsuccessful bidders.

- Reimbursement of bidding costs to entitled unsuccessful bidders shall be effected only after contract signature with successful bidder.

- In the event of tender cancellation, bidding fees will be reimbursed to the lowest bidder in addition to the other unsuccessful bidders subject to the meeting criteria for selection specified in the tender.

Tendering Process under the English Law

However, slightly contrary to the above approach, under the English legal system it is very complicated to say that the public departments have full authority to reject the lowest bidder without any liabilities.

As per the English court cases, an implied contract would arise between the bidders whose bids conform to the bid requirements and conditions, and are at least considered if others are.

In English law there are two sorts of rules and regulations that govern a tender process, either for the private or public sector. In fact, there are some constraints applied to the public sector/public procurement - more than those applied to the private sector - as will be illustrated below.

The England and Northern Ireland, as well as some common law countries such as New Zealand and Canada, set and adopt some principles that have to be taken into consideration, as well as to be complied with by any client who procures goods or services through a tendering process; either the owner himself is private or public sector, as long as the client goes through the competition tender. Such major principles were discussed earlier, such as:

- In general, the client/owner is not obliged to accept the lowest tender, since usually the invitation to tender has an express term that gives the client/owner the right not to accept the lowest tender. However, there is a constraint that has been imposed by the English court that there is a contractual obligation which will arise between the client/owner and the bidder, whose tender conforms with the tender's terms and conditions. This must be considered.

This principle has been adopted by the English court in the *Blackpool and Flyde Aero Club v Blackpool BC*[43] case to declare a new era for the tendering process in the UK. This principle is required either for the private or the public sector. In the case of *Fairclough Building Ltd v Port Talbot BC*[44] it confirmed the rules that had been adopted in *Blackpool*, where an implied contract that comes into existence between the bidder and the client/owner is to be treated fairly, equally and in a good faith.

[43] [1990] 1 WLR 1195.

[44] [1993] 62 BLR 82.

This has been affirmed by the court in this case although it agreed with the defendant's decision to remove the plaintiff from the tender shortlist, as it is reasonably taken on the honesty of the client/owner to avoid any conflict of interest as the defendant's architect was married to one of the plaintiff 's directors.

- The client/owner also has to be complied with the contents of tender contracts whether such contents inside or outside statuary regulations. This has been adopted by the Northern Ireland court in the cases of *Scott v Belfast Education & Library Board*[45] and *J&A Development Ltd v Edina Manufacturing Ltd.*[46]

In the latter case, which is also called the "*Edina* case", the court held that where a tender procedure has already been specified, then any departure from this specified procedure will apparently be a breach of the client/owner's tender contract obligation.

Sometimes the court may find the client/owner in a breach of both a duty of the tender contract and a breach of the Public Works Contracts Regulations as it was held by the Technology and Construction Court in the case of *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons.*[47] In this case the court found the defendant in breach of tender contract when it unfairly gave a successful bidder alone a certain procedure; for in post-tender negotiations as well as in breach of the Regulations, the defendant failed to reasonably justify its decisions.

In general, in the tendering process, the client/owner has to act fairly and in good faith in certain areas, as it was identified recently in the case of *Scott v Belfast Education & Library Board:*[48]

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[45] [2007] NICh 4.
[46] [2006] NIQB 85.
[47] 67 Con LR 1, (2000) 2 LGLR 372.
[48] *Scott* (n 44).

(1) Fairness applies to the nature and application of the specified procedures in a particular contract.

(2) Fairness applies to the assessment of the tenders according to the stated criteria.

(3) Fairness applies to the evaluation of the tenders in a uniform manner and as intended by the tender documents.

Furthermore, there are statutory rules applied to the public procurement. These rules are split into two sorts of rules; domestic regulations and the European Community regulations that are applied to all country members of the European Union including the UK.

In addition to its domestic regulations, all the European countries are obliged to implement and incorporate the European regulations into its legal system. For example, and with respect to the tendering and procurement process, this mean was clearly stipulated in the EC Treaty such as Articles 12, 28, 43 and 49, which apply to the public procurement within European Union regime countries. This way of treatment was supported as well by the European and domestic judiciary system as it was confirmed in the case of *Commission of the European Communities v Ireland*[49] where the court held that it is discrimination when the Dundalk Council required the bidder to comply with the Irish technical standard, rather than the equivalent international bodies. Consequently, the European procurement regulations incorporated in the UK's Public Sectors Contracts regulations, govern the public sector procurement and the procurement in the utilities sector, and is called the Directives.

As a result, nowadays all of these rules govern public works and utilities in the UK. In essence, the most important provisions that have been set out by the Procurement Regulations are as follows:

[49] [1987] 2 CMLR 563.

- The only procurement project that is subject to the Procurement Regulations is that its value exceeds the certain financial threshold as specified in the Regulations.

- Any technical specifications that are required to be met by the bidder have to be clearly specified in the tender documents. However, the bidders are not obliged to stick with domestic technical specifications as long as the equivalent standard can be met and stuck with. In the UK this provision faces some difficulties as the provisions of Public Contracts Regulations require certain British standards. But now these conditions can be overcome by having an equivalent standard.

- All bidders from the European Community countries should be treated equally.

- Nevertheless, there are certain types of projects exempted from the latter provision and can be limited to domestic contractors due to the nature of these projects, which are usually related to the security reasons such as telecommunications projects.

Finally, the Procurement Regulations also specify the limited and restricted ways of how the public authority proceeds its tender. In essence, there are four means of procedures to process a tender, such as: the opining procedure; restricted procedure; negotiated procedure; and the competitive dialogue. All these ways to seek a tender are restricted with certain provisions that must be followed or otherwise the public authority will be considered in breach of the Procurement Regulations, which may lead to compensate a damaged or suffered bidder for his cost of tender, losses and any profit that's expected to be gained from the project.

In the case of *Blackpoo*l,[50] Lord Bingham in his judgment sees that the invitee should be protected at least to the extent that his bid was in conformity with the tender, and is submitted before the time the bid lapsed. Lord Bingham sees that

[50] [1990]1 WLR 1195.

there is a contractual obligation that has arisen that gives the bids conforming with the other bids, a right to be at least considered.

Furthermore, in the case of *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons,*[51] the court found that in accordance with Public Works Contracts Regulations 1991 (PWR), the public authority has to fall within the criteria that had been stipulated by such regulations. It also must comply with Article 6.30.5965 of the Treaty of Rome (as amended at Maastricht), which set criteria where a base for the awarding of the tender is as follows:

1) either the lowest price;

2) it is economically advantageous.

Any decision in this regard by the public authority has to be in compliance with such criteria, and must be fair, regardless of the nationality of the bidders. Any breach of these criteria or not even setting any criteria could entitle the suffered bidder damages that include his tender cost and the profit margin that he might have achieved if he had won the tender.

In conclusion, according to *MJB Enterprises Ltd v Defence Construction (1951) Ltd*[52] it is necessary to distinguish between the two principles that overriding the relationship between the parties under the tendering process in the common law legal system;

a) An implied obligation to treat compliant bids fairly and equally would be applied to the process regardless of whether or not a contractual obligation arose between parties.

b) Apart from the aforementioned principle, the terms and conditions and the term of the invitation to tender may constitute a separate contractual obligations to

[51] *Harmon* (n 46).
[52] (2000) 2 TCLR 235.

enter into an agreement between the inviter and the compliant bidders in particular where these bidders have been purposely selected by the owner.

Cost of Tendering and Enrichment

But what if the Contractor (being the offerer) for some reason - having too much faith, for instance - thought that his offer shall be entertained or his offer is so attractive that the Employer may accept it, and set out performing his obligation unilaterally with the result that such performance produced had its fruit and benefits for the Employer? What, even more, if this Employer received the benefits and enrichment because of the performance of the Contractor, and nevertheless denied the right of the Contractor to receive consideration? How does the Contractor get the Employer to fulfill his obligation?

The above questions impose a problem dealt with under both the civil and common law systems as “Unjust Enrichment” or “Restitution”, which will be discussed below.

Due to the various reasons as well as to its nature, it is common in the construction industry for parties of a construction contract to commence a planned project before signing a written document, or before their completed agreement came into existence, especially when most of the essential issues had been agreed, with some pending a further negotiation. Also, sometimes the work or project is already finished even though the parties have not signed any contract, or broadly a contractor begins a work pursuant to the letter of intent issued by the owner. As a result, the usual question that can arise in such cases is of which basis that the contractor can be compensated for his work and incurred expenses. So as this issue is not treated under the English law as simple as under the Kuwaiti law, we will start to illustrate under the English law, and then as per Kuwaiti law.

Under English law

The law of obligations, under the English law, has its bases in the law of contact, tort and restitution. In essence, the latter source of obligations (restitution) comes into action later than the others, and overlaps with such bases of obligations; this makes it difficult, in some cases, to identify the appropriate or applicable base for the subject claim. It was noted by Lord Goff, in the case of *Henderson v Merrett Syndicates Ltd,*[53] where he said:

> The situation in common law countries includes of course England, which is exceptional. In that common law grew a procedural framework which was uninfluenced by Roman law. The law was categorized by reference to the forms of action, and it was not until the abolition of the forms of action by the Common Law Procedure Act of 1852 that it became necessary to reclassify the law in substantive terms. The result was that common lawyers did at last separate our law of obligation into contract and tort, though in doing so they relegated quasi-contractual claims to the status of an appendix to the law of contract, thereby postponing by a century or so the development of a law of restitution.

It was also remarked by commentators that the law of restitution recently completed the trio of obligations. Hence, a claimant can make his claim not only on the basis of contract or tort but also on the basis of the law of restitution.[54]

The doctrine of restitution is based upon the unjust enrichment of the defendant at the expense of the claimant. Although the principle of restitution was originally recognized by the civil law system, it is also accepted by a common law system as it was remarked by Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd:*[55]

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, which is

[53] [1995] 2 AC 145 (HL).
[54] Gerard McMeel, *The Modern Law of Restitution* (Blackstone Press Limited 2000) 4.
[55] [1943] AC 32 (HL).

> to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

The House of Lords recognized the concept of unjust enrichment as the foundation of the law of restitution where in the latter, the claimant can recover what he unjustly paid or delivered to the defendant.[56]

In case there is no contract in existence between the disputed parties, it is possible to compensate the party who carried out a work on his expense on the bases of restitution.

Approaching restitution as a way of recovering damages requires four elements that must be present in such a case, which are:[57]

- The defendant should be benefited or enriched.

The benefit received by the defendant can be money, goods, services or may be by wrongdoing. It is easy to assess and calculate the damages in the case of money or specific goods benefits, while it is difficult in the case of services or other nonphysical benefits. In the case of *BP Exploration Co (Libya) Ltd v Hunt (No.2),*[58] Robert Goff J said 'by receipt, the recipient is inevitably benefited; and (subject to problems arising from such matters as inflation, change of position and the time value of money) the loss suffered by the plaintiff is generally equal to the defendants gain, so no difficulty arises concerning the amount to be paid'.

- The defendant's enrichment should be at the claimant's expense.

[56] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).
[57] Andrew Burrow, *Law of Restitution* (2nd edn OUP, 2002) 15.
[58] [1979] 1 WLR 783.

Proving this provision, the claimant has to prove that he lost against what the defendant gained, whether it was money paid, goods supplied, or services rendered to the defendant.

- Such an enrichment was unjust.

Here the benefit gained should not transfer to the claimant on eligible reasons. So, the benefit may be delivered by mistake, fail consideration, or even claim quantum meruit.

- There are no defenses.

The claim of restitution should not be resisted by a defense of good faith in purchase, change of position or in public policy. In the case of *Lipkin Gorman v Karpnale Ltd,*[59] Lord Goff ascertained that 'The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on legal principle'.

Cost of Tendering

The cost of tendering and estimating the required work, especially for major projects, usually costs a bidder an extremely large amount of cost, specifically when it is needed to hire an outsourcing surveyor, or estimating expertise to check and evaluate the foreseeability of the project. This cost in general should be borne by the bidder himself to obtain the tender, and the employer will not be liable for the bidder's expenses. Nevertheless, the bidder may deserve to be reimbursed for the cost of tender in certain cases.

If the contractor performs additional services at the employer's request, he may be entitled to a reasonable payment. In the case of *William Lacey (Hounslow) Ltd v*

[59] [1991] 2 AC 548 (HL).

Davis,[60] the court held that, 'Although no binding contract had been concluded between the parties, a promise should be implied that the defendant would pay a reasonable sum to the plaintiff in respect of the services rendered'.

Also if the contractor does a substantial amount of preparatory work over and above the normal tendered preparation, which expressly or impliedly is requested by the employer, such as performing a small quantity of design and no contract is ever placed, then the contractor will have a right to payment of reasonable sum.[61]

Under Kuwaiti Law

As mentioned earlier in Chapter One regarding the applicable law to the construction contract under Kuwaiti jurisdiction, as per Article (5) of Kuwaiti Law of Commerce, a building construction contract is considered a commercial transaction and is subject to the Law of Commerce. And as we have seen, the merchant transactions under Kuwaiti law can be proved by any means of proving regardless of the value of the transaction itself. This is contrary to the Civil law which does not allow to prove any transaction whose value exceeds 1000 Kuwaiti Dinar, other than the written evidence.

As a result, a construction oral contract can be proven as per Kuwait Law of Commerce by any means of evidence including oral witnessing. Additionally, as per Kuwaiti law jurisdiction, if there is an agreement between parties without specifying the price of contract, then the court can decide on the reasonable price having estimated by an expert, or by the court itself if it found itself capable to do so. This is usually what happens, especially for an urgent or contingency work that is usually performed before parties have agreed upon the price or other such details. But, in essence, the difficulty can arise when a precedent agreement cannot be approved or denied by a defendant; then the question that may arise is how to compensate a plaintiff for his loss, or work he performed. In fact, if any

[60] [1957] 1 WLR 932.
[61] *Morston Ltd v Kigrass Ltd* (1989) 15 Con LR 116.

agreement, either oral or written, can be proven between parties, then we only have a way of unjust enrichment to compensate a loser or suffered party.

If this means cannot be approached by a plaintiff, as it is the best way to claim his loss or damage, then a basis of unjust enrichment approach can be taken by the plaintiff in accordance with Article (262) of Civil Law which provides, "Every person who enriches himself without lawful cause at the expense of another person shall be liable to the extent of the riches obtained to compensate such other person for the loss sustained by the latter; the said liability shall continue to exist even when such enrichment has disappeared at a later date."

Generally, and considerably similar to the English law in this regard, there are three elements required to exist in such a case in order to apply the provisions of the unjust enrichment (restitution) in accordance with the Kuwaiti Civil law:[62]

- The defendant should be enriched

Utterly similar to the English law, the defendant might be enriched whether by money, goods or services that he received, or any negative benefits that he has received, such as paying his debts on his behalf.

Nevertheless, such benefits do not need to exist until the date of filing the case, and the plaintiff can claim his damages even though such enrichment has disappeared at a later date.

- Such enrichment should be at the plaintiff's expense

This expense can be a direct or indirect expense, and can be goods or money that has been delivered to the defendant, or services that have been performed for the benefit of the defendant, or even such expenses that are tangible or intangible.

[62] Abdel Razzaq Al Sanhoury, *Al Waset in Alqanon Almadani: Civil law* (Monshaat Almaarif 2004) vol I, 949-967.

- There is no cause for such enrichment

That means if there is a reason for this enrichment, the claim should be based upon said reason; such a contract, or the law and the court, should look into the contract or the said law to examine the plaintiff's claim, not to the Unjust Enrichment rules.

CHAPTER THREE

Arbitration

The construction industry in general, as distinct from other industries, has an excess number of claims and disputes, particularly with regard to "turnkey" contracts. Furthermore, as with all other types of contracts or legal deals, the disputes in construction contracts can be resolved through several means. Different from the English law and FIDIC's models, the Kuwaiti law, although giving this type of contract special rules that are badly needed, does not give such contracts any special treatment in terms of dispute resolution. However, in practice, parties to a construction contract, in particular with major projects, often adopt or refer to an alternative dispute resolution method such as adjudication, conciliation, mediation or arbitration, rather than the normal litigation before local courts.

Under this chapter we shall deal with the arbitration as it is the most common way which is used to resolve disputes in connection with turnkey contracts in the construction industry in the State of Kuwait.

A Look at Kuwaiti Law

At present, Kuwait has quite an organized judiciary system - amongst the most contemporary of judiciary systems - with two degrees of litigation. The first degree which is the courts of first instance and courts of summary justice and practice. The second degree court is the Court of Appeal and Cassation. The Court of Appeal and Cassation is at the summit of the judiciary pyramid, which ensures the right application and enforcement of the law. The rules of arbitration for civil and commercial disputes are incorporated within the judiciary systems of Kuwait by special and distinctive rules that are different from those applicable under normal litigation. This approach was adopted by the Kuwaiti legislators to facilitate and expedite the resolution of commercial disputes at both the local and

international level. Furthermore, it is intended to support the arbitration tribunal and to ensure its verdicts and awards are enforced properly, without any delay or challenge.

The Definition of Arbitration

Generally there is no single global definition for the arbitration. It differs from one legal system to another based upon what can be arbitrated in each legal system.

Kuwaiti law does not define the arbitration, although it is quite organised to the arbitration. However, the Kuwaiti Court of Cassation defines the arbitration as an agreement to refer to any depute that has arisen, or may arise in the future due to an independent person or persons in lieu of a competent court for their determination.[63]

Such a definition meets all elements of what national and international commentators have tried to embody in the definition of arbitration. For example, Q Hogg states that 'arbitration is the reference for binding judicial determination of any matter in controversy capable of being compromised by an agreement by way of accord and satisfaction or rendered arbitrable by statute between two or more parties to some person or persons other than a Court of competent jurisdiction'.[64]

The definition by the Kuwaiti Court of Cassation includes all four elements which are to be required in any arbitration, whether an institutional or an ad hoc arbitration. These elements include: the arbitration agreement whether as a provision in the main contract or as a condition of arbitration; a dispute or conflict; a reference to an independent third party; and a final and binding award.

[63] Kuwaiti Court of Cassation (444/97 session 17/5/1998 Commercial).
[64] Q Hogg, *The Law of Arbitration* (Butterworths,1936) 16.

Distinction between a Court Procedure and Arbitration

There is a distinct difference between a court procedure and an arbitration procedure. Generally in an arbitration the parties are free to agree upon their own procedural rules; on the other hand, the tribunal can adopt a suitable procedure to the dispute.

One of the essential characteristics of arbitration is that it is based upon contractual liberty, which means that there are no fixed rules of procedure. Party autonomy is the first principle in arbitration. The parties should be free to agree upon any procedures whichever they agree. The principle of party autonomy is not a new concept, but one which has been at the heart of the arbitral process and is indeed a major reason why parties choose arbitration rather than litigation.

Nevertheless, the arbitration tribunal must follow the strict rules of pleadings; defence; discovery of documents; and to follow very strictly the Public Policy.[65]

The freedom to choose their own set of procedures is a part of the arbitration process in many countries. In France, for example, the parties are naturally free to choose or not to choose the applicable law to the proceedings, either in their arbitration agreement, or once a dispute has arisen. This is stated in the French Arbitration Law, Article 1494(2) of the New Code of Civil Proceedings, as the arbitrator's freedom to determine the procedural rules is "in so far as necessary" in keeping with its liberal tradition.

In Kuwait, arbitration is not subject to the same rules applied to legal litigation. Article 182 of the Civil and Commercial Procedure Code No. 38 of 1980 reads:

The arbitrator shall render his award without compliance with pleading procedures, save the proceedings provided for in this chapter. Nevertheless, the

[65] Kuwaiti Court of Cassation (160/90 session 11/11/1991 Commercial).

litigant parties may agree upon certain proceedings to be followed by the arbitrator in that respect.

The award rendered by the arbitrator shall be based upon law provisions, unless he is authorized to compromise and conciliate where he shall not comply with such provisions, save those relating to public order.

The rules governing urgent self-executing judgments shall be applicable to the arbitrator's award.

The Arbitrator's award shall be rendered in Kuwait; otherwise the prescribed rules applicable to the arbitrator's awards in a foreign country shall be applied in that respect.

This article states that the arbitrator shall render his award without compliance to the pleadings procedures, and this goes to illustrate the fact that there is great flexibility in the procedures adopted by arbitration in Kuwait.[66]This is very much the same procedural rules in most jurisdictions. There is a great tendency for the arbitrators to be as flexible as possible.

In the English Law, section (33) of the Arbitration Act 1996 states:

33(1) The Tribunal shall-

a) act fairly and impartially as between the parties, giving each party a reasonable and opportunity of putting his case and dealing with that of his opponent; and

b) adopt a procedure suitable to the circumstances of a particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

[66] Explanatory Note to the Kuwaiti Civil and Commercial Pleadings Law 38 of 1980.

(2) The Tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

This section in the English Arbitration Act of 1996 states the fact that the tribunal is positively required to use flexibility and adaptability of arbitration to evolve an appropriate arbitral format to meet the individual circumstances of each case. In particular, it does this through its decision on procedural and evidential matters, in section 34. The keynote in this process is the avoidance of unnecessary delay and expense. It is now absolutely clear that it is unnecessary for arbitral to follow the "court" procedure slavishly.

In comparison to the Model Law, article 18 of the Model Law provides:

'The parties shall be treated with equality and each party shall be given a full opportunity of presenting its case.

It can be noted that an arbitration provides greater procedural flexibility, but in the case of civil matters in the English court, the parties must follow the strict rules of pleadings, defence, discovery of documents, and to follow very strictly the Rules of the Supreme Court and the County Court Rules. There is strict time limits for every action, and if not followed then the action can be struck off. There is always the problem of cost and inflexibility in a court procedure.

There are certain aspects of principles which the parties must pay particular attention to. Firstly, the principle of equality; this principle is important because it is mandatory for the arbitrator to follow. As in section 33 of the Arbitration Act, the tribunal must act fairly to both parties. Hence, the parties deciding to arbitrate must always bear in mind the principles of equality. However, Kuwaiti law does not express or refer to this principle of equality directly. Still, it is implicitly

applied to every arbitration.[67]Therefore, the tribunal must give each party "full opportunity" although giving full opportunity to both parties could lead to delays. Giving full opportunity to both parties is mainly to avoid any gross injustice, and to be fair to both parties.

Secondly, in terms of public policy, it is akin to court procedure. Parties who agree to arbitrate must avoid infringing public policy principles. Anything contrary to the public policy would not be entertained in arbitration. Regarding Kuwaiti Arbitration Law, it is clearly spelt out in Article 182 of the Civil and Commercial Procedure Law No. 38 of 1980. The Article reads "... The award rendered by the arbitrator shall be based on law provisions, unless he is authorized to compromise and conciliate, where he shall not comply with such provisions, save those relating to public order..." The parties cannot agree with anything which is contrary to public policy. In the Kuwaiti context, the word "public order" refers to public policy, and parties cannot infringe this principle. The arbitration must also take note that this is an important principle. In England, the principle of public policy is in the context of common law.

Thirdly, the arbitration agreement must not affect the rights of third parties, unless there is a special provision which allows this. In most cases this is rare[68] . However, there are instances whereby the arbitrator would seek the assistance of the court to make it possible for third parties to attend the arbitration or also to enforce the award. In Kuwaiti Law this can be found in Article 180 of the Civil and Commercial Procedure Code No. 38 of 1980, chapter 12. Article 180 reads "... Consequently, the arbitrator shall suspend his work and refer the case to the Chief Judge of the Court originally competent to hear the dispute so as effect the following:

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[67] Kuwaiti Court of Cassation (160/90 session 11/11/1991 Commercial). And 'see also' Ahmed Melijee*, Quaed Altahkeem fee Alqanon Al-Kuwaiti- Principles of Arbitarion in Kuwaiti Law* (Dar Alkotob, 1996) 155.

[68] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (1st edn Sweet & Maxwell, 1986) 227.

(A) Adjudicating the legally prescribed penalty upon the witness who fails to appear or abstain from answering.

(B) Having third parties adjudged to submit any document in their possession, which is deemed necessary for retention of the relevant award..."

The Kuwaiti Arbitration law is like most other Arbitration laws whereby parties cannot contract anything which is contrary to public policy principles, and the courts are to assist parties in terms of anything to do with third parties. The tribunal must always conduct the arbitration fairly to both parties as explained earlier.

Evolution Of The Judiciary System And Arbitration In Kuwait

The magazine named "Al Ahkam Al Adleyah "(The Judicial Judgments) was the prevailing and applied rules of law enforceable in the country before independence. After independence in 1960, Kuwait embarked on establishing broad bases of a developed legal system. No sooner had the magazine law been in application than it revealed its insufficiency to meet the regulation of the transactions of the society and the people inter se even before the discovery of oil.[69]When oil has been discovered in the late forties, and life started to develop and change took place rapidly, it was inevitable for law to confront such development and changes and set up solutions to cope with new reality rather than to become a stumbling block. Thus the magazine declined and legislation started to make the relevant law rules in different aspects that dealt with civil, commercial, maritime, litigation and arbitration.

[69] H.E. Sheikh Salman Deig Al Sabah, Minister of Legal & Admin Affairs, Introduction to Civil Code on 1-10-1980.

As a matter of fact arbitration has not been a stranger or a new comer to State of Kuwait as it was known and conducted in a primitive shape being the only and essential means of dispute resolution in all domains whether civil, commercial, personal statutes or even the criminal questions[70] where disputing opponents resort to the ruler or religion men to arbitrate and finalize the dispute by a final decision. The arbitrator for instance in criminal matters applied the "eye for an eye principle" and owing to the victim family acceptance, the arbitrator may quantify the damage and impose a sum of money called "Diyah" against the respondent who pays and acquitted.

Officially, the first time that the State of Kuwait applied the arbitration as a method of its dispute resolution was on 1934 when the British Petroleum Company started to explore for the oil in the area of Arabic Peninsula. In the Concession Agreement between the Amir of Kuwait (whom represent the State) and Kuwait Oil Company Limited (British Petroleum) to explore and produce the oil in the territory of the State of Kuwait, it was stated in clause 18 of the Concession Agreement that :

"a) If at any time during the currency of this Agreement and difference or dispute shall arise between the parties hereto concerning the interpretation or execution hereof, or anything herein contained or in connection herewith, or the rights or liabilities of either party hereunder, the same shall, failing any agreement to settle it in any other way, after discuss the same with the British High Commissioner in the Gulf, be referred to two arbitrators, one whom shall be chosen by each party, and a referee, who shall be chosen by the arbitrators before proceeding to arbitration.

b) Each party shall nominate its own arbitrator within sixty (60) days after the delivery of a request so to do by the other party, failing which its arbitrator may at the request of the other party be designated by the British High Commissioner in the Gulf. In the event of the arbitrators failing to agree upon the referee within

[70] Abdul Hameed Al-Ahdab, (*Arbitration in the Arab Countries*) vol. II, 1998, p 413.

(60) days after being chosen or designated , the British High Commissioner in the Gulf may appoint a referee at the request of the arbitrators or of either of them.

c) The decision of the arbitrators, or in the case of difference of opinion between them, the decision of the referee, shall be final and binding upon both parties.

d) In giving a decision the arbitrators or the referee shall specify an adequate period of delay during which the party against whom the decision is given shall conform to the decision and that party shall be in default if that party has failed to conform to the decision prior to the expiry of that period and not otherwise.

e) The place of arbitration shall be such as may be agreed by the parties and in default of agreement shall be London.

After the dawn of independence broke in 1960, Law No. 6 of 1960 regulating Civil and Commercial procedures was promulgated and issued. The third section of it was set aside for local arbitration but not the international arbitration. This organization of such optional arbitration was primarily developed by Law No.3 of 1971, which added a new paragraph to Article 264 of the aforesaid law that provides that one or more Arbitration Panels shall be formed at the Court of First Instance, each of which is chaired by a Counsel or a Justice Judge elected by the General Assembly of the competent court, with the membership, duly selected of two merchants by Chamber of Commerce and Industry. The Panel shall hold its sitting at the place appointed by the head of Panel where disputes brought before it free of fees. The Panel may be aided by one of the court officials as a secretariat. The arbitrators' award shall be awarded by the majority votes and shall not be appealed. The award shall be entrusted to the Clerks department within five days following the date of issuance.[71]

In 1980, the present Law of Civil and Commercial Procedures No.78 has been promulgated and issued where it contained provisions deal with implementation of foreign arbitral awards issued by arbitration institutes abroad on the field of

[71] Paragraph (4) of Article 264 of Law No. 3 of the year 1971.

international commercial relations in Kuwait. Nevertheless, this law has not dealt with international commercial arbitration in essence and neither dealt with the procedures and terms of reference or the arbitral award, the modality of issuance, its challenge, setting aside etc.. as the Kuwaiti legislator's attitude remained looking upon arbitration as an exceptional route for litigation other than litigating at state courts at least in case of domestic arbitration.

Such development, though slight, was as a matter of fact not accompanied by suitable steps that should have been taken by the Kuwaiti legislator to cover the broad scale of international arbitration and keep pace with the requirements of this era in which businesses are booming nationally and internationally. This is, in our view, the reason why the number of disputes that were resolved pursuant to these rules of arbitration was kept at very small rate.[72]

A New Trend of Arbitration under Judicial Arbitration Law 11 of 1995

The Kuwaiti legislator felt and understood the importance of arbitration for the modern commercial life particularly when the practicality revealed an ill application of article 177 of the Law No. 38 of the year 1980 and the reluctance of people to resort to the arbitral panel under such a law.

Recently, the latest intervention of the State in favour of arbitration was made in 1995 through the promulgation of Arbitration Law No.11 of the year 1995, which encourages and gives more flexibility to the parties to resolve their disputes by means of arbitration.

Moreover, the law in question has obliged some parties to resolve their disputes through the new judicial arbitration process as is mentioned in the second paragraph of Article 2 of Arbitration Law No.11 of 1995: '…2- It shall alone have exclusive jurisdiction to determine on the disputes arising between the Government Ministries, Authorities, Public Corporation and Companies whose capital is fully owned by the State, Government or between all such institutions'.

[72] Guidelines for Arbitration in Kuwait,1995.

This fashion of compulsory arbitration has only been adopted in very narrow ways and only for certain cases due to the nature of these cases - as can be seen in the two following examples:

- Kuwaiti Labour Law No 38 of 1964 pertaining the resolution of disputes arising between the employer and the trade union which had not been resolved amicably which states that:[73]

" when a dispute arises between an employer and all or a number of his workers regarding the conditions of work. The following proceedings shall be followed to settle the dispute:

1. Direct negotiations between the employer or his representative and the workers or their representative shall be conducted; if both parties reach an amicable settlement, the settlement shall be registered with the ministry of Social Affairs and Labour within seven days of signature of such settlement in accordance with the formalities set down by the Ministry.

2. If both parties fail to settle the dispute by negotiation, either or both parties may apply in person, or though a representative, to the Ministry of Social Affairs and Labour which shall endeavour to settle the dispute;

3. If the Ministry of Social Affairs and Labour fails to resolve the dispute within fifteen days of the date on which the said application was submitted, the dispute shall on the expiry of the said time –limit be referred to the Arbitration Committee for Labour Disputes, which shall be formed from the following:

- A department of the high Court of Appeal designated every year by the General Meeting of the said Court;

- The head of a prosecution department delegated by the attorney General;

[73] Article 88 of Law No. 38 of the year 1964.

- A representative of the Ministry of Social Affairs and Labour appointed by the Minister; the employer or his representative, and the representative of the workers may attend before the said Committee, provided that the representative of either party shall not be more than three.

The award of the Arbitration Committee shall be final and binding on both parties."

- The same concept can also be found in the Amiri Decree No. 2 of 1984 pertaining to regulating the Kuwait Stock Exchange Market under Article 13 which states:

"An Arbitration Committee shall be set up within the market, by a resolution passed by the Market Committee; it shall be chaired by a number of Judiciary, to be selected by a 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, with 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."

The Arbitration committee would not handle arbitrations free of charge as it was under the Law no. 3 of the year 1971. Irrespectively, the legislator estimated fees for arbitration as article 13 of the Law 11/ 1995 stipulated the necessity of the objecting party to deposit an amount " namely 100 Kuwaiti Dinars " as surety on submission of the notice of objection.

One more crucial feature of the Law 11/ 1995[74] is the repeal of article 177 of the Law of Civil and Commercial Procedures No. 38 of the year 1980, further stipulating that the Arbitration Panels provided for herein shall be subject to the

[74] See the Explanatory Note to the issuance of Law 11/1995.

provisions of Law 11/ 1995 whilst applying the provisions of the Law 38/ 1980 where it is not in contradiction with the provisions of the Law 11/ 1995.

Nevertheless, arbitration, in the true technical global sense, in Kuwait still faces some obstacles in respect to the confidence of the public[75] as far as its viability as a method of dispute resolution when compared with the classic judicial authority.

Shapes of Arbitration Practice in Kuwait

Arbitration practice in Kuwait takes different shapes as to the modality through which an arbitration case may be conducted based on the desire of the disputants themselves to opt for the modality that will maintain the maximum benefit for each one:

1. Optional Arbitration which is provided under the Law of Civil and Commercial Procedures issued in 1980, articles 173 to 188.[76]

2. The Ministry of Justice Optional Arbitration provides that the Ministry of Justice may constitute one or more arbitration panels[77] that are free of fees to deal with the disputes of the concerned parties agree in writing to submit thereto. The legislator proposed to broaden the constitution of the arbitration panel so as not to be limited only to the membership of merchants with the purpose of enlarging its scope of jurisdiction[78] to include disputes which lack other technical or scientific specialties such as engineering, medical or labour specialties.

Thus, the legislator gave the Minister of Justice the power - via issuing a decree - to regulate the said different specialties tabling. Moreover, the organizing of the tables and the selection of arbitrators would be performed according to the required specialty of the subject dispute to be submitted to the panel.

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[75] Abdulrasoul Abdulreda, 'European – Arab Arbitration Symposium in Tunisia',1985.
[76] Explanatory Note to the Law of Civil and Commercial Procedures, Page 195.
[77] Article 177 of the law.of Civil and Commercial Procedures.
[78] . Explanatory Note to the Law of Civil and Commercial Procedures.

3. The Permanent Institutional Arbitration undertaken by the Chamber of Commerce issued on 28-6-1958 where the personality of arbitrators play an important role, even more than the arbitration. This role is to make good offices conciliate and re-conciliate rather than to resolve the dispute by means of arbitration. The arbitral panel under such modality constitutes of merchants and nobles and not legal persons.

4. The International Arbitration where the Kuwaiti legislator does not distinguish between the domestic and international arbitration but it considers each arbitration case conducted outside Kuwait as foreign even though a Kuwaiti law is applied or even if it was between Kuwaiti parties. Therefore, all the provisions related to the implementation of foreign judgments are applicable thereon.

Disputes That Can Be Arbitrated

As a general rule, matters that cannot be conciliated may not be arbitrated,[79] and the concept of such an article must be understood in light of the principle derived from the civil law code which states that in case the object of obligation is in violation of the law, the public order or the good morals, a contract shall be void.[80] The same meaning is provided under the principle which reads that matters related to public order may not be conciliated and that conciliation only is valid where there are any financial rights generated thereof.[81]

Thus we see that the violation of law rules of one side, and the non-ability of the matter of the dispute are to be conciliated with the other side; this poses a question regarding the ability of arbitrating three matters under the Kuwaiti legal system:

a. Bankruptcy

[79] Article 173 para. 3 of the Law of Civil and Commercial Procedures.
[80] Article 172 of the Kuwaiti Civil Law.
[81] Article 554 of the Kuwaiti Civil Law .

Under Kuwaiti law a merchant may be declared bankrupted at the request of one of its creditors or at his own request; the court also may render a judgment by its own based on a request of the prosecution general.[82]In the case mentioned, the matters related to bankruptcy cannot be arbitrated but the financial rights generated from bankruptcy may be conciliated and accordingly arbitrated.

b. Trade Mark

The Kuwaiti commercial law provides criminal penalties for the falsification of a registered trade mark; imitation or usage of a counterfeited trade mark; using a trade mark which is the property of a third party; or selling of products labeled with counterfeited, falsified or placed without legitimate right.[83] Such matters therefore, cannot be arbitrated but the financial rights generated thereof may be arbitrated.

c. Commercial Representation

All disputes arising out of a commercial representation contract shall be referred to the competent court wherein jurisdiction for the contract is executed.[84] This provision raises the question whether the essence of the provision means that these disputes cannot be arbitrated but only litigated before the designated court. The answer to this question requires a profound reading of Article 282 of the commercial law code which provides that the competent judge shall quantify the compensation irrespective of any opposite agreement. In light of the reading of the aforementioned two articles, we deduce the intents of the legislator which will nullify any agreement that occupies the jurisdiction of the competent court.

Arbitration Agreement – The Kuwaiti Approach

The parties may agree to arbitrate any arising dispute and stipulate for such agreement by incorporating into the contract an "Arbitration Clause", and this

[82] Article 557 of the Kuwaiti Commercial Law.
[83] Article 92 of the Commercial Law.
[84] Article 285 of the Commercial Law.

what is known as the pre-dispute arbitration agreement. If the contract does not include an arbitration clause and a dispute arises between the parties, they may enter into a post-dispute arbitration agreement which is termed as an "Arbitration Charter". Kuwaiti jurisprudence distinguishes between the pre-dispute and the post arbitration agreements.[85] Thus the Kuwaiti approach on this subject came in conformity with the global norm in this respect.

Aminoil V Government of the State of Kuwait

One distinct advantage of ad hoc arbitration is that it may be shaped to meet the wishes of the parties and the facts of the particular dispute. It needs the cooperation of the parties and their advisers for this to be done efficiently and effectively. It is however, an expensive and time-consuming process to draft special rules for an ad hoc arbitration. Time and money can be saved by adopting or adapting, rules of procedure which have been specially formulated for this purpose. The best set of rules is the Uncitral Arbitration Rules. However, it is not advisable to try to adopt or adapt institutional rules (such as those of the ICC) for use in ad hoc arbitration, since such rules make constant reference to the institution concerned and will not work properly or effectively without it.

In the case of Aminoil arbitration between the Government of the State of Kuwait and the American Independent Oil Company (Aminoil) the inherent flexibility of ad hoc proceedings was a considerable advantage in a dispute involving legal principles. Time limits were fixed which took account of the reasonable requirements of both parties, and the issues were defined in a way which considerably shortened the time spent in dealing with the case. The day to day presentation of the Government's case was left in the hands of the external lawyers retained by the Government, but the agent alone had authority to make immediate decision on behalf of the Government on the many practical and logistical questions that necessarily arise during the conduct of major arbitration.

[85] Kuwaiti Cassation Court judgment No.19/1974 Joint Chamber 2/6/1976, Set 1975-1979, page 91.

The procedure adopted also provided that the parties should file their pleadings at the same time, which they did over a period of months in an exchange of memorials, counter-memorials and replies. By this simple device, either party was labeled as defendant- an application which is sometimes resented, where each party considers that he has justifiable claims against the other. In the same spirit, the arbitral tribunal ordered that the Government should lead on some issues and that Aminoil should lead on others.

The Agreement to Arbitrate

Like any agreement, arbitration is to be mutually agreed upon by the parties involved, and can consist of the exchanging of an offer and an acceptance, which was earlier elaborated regarding the formation of the construction contract. However, it is stipulated in Article 173 of the Kuwaiti Civil and Commercial Pleadings Law that the arbitration may not be established unless it is in writing. In essence, the commentators look to this provision as a condition for proving the arbitration agreement is not for the formation of the agreement. The arbitration agreement is required to be included of all essential elements that need any arbitration such as the matters that can referred to in the arbitration, or identifying an arbitrator either namely or institutionally and the power of tribunal, etc. In essence, the Kuwaiti law, neither statuary nor judiciary, have identified the meaning of the writing, but simply leave it to the general principles of the Law of Evidence.

The Kuwaiti law in this regard is in some extent in conformity with English law. It is provided by s 5(1) of the Arbitration Act 1996 that the provisions of the Act only apply to the arbitration agreement that is in writing. Nevertheless, an arbitration agreement which is not writing is not invalid, but is outside the scope of the 1996 Act. Moreover, the common law may apply in case the oral agreement is pursuant to s81 of the Arbitration Act 1996. Contrary to the Kuwaiti law, s (2) of the 1996 Act defines the meaning of the agreement in writing as follows:

- If made in writing, whether or not it is signed by parties. This also applies where the parties refer to terms which are in writing in accordance with s5 (3) of 1996 Act; or

- If made by the exchange of communications in writing; or

- Evidenced in writing. This includes where the agreement is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement, per s5(4) of 1996 Act.

Independence of Arbitration Clause

The question of the independence of the arbitration clause was in question and unsettled till a recent time when determined by cassation court judgments. It is no secret that both jurisprudence and judicature were divided; both struggled for the determination of this matter while the legislation did not initiate any step towards the entire problem, neither under the previous law nor the new one. There is an opinion under the old law which adopts the notion that the legitimacy of the contract where the incorporated arbitration clause shall be the jurisdiction of the court and not the arbitrator.[86] Another opinion under the new law says that it is incontestable under jurisprudence and judicature that if the arbitration clause is incorporated in the contract, it shall be independent from that contract being a separate legal behavior and consequently the arbitration clause shall not be effected by a probable rescission or even voidance of the original contract which produced the dispute, unless the reason that voided the original contract includes the arbitration clause also.[87] Such a change of the jurisprudence and judicature situation towards this question in the absence of a law provision constitutes a progressive development for the benefit of arbitration.

[86] Fouad Abuzeiad, Yearbook,vol.IV,1979,p.139.
[87] Abdulrasoul Abdulreda, 'European – Arab Arbitration Symposium in Tunisia',1985.

Effect of the Contract on an Incorporated Arbitration Clause

The effect that principally emerges from incorporating a contract with an arbitration clause takes the jurisdiction from the judicial authority represented by the court, and gives this jurisdiction to the arbitration panel. The Kuwaiti law explicitly provided that the courts have no jurisdiction to handle disputes that have been agreed upon referring them to arbitration; the plea of lack of jurisdiction may be waived expressly or explicitly.[88] The Kuwaiti legislator's Interpretative Memorandum explains therein the withdrawal of the jurisdiction from the court, supported in its attitude by the Egyptian judicature, stating that it frequently happens when an opponent proceeds to the court in connection with a dispute that was agreed upon to resolve by arbitration. Both jurisprudence and judicature were in controversy about the legal conditioning of such behavior. One opinion described the behavior as violation of functional jurisdiction, and another adopted the notion of "law suit acceptance" rules, but the legislator was of the first opinion which is also adopted by the Egyptian Court of Cassation in a number of judgments. Accordingly, paragraph 5 of article 173 was decisive in providing that the courts lack the jurisdiction of handling disputes that have been agreed upon by parties to be referred to arbitration, and such jurisdiction is not connected to the public order due to the parties' autonomy and the nature of the agreement which is the essence of arbitration. Therefore, and based on the lack of a jurisdiction plea, being not connected to the public order, all effects of the plea are arrayed such as the lapse of the right to use the plea if the substantial argument started and the plea was not made. The silence to use it by then is deemed to be an implicit waiver of the plea.[89]

[88] Law of Civil and commercial Procedures, article 173.
[89] The Explanatory Note to the Kuwaiti Law of civil and Commercial Procedures.

Our Assessment of the Legislator's Position[90]

We remarked that the Kuwaiti legislator tended to consider the plea of lack of jurisdiction as non-connected to the public order, to save the courts the trouble of judging its non-competence to handle a dispute that arises out of a contract incorporating an arbitration clause. The legislator shouldered the burden of allegation the plea of lack of jurisdiction of the court on the party assuming the existence of an arbitration clause incorporated in the contract whose failure to use it will result in an implicit waiver of the plea by such a party.[91] It seems to us that the legislator still looks upon arbitration, being a private means for the opponent parties to resolve their dispute, as a rival who threatens to dethrone the state judicial order despite the state efforts to issue the judicial arbitration law 11 of 1995.

Nevertheless, arbitration in its true technical and global sense still faces obstacles in the State of Kuwait with respect to the confidence of the public[92] in terms of its viability as a method of resolving disputes when viewed in comparison with the state classic judicial authority.

Countries in the Middle East and the Arabian Gulf like Egypt, Saudi Arabia, Bahrain, Oman, UAE and Qatar have gone quite far towards the issuance of arbitration law codes derived from the United Nations Commission on International Trade Law (UNCITRAL) Rules.[93] However, Kuwait so far has not taken the due step to issue an arbitration law that may satisfy the needs of domestic and international trade regarding the volume of transactions of a foreign

[90] I bear all the respect to the legislator but I believe the issuance of law 11/1995 should have been more beneficial to the commercial society if it considered the UNICETRAL rules and liberated the arbitration parties from choosing their arbitrators from state judges. The Parties Autonomy principle is not purely adopted under the mentioned law and this defects the law since the said principle is the milestone of the arbitration.
[91] Article 173 of the above law.
[92] Abdulrasoul Abdulreda, 'European – Arab Arbitration Symposium in Tunisia',1985.
[93] See United Nations Commission on International Trade Law.

nature and the reluctance of the foreign entities to recognize the judicial arbitration under Law 11 of 1995 as an effective means of dispute resolution.

In the following section we are going to deal in detail with arbitration in the State of Kuwait in a comparing with other systems as is needed.

A Process of Arbitration in Kuwaiti legal system

The Kuwaiti legal system first organised arbitration within the pleading of Law No. 6 of 1960. This law was amended mainly through law No. 3 of 1971, by adding Article 264 which states that one or more arbitration panels are to be formed and held in the seat of the Court of First Instance, and the presidency over the panel shall be taken over by the Counsel or a Justice judge to be selected by the General Assembly of the competent court and its membership, duly comprising two merchants. The award of such panel shall be rendered by the majority and shall be final and binding and is not to be appealed. This was the first step in adopting arbitration in the Kuwaiti legal system. Later, this was reorganised through the civil and commercial pleadings law issued by Decree Law No. 38 of 1980 on June 4th 1980. This law was annexed by other amendments by laws under numbers 121 of 1986; 42 of 1987; 3 of 1988; 44 of 1989; 57 of 1989; 47 of 1994 and 18 of 1995. As the legislators realised that to be in pace with the evolvement of commercial transactions, it must moved forward to develop the arbitration procedure by incorporating new provisions under part 12 of the Pleadings Law Article 173-188.

In 1995, there was a special law namely No. 11 of 1995 on the judicial arbitration stipulated by Article 177 of the pleadings law. There have been major changes in the arbitration law because the arbitration law in Kuwait is always keeping in pace with the international arbitration. Also the amendments have been made to avoid any serious irregularity of the law. Many international commercial contracts are carried out in Kuwait and there has always been a need to keep pace with the international law in Arbitration.

On March 29th of 1995 under Law No. 11/1995 the judicial arbitration department was established in a judicial form with a high level of degree of expertise duly comprising litigants' arbitrators so as to solve whatever civil and commercial disputes the litigants may bring. Regarding disputes of natural and/or judicial persons which are instituted by or against the State of Kuwait, its institutions or affiliated companies of such disputes may be brought before the said Arbitration Panel under the same rules of procedure.

Summary of Articles from 173 to 188 of the Civil and Commercial Procedural law No. 38 in 1980

Prior to going into details to illustrate the Arbitration Law No. 11 in 1995, it is worth describing in summary how the arbitration was run under the Kuwaiti law.

Law No. 11 in 1995 concerned arbitration in civil and commercial clauses in addition to cancelling Article 177 of the civil and commercial procedure law, while Law Decree No. 10 in 1978 approved joining the 1958 New York Convention on the acknowledgment and implementation of the foreign arbitration award.[94] Agreement in arbitration is possible, whether before the occurrence of a dispute (the arbitration provision in the contract) or after it (condition of arbitration), thus eliminating the jurisdiction of the courts of the state. Agreement of arbitration must be in writing as a condition proving the agreement on arbitration. Arbitration is not allowed in matters where reconciliation is not possible, for example, arbitration in border disputes, and punishment and rights violating the sacred law. Agreement is permitted only to those who have authority to act to the rights, or the rights under dispute. If there are several arbitrators, then the number must be odd. Arbitrators may be removed, reinstated or dismissed upon the approval and consent of parties or the court's decision or judgment.

[94] Kuwaiti legislators prefer to use the word "arbitral award" rather than a "arbitral decision" due to the resemblance between the litigation system and arbitration system as it was described by the Kuwaiti Court of Cassation, 42/81 session 3/6/1981 commercial.

The Position of New York Convention of 1958 under Kuwaiti Law

The New York Convention of 1958 is, to date, easily the most important international treaty relating to international commercial arbitration. Indeed its general level of success may be regarded as one of the factors responsible for the rapid development of arbitration as a means of resolving international trade disputes in recent decades. The New York Convention is plainly a considerable improvement upon the Geneva Convention of 1927, since it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards. The New York Convention also gives much wider effect to the validity arbitration agreements than does the Geneva Protocol of 1923; and again the Convention replaces the Protocol, as between states which are bound by both. In order to enforce arbitration agreements, the New York Convention adopts the technique found in the Geneva Protocol of 1923. The Convention, in Article II.3 requires the Court of contracting states to refuse to allow a dispute which is subject to an arbitration agreement to be litigated before its courts, if an objection to such litigation is raised by any party to the arbitration agreement.[95] The New York convention is intended to apply to international agreements, rather than to purely domestic agreements; and it is in this sense that the Convention has been interpreted by national laws implementing the Convention, such as the Kuwaiti legislature by Law Decree No. 10 in 1978.

In terms of the enforcement of the arbitration award under Kuwaiti law, and as the Kuwaiti law treats the international arbitration and domestic arbitration differently, it is worth to describe the criteria in order to distinguish between the international arbitration and the domestic arbitration in accordance with the Kuwaiti law; thereafter, the rules that govern each one will be elaborated.

[95] In accordance with Article 77 of the Civil and Commercial Pleadings Law Decree No. 38 of 1980, the court cannot refer to the arbitration by itself without any application from the parties and the parties' right to refer to arbitration will dismiss, if not submitted firstly before any other order.

The arbitration under Kuwaiti law is categorized based on the seat or place of the arbitration as follows:

- The main factor to differentiate between the international arbitration and the domestic arbitration is the seat of the arbitration.
- So, if the arbitration panel had been held and issued its award outside the State of Kuwait's territory, then it would amount to a foreign arbitration award irrespective of the arbitration parties' nationalities.
- Consequently, if the arbitration tribunal takes its seat within the State of Kuwait's territory, it would be considered as a domestic arbitration.

If this is defined, then the rule of the enforcement of arbitral award will be as follows:

- For the domestic arbitration award, the way to enforce it is stipulated in Articles 184 and 185 of the Civil and Commercial Pleadings Law 38 of 1980, which is put in two steps:

- The original award shall be deposited, along with the original arbitration agreement, with the Clerical department of the competent court originally hearing the dispute within ten days following the determined award.

- The award shall not be enforceable, save under an order issued by the Chief Judge of the court where the award was deposited. After having perused the award and the arbitration agreement, it shall meanwhile verify the nonexistence of the impediments of its implementation and the basis of appeal limitation, if the award is appealable and not urgently self-executing.

On the other hand, for the enforcement of the foreign arbitration award, the Kuwaiti distinguishes between two cases: the award that is issued in the state that a member of the New York Convention of 1958, or, from the state that is not a member of the convention.

In case an enforcement of a foreign arbitration award is issued in a convention member state, it will be treated like a domestic arbitration award and the same procedural rules that applied to the domestic award, as it is stipulated in Article 185 of the Civil and Commercial Pleadings Law, will be applied here to, provided that these rules does not impose substantially more onerous conditions or higher fees or charges on the enforcement of arbitral awards than those imposed on the state of the seat of arbitration tribunal.[96]

But for the foreign arbitral award of a non-member of the convention, it will be treated in accordance with the reciprocity principle, i.e. the foreign arbitral award will be treated in Kuwait as such state treats the Kuwaiti arbitral award.[97]

Nevertheless, in general, there are provisions that have been stipulated in Articles 199 and 200 of the pleadings law to be required for enforcement of any foreign arbitral award which is as follows:[98]

1. The foreign arbitral award has been issued by a competent tribunal and the appointment of the arbitrators all have been done in accordance with the arbitration agreement and the laws of the state of the seat of arbitration.

2. The parties genuinely have been represented before the tribunal and they have been treated equally and each party has been given a full opportunity of presenting its case.

3. The foreign arbitral award is final and enforceable in the state of seat of arbitration.

4. The subject award does not contradict any other award or judgment that is issued in the State of Kuwait nor to the contrary of the public policy.[99]

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[96] Yaqoub Sarkhooh, *Ahkam Almohakemeen Wa Tanfeedhoha :The Enforcement of Arbitral Award* (2nd edn, 1996) 137-152.
[97] ibid.
[98] ibid.
[99] Egyptian supreme Court Nos. 369/year22 session 12/4/1956, 450/year40 session 5/3/1975.

It should be noted that reference to the public policy in this regard does not mainly mean the national public policy but the international public policy.

5. The subject matter of the dispute is capable of settlement by arbitration under the Kuwaiti law.

The original authenticated copy of the foreign arbitral award must be submitted attached with an official Arabic translation.

Kuwaiti Arbitration Procedure and how it Works

In Kuwait, arbitration can be divided into two different kinds of arbitration: the voluntary arbitration, and the compulsory arbitration where the parties are obliged by law to resort to arbitration. Voluntary arbitration is agreement between parties, individuals or by the body corporate. This kind of arbitration is common among private individuals and commercial enterprises. As it has been discussed earlier, voluntary arbitration is simple, non-costly and is to be fair to the parties. This type of arbitration is to maintain confidentiality.

Voluntary arbitration is divided into judiciary arbitration and reconciliatory arbitration depends upon whether the arbitrators are chosen from the judicial body or from other professional's bodies. In some cases a judiciary judge is appointed as an arbitrator to determine on a purely unusual legal dispute which needs judicial expertise to decide on it. This type of arbitration is also a voluntary arbitration and is absolutely required for an arbitration agreement referring to such arbitration.[100] In Kuwaiti law, this type of arbitration can be seen in the old Article 177 of the Civil and Commercial Pleadings Law 38 of 1980, which allows the formation of one or more arbitration panels to be held in the seat of the Court of First Instance or in any other location to be specified by the Chief of the Panel and should be headed by the counsel. Alternatively, a justice judge is to be selected by the General Assembly of the competent court, and its membership, duly comprising two merchants or experts of other specialized areas to look into

[100] Michael Mustil and Stewart Boyd, *Commercial Arbitration* (2nd edn, Butterworths, 1989) 229.

the disputes agreed upon by concerned parties in writing to be brought before it.[101] Kuwaiti's Code of Procedure has regulated arbitration in Articles 173 to 176, 178 to 188 Chapter XII. Parties may resort to a permanent arbitral tribunal setting forth rules in advance to settle disputes known as institutional arbitration such as the Arbitral Tribunal of the Kuwaiti Engineers Association.

Compulsory arbitration is whereby the parties must by law resort to arbitration. Compulsory arbitration exists in collective labour disputes, and can be found in Article 88 of the Labour Law No.38/1964, and in disputes dealing with the Kuwaiti Stock Market, in Article 13-Special Decree issued on 14/8. 1983.

The judiciary arbitral tribunal has been set up under law 11/1995 and the tribunal is given powers to settle disputes among ministers, government bodies or the general body corporate, and state-owned companies or among such companies, the Code of Procedures 2/2. In essence, unlike most common law countries, arbitration in Kuwait is described by the Court of Cassation[102] as a judiciary dispute resolution process rather than an adjudicative process as the arbitration tribunal formed by the state and its award is also protected by the state. In general, there are the components of ordinary arbitration in Kuwait with those distinct characteristics, and these components consist of persons, subject matter, and reasons.

Firstly, when dealing with persons, it must be said that these persons should in the first place be eligible to proceed for arbitration. Under the civil code-Article 107, the person must have a sound character and if the person is disabled, the court could assign a legal assistant to proceed on the person's behalf. If the action is taken without the legal assistance, then the award is considered null and void. If for unknown reasons or due to any unforeseen circumstances, if the party is unable to attend, a power of attorney can act on the person's behalf (Civil Code-Article 702/1-Procedure-Article 57). In the choice of an arbitrator, this may be in

[101] Sarkhooh (n 95) 81.
[102] 1/1973 session 19/3/1975 Commercial.

the agreement or the court can decide for them Procedure –Article 174 and Article 175. The arbitrator must remain neutral at all times, and if not neutral, can be removed in accordance with Article 178/3.

In dealing with subject matter of the arbitration agreement, it must be said that the subject-matter should not be against the public policy of the state. In accordance with Article 173 of the Procedural law arbitration is not allowed in matters which cannot be settled through reconciliation and which are required to be read with the contents of the Article 554 of Civil Code law of 67/1980, which does not allow conciliation nor mediation in matters relating to public order, but only to the rights and obligations that come out of these matters. Such matters relate to general discipline such as nationality; eligibility; status of the persons; civil interests; bankruptcy; divorce; inheritance; wills; administration; or any penal matters that cannot be brought for arbitration. This is called the subject matter of arbitration. The agreement to arbitrate must not fall within these categories, and the subject matter must be clearly identified in the arbitration agreement.

Thirdly, in terms of ordinary arbitration, there must be reasons to proceed with arbitration. The reason of ordinary arbitration is the encroachment upon an exclusive right or the threat to encroach on that right. This may sound obvious, but the arbitration law in Articles 173 to 176 and 178 to 188 are worded in such a manner that the arbitration agreement must be of a commercial nature. This must be in the form of an agreement-article 173. Article 173 states '...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...'

Ordinary Arbitration/Judiciary Arbitration (mixed arbitration)

There are basically two main types of arbitration in Kuwait: there is the ordinary arbitration whereby the parties have agreed to arbitrate (this has been discussed earlier as the voluntary arbitration), and the other is compulsory arbitration whereby parties must resort to arbitration. This is for industrial disputes, disputes

in relation to Engineers, and Kuwaiti Stock Exchange disputes. However, since 1971, there has been the mixed judiciary arbitration system which consists of a judiciary and non-judiciary element. This mixed judiciary will be discussed first, and later the ordinary arbitration will be discussed. In the mixed arbitration, Article 264 of the Law of Procedure-under No.3/1971 stipulates that the jurisdiction court may have one or more arbitral tribunals chaired by a judge or a counsellor, who is chosen by the general assembly of the court, with the membership of the two traders chosen by the Chamber of Commerce. In essence, this is an exemption to the general principle of prohibiting judges from acting as arbitrators at all, even without charging for his work, in order to maintain the independency of the judges, pursuant to Article 26 of the Law of Organizing of Kuwaiti Judiciary System No. 23/1990. Such prohibition is still valid except for the purpose of judiciary arbitration under the law of 1995.[103]

The Arbitral Tribunal is to convene in the place decide by its chairman. The tribunal is to consider civil or commercial disputes agreed to in writing by the concerned parties. The tribunal is not governed by the rules of the civil and commercial law of Procedure (except those mentioned in Chapter III of the second book). The Tribunal is allowed to hear witnesses; carry out inspection; seek the help of experts if needed; and assign one of the Court personnel to act as a secretary.

It must be noted that the composition of the tribunal is dominated by the non-judiciary element consisting of two traders, and the other is chosen from the judiciary. A similar line can be drawn in France where parties are allowed to entrust the court with an open agreement to settle disputes through the application of rules of justice. It is to be found in Article 14 of the French Law Procedure.

In Kuwait the mixed arbitration has been gaining more importance, and the Procedure Law No. 38/1980 changes were made whereby the chosen arbitrators

[103] Ahmed Melijee, *Quaed Altahkeem fee Alqanon Al-Kuwaiti: Principles of Arbitarion in Kuwaiti Law* (Dar Alkotob, 1996) 262.

were not confined to traders. They could be chosen from other professions and the authority of the tribunal has been expanded as well. The tribunal is allowed to issue awards or orders included in Provisions A, B, and C of Article 180 of the Law of Procedure. The Tribunal could impose fines on absentees, or persons abstaining from answering questions or ordering others to show documents in their possession. This goes to show that the mixed arbitration has been gaining in strength since introducing Article 264 of the Law of Procedure under No. 3/1971. This is extraordinary authority given to the tribunal where the mixed arbitration is not given to the ordinary tribunal, which is only confined with regular rules of conducting arbitration.[104]

Such judiciary arbitration has been described by some commentators[105] as an institutional arbitration. Pursuant to Article 1 of the Arbitration law of 1995, the majority of the tribunal arbitrators must be from the judiciary members (Counsel/judge) and headed by one of them as well. In the judiciary arbitration, the tribunal mostly conducts the trial in accordance with procedural law, except when the parties are agreed upon and when nature arbitration is required.

Judiciary Arbitration under law No. 11/1995

It is characterized by the following characteristics:

- The mixed nature of nature tribunal formation guarantees the effectiveness, independence and neutrality awards.

- The second article of the new arbitration law provides that the arbitral tribunal settles disputes free of charge.

Article 2 reads:

The Arbitration Panel shall have jurisdiction over the following issue:

[104] Wajdi Ragib, Law School Journal, Kuwait University, Volume 1 year 1993.
[105] Mileeje (n 102) 266.

1) To determine and render arbitrations on the disputes the litigant parties concerned have agreed to bring before it.

Moreover, it shall have jurisdiction over the disputes arising from the contracts after enforcement of this law which comprises provisions covering settlements of such disputes through arbitration, unless otherwise is stipulated in the relevant contract or in any such other system of Arbitration.

2) It shall alone have exclusive jurisdiction to determine the disputes arising between Government Ministries, Authorities, Public Corporations and the Companies whose capital is fully owned by the State-Government or between all such institutions.

3) To determine on arbitration applications and petitions submitted by individuals or private firms against Government Ministries, Authorities, Departments of Public Corporations regarding disputes arising between them, unless the relevant dispute was already brought before the judiciary, i.e. the Courts of Law.

The dispute brought before the Arbitration panel shall be free of fees.

The analysis of this Article reveals the following remarkable issue that needs careful consideration:

- As it was elaborated earlier in this thesis,[106] the Kuwaiti system distinguishes between two types of contracts that are signed with the state department/ authorities: the administrative contract and the commercial/civil contract. The criteria and conditions which are required to distinguish between them also have been described.

By virtue of the above sub-Article 2(2), due to the plain drafting and understanding of it, all the contracts that are signed among the state departments, or with its public corporations and companies which are totally owned by the

[106] 'Text to pages 4-7 in ch 1'.

state, have to be referred to by such judiciary mixed arbitration tribunal. This raises a very critical concern according to the eligibility of such reference to the arbitration.

The Kuwaiti Constitution States in Article 169:

'The law regulates the settlement of administrative suits by means of a special Chamber or Court, and prescribes its organization and manner of assuming administrative jurisdiction including the power of both nullification and compensation in respect of administrative acts contrary to law'.

Furthermore, since the Kuwaiti Constitution has been published on 1962, the administrative court was only established by the Law of Establishing the Administrative Court No. 20 of 1981. And between the time of publishing the Kuwaiti Constitution and establishing the Administrative, the Kuwaiti court had not particularly looked at the eligibility of arbitration in the administrative contract; it had only assessed the arbitration award itself which implicitly meant that referring the administrative contract disputes to the arbitration was eligible and the concerned arbitration tribunal has a jurisdiction. This has been perceived by the Kuwaiti court decision of a dispute between the Ministry of Public Works and one of its construction contractors.[107]

In this case an administrative construction contract was signed between the Ministry of Public Works and a construction contractor. Clause 31 of this contract said: 'Any difference or dispute that may arise hereto concerning the subject of the Contract or its execution, shall be referred to one arbitrator chosen by parties. The decision of the arbitrator will be final and binding'.

The dispute had arisen and the parties had entered into an arbitration charter that formulates the procedures of the tribunal, which consequently decided on the dispute.

[107] Case No.1064/1968, session 17/3/1969. Judicial and Law Journal.

The Contractor was not happy with the award and challenges it before the Court on the basis of nullity of the arbitration on such a contract.

The Court dismissed the appeal and decided that the arbitration was eligible and the tribunal had jurisdiction to decide upon the dispute.

This was before the law of establishing the Administrative Court came into existence in 1981, which Article 2 of this Law gives exclusive jurisdiction to the Administrative Court to decide on any disputes that arise out of the administrative contract.

After that and before issuing the Law of Arbitration in 1995, the Kuwaiti Court[108] decided that pursuant to the law of establishing the Administrative Court, no tribunal - either court or arbitration - has a jurisdiction to look at any administrative dispute arising out of the administrative contract except the court appointed by the law of 1981. The Court in this case distinguishes between the administrative matters and the civil and commercially-related to administrative matters, since the latter can be referred to as arbitration tribunal, but the earlier cannot to be referred to any tribunal, except to the Administrative Court.

Nevertheless, after the promulgation of the Arbitration law of 1995, the situation of the arbitration tribunal jurisdiction regarding the administrative contract has become a more contentious matter. The debate in this regard has been drawn to the two facets of the matter: firstly, regarding the criteria to distinguish between the administrative and the commercial issues in the administrative contract, the court cases do not precisely characterize each of them, but only refer to public order as a keynote to differentiate between each of them. Any matter that is related to the public policy would then be subject to exclusive jurisdiction of the Administrative Court. However, it was remarked by commentators that a notion

[108] Case No. 122/88, session 23/1/1989 Commercial.

of public policy has been developed and changed as a result of life revolution all over the world, and particularly in the Middle East region.[109]

Secondly, with respect to compulsory arbitration, there is an uncertainty relating to the constitutionality of the rule of this content, as it contradicts with principles of the liberty of choosing the way to resolve disputes. Due to the stringency of its procedure, the Kuwaiti Constitutional Court has not yet seen this issue nor has referred to it.

Nevertheless, because of the following reasons we are finding that it is eligible to refer the administrative contract to the private arbitration:

- In addition to the rules of the Arbitration Law of 1995, the legislators keep it up with enacting other new legislations that allow specifically the state department to include an arbitration clause in its contract, particularly in a typical administrative contract such as Concession Contract, Monopoly, BOT, etc. For example, in the latest enactment that organizes the BOT agreement, Article 15 of the Law No. 7 of 2008 expressly allows any state department that enters into an agreement in accordance with this law to resolve the disputes arising out of such agreements through the ordinary arbitration. And due to the limitlessness of such a right, the parties in this regard are not restrained with a domestic arbitration and may agree to refer their dispute to either an ad hoc or intuitional international arbitration.

This also can be seen in Article 16 of Kuwaiti Foreign Investment No. 8 of 2001, which allows reference to ordinary arbitration in any agreement that may sign with foreign investors.

The Explanatory Memorandum of the issuance of this law clearly mentions the right to refer to either a domestic or international arbitration.[110]

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[109] Mileeje (n 102) 276.

[110] The Kuwaiti commentators have concluded that the explanatory note of law have the same power of the law itself.

• Moreover, in the terms of the international convention for dispute resolution, the State of Kuwait has become a member of the Convention of the International Centre for Settlement of Investment Dispute (ICSID) in 1978. The convention has been entered into force in the State of Kuwait since March 4 1979, and since then the State of Kuwait has concluded bilateral treaties (BITs) with many state parties of the Convention to promote, protect, and attract foreign investments.

And according to Article 25 of the Convention, the Centre has a jurisdiction over a legal dispute arising directly out of an investment.[111] However, the Convention does not delimit the definition of the word "investment", leaving the contracting parties a large measure of freedom to define that term, and their specific objectives and circumstances may lead them to do so,[112] unless the Centre jurisdiction can define it. That freedom does not, however, appear to be unlimited, considering that "investment" may well be regarded as embodying certain core meanings which distinguishes it from "an ordinary commercial transaction" such as a simple, stand alone, sale of goods or services .

In the case of *Salini Construction SpA and Italstrade SpA v Kingdom of Morocco,*[113] the tribunal recognised that the transaction in connection with the construction of a highway was included within the concept of "investment".

Furthermore, the Convention state party cannot deny the jurisdiction of the Centre on the basis of public order argument. In the case of *AMCO v Republic of*

[111] Article 25 (1) of the Convention states:" The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties of the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."
[112] *SGS Societe Generale de Surveillance S.A. v Islamic Republic of Pakistan, ICSID Case No.ARB/01/13*.
[113] ICSID Case No. ARB/00/4

Indonesia,[114] the tribunal rejected the Indonesian government argument regarding its jurisdiction to look at the intervention action made by the military.

For all the above arguments and to go with the flow of the revolution in international business and transactions, we are of the opinion that the definition of the Administrative has been changed.

The last wordings of the Article states that if brought under Law No. 11 of 1995, and if the said issues were dealt with by the Panel, which is a mixed panel comprising of judiciary and traders, they shall be free of charge. It must be mentioned that the state would bear the costs of arbitration on such matters, for example anything against Government Ministries and the rest mentioned in the Article. However, if the matters are purely civil and commercial, then the private parties must pay for the panel.

Parties to the dispute choose two ordinary arbitrators from the relevant lists recorded at the Arbitration Department at the Court of Appeal. If no parties choose arbitrators within 10 working days, the Department may appoint arbitrators whose names appear in the list and who are specialized in the subject matter. Apart from the chairman from the judiciary, there could be two other members of the public listed in the panel who understand the subject matter of the case. It must be said that these two members who assist the judge would be paid by the parties.

Stages and application

An application for arbitration is submitted by the concerned parties to the Arbitration Department and this application is free of charge. There is no need to pay any fees at this stage of application. Application should be submitted in one original copy and a number of copies equivalent to the number of litigants. Certain information should be given in the application (Article 4, Ministerial

[114] ICSID Case No. ARB/81/1

Decree No. 43/1995) including date of applying; name and title of litigants; address; name of their representative; subject matter of the dispute; brief pleadings; and name of their chosen arbitrator.

The application should also consist of a copy of the arbitration agreement or the clauses stipulated for resorting to arbitration in the contract. As soon as the Arbitration Department receive the application, it should notify parties to choose their arbitrator within 10 working days of notification, otherwise the Department would appoint an arbitrator whose name appears in the list in the panel. The arbitrator must be specialized in the subject matter of the dispute.

If the chosen does not set his fees, the Department with the assistance of the Chairman would estimate the fees to be set. The arbitration parties must deposit fees at the treasury within 10 days. If one party fails to pay his share of the fees, the other party may pay fees and later would be able to claim the fees, if the party wins. The Arbitration Department after three days of depositing fees in the treasury should submit the application to the arbitral tribunal chairman to fix the date and venue for the session.

The Arbitration Department would notify the parties of the date and venue of considering the demand and the formation of the arbitral tribunal and the date of submitting documents before the session. Though the legislator does not set a certain form for notification, he sets a date for it (Article 179-Procedure). Notification can be done through registered letter; telegraph; telex; fax; telephone; email or any other means (unless agreed otherwise by the parties).

Article 179 reads:

The arbitrator shall within 30 days from accepting the arbitration, notify the litigant parties of the date and venue of the first session set for hearing the dispute, without compliance with the rules prescribed in this law for notice serving. An appointment shall be fixed for them to submit their documents, their pleadings,

and defence. Awards may be rendered pursuant to the submissions of one party if the other party fails to appear on the fixed date.

In the event of several arbitrators, they shall jointly handle the investigation proceedings and each one of them shall sign the minutes and verbal process, unless they unanimously agree on delegating one of them for a certain procedure and confirm his delegation in the minutes of the session, or in case the agreement on arbitration authorises one of them to do so.

Awards may be issued on the basis of documents or memorandum, submitted even by one party as long as the other had the chance to submit his documents but he had failed to do so. Disputes are held in closed doors. In some cases, arbitration would be held with documents only. After an award is made, the tribunal has no right to amend it or cancel it. The Kuwaiti court may enforce the award, if the parties do not settle by paying the award.

In accordance with Article 10 of the Arbitration of 1995, the award of judiciary arbitration is final and binding and may not be challenged by any way which may apply to challenging or appealing the court verdict in the ordinary way. It can only be objected before the Court of Cassation (Supreme Court) on the extraordinary way which is only limited to the following reasons:[115]

1) Violation of the law or any erroneous applications or misconstructions of the same.

2) Occurrence of nullity of any award, verdict, arbitration or invalidity of the relevant proceedings to a prejudicial extent affecting such award or verdict.

3) If the Arbitration Panel has rendered an award contradictory to a former ruling already made in respect of the litigant parties which has conclusively possessed the determinative effect of an adjudicated order, whether rendered by an ordinary court of law or by any Arbitration Panel.

[115] The same reasons that are required for an extraordinary way of appealing the ordinary court verdict.

4) In case of actualizing or realizing any cause under which a rehearing is permissible.

Ordinary Arbitration

Unlike judiciary arbitration (mixed arbitration) in the ordinary arbitration, the process does not start with notification. The arbitration agreement is considered a notification for the parties. The arbitrator within 30 days of accepting the assignment should inform the parties of the date and venue of the first session. The arbitrator should set a date for the parties to submit their documents, memorandum and aspects of defence, Article 179 of the Law No. 38 of 1980. The arbitrator can proceed with mail, telegraph, fax, telex or telephone. The arbitrator has no right to determine any issue outside the mandate of arbitration. The arbitrator has no right to judge whether a document is forged or not. However, this needs to be decided by the courts in a criminal part of the law.

In order to settle certain dispute, the arbitrator is allowed to take verification measure. In accordance with article 179/1 the arbitrator needs to set a date to submit their documents and memorandum. The arbitrator can issue his award on the basis of documents presented by one party if the other fails to submit documents on the fixed date.

The arbitrator is allowed to summon the parties or one of them for questioning. He can get the help of witnesses, experts or carry out inspection. The arbitrator should abide by the time limits stipulated in the arbitration agreement or in Law; it is six months according to Article 181/1. The time limits are to begin when notifying the parties of the date of the arbitration session, otherwise by any party referring to the court dispute if it was previously raised. The arbitrator must give the award within six months of the notification of the arbitration. The aim is to make sure that the arbitration is conducted in a cost-effective and speedy manner.

Article 182

The Arbitrator shall render his award without compliance with the pleadings procedures save the proceedings provided for in this Chapter. Nevertheless, the litigant parties may agree upon certain proceedings to be followed by the arbitration in that respect.

The award rendered by the arbitrator shall be based on the law provisions, unless he is authorised to compromise and conciliate, where he shall not comply with such provisions, save those relating to the public order.

The Court of Cassation decided that although the arbitration award is amounted as a sort of judiciary verdict, it is not required to have all the essential requirements that must be availed in the ordinary court verdict when reasoning the award.[116]

In accordance with Article 186 of the Procedure Law of 1980 the award of ordinary arbitration must be final and binding and may not be challenged in any way of appealing, unless agreed otherwise by parties.

Nevertheless, the arbitration award shall not be appealable at all if the arbitrator is authorized to compromise and conciliate, or if he is an arbitrator of Appeal, or if the value of the relevant action does not exceed KD 500.

The rules governing urgent self-executing judgments shall be applicable to the arbitrator's awards.

Generally, the arbitration must be run in Arabic language and all the documents, witnessing, cross-examining must be in Arabic language or at least to be translated to Arabic unless parties agreed to run the trial in the other language particularly when choosing a non-Arabic arbitrator. This is an exemption given to the arbitration on the contrary to the ordinary judiciary trial which must be run in an Arabic language as it is a public order pursuant to Kuwaiti Constitution.[117]

[116] Case no. 148/86 session 18/2/1987 commercial.
[117] Court of Cassation case no. 42/1974 session 1975.

The Arbitrator's award shall be rendered in Kuwait, otherwise the prescribed rules applicable to the arbitrator's award in a foreign country shall be applied in that respect.

It must be said that the arbitration award is binding to both parties; if one party refuses to pay the award, then the enforcement of the award will be done by the court.

Appeal is governed by rules applicable to judiciary judgments, and the Appeal must be made within 30 days.

Chapter Four

ADJUDICATION

Introduction

Adjudication has become one of the most crucial methods for dispute resolution at the present time. Though widely used to solve different types of disputes, it is principally and specifically the preferred method in dealing with disputes of construction industry contracts due to the particular nature of such contracts, i.e. long-term and complicated contracts that require disputes to be resolved quickly and amicably. The United Kingdom, as the leader of the common law school, is deemed to be the pioneer in the field of studying and developing the mechanism of dispute resolution, in particular adjudication, in construction contracts despite the early opposition of some senior construction lawyers who stood against this method. Adjudication was barely known in construction industries before its appearance in 1976, when it was crystallized in the technical sense ever since. Adjudication has evolved through two stages. The first one, when the legislator introduced the adjudication mechanism to the contract models JCT and NCE in 1976 and 1993, respectively.[118] It was added to the JCT system (the 'Green Form') to protect the sub-contractor from abuse that might be waged by the employer on exercising his right to set-off, following the decision of House of Lords in *Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd,* [119] which gives the employer the right to exercise the normal rules and rights of set-off against the sub-contractor as stated by Lord Reid ' It is now admitted, and my view properly admitted, that at common law there is a right of set-off in such circumstances: but that right can be excluded by contract'. Viscount Dilhorne also added, "The sub-contract is related to the main contract but it is wrong, in my opinion, to describe it as the creature of the main contract. If it were the case,

[118] The 1976 revision of the " Green Form" of Nominated Sub-Contract and the " Blue Form" for domestic sub-contract of the 1963 edition of the Joint Contracts Tribunal (JCT) Contract.
[119] [1974] AC 689 (HL).

which in my opinion it is not, that under the main contract the amount certified in an interim certificate and the amount included in the amount certified attributable to sub-contract work had to be paid without deduction, then one would not expect a sub-contract not to reflect that." In *Gilbert*, Lord Reid concurred with the common-law doctrine of set-off in such circumstances, but noted that such a right could be excluded by contract.

The second stage, with the investigation undertaken by Sir Michael Latham, a former Conservative MP and ex-director of the UK House Builders Federation, in the beginning of the 1990s to come up with his 1994 report entitled Constructing The Team, Final Report of the Government / Industry Review of Procurement and Contractual Arrangements In The UK Construction Industry [HMSO, London, 1994. Amongst the thirty principle recommendations made by Sir Latham: a quick and temporary resolution to construction disputes, reflected in an extraordinary statute, Part II of the Housing Grants, Construction and Regeneration Act 1996 (came into effect the first of May, 1998). In fact, in addition to Sir Michael Latham, Lord Woolf has considered and noticed the problem of time and cost in civil litigation while he was carrying out a survey and review of the English court system, which gave an understanding of what these aspects of actions look like. Consequently, a number of common law system countries followed the UK in this regard, such as New Zealand with the issuance of Adjudication under the Construction Contracts Act 2002, Australia and Singapore. The International Federation of Consulting Engineers (FIDIC), in 1999, issued their model that included adjudication procedures as mentioned in clause 20 in both the Conditions of Contract for Construction (For Building and Engineering Works Designed by the Employer - The Red Book) and the Conditions of Contract for EPC/ Turnkey Projects (The Silver Book).

What is Adjudication?

The word "Adjudication" is an old word which is utilized in various fields in different ways. Therefore it seems meaningless without being used in a particular field or area.[120]

In a literal understanding, adjudication means making an official decision about who is right in a disagreement between two groups or organizations.

In fact, neither the Act of 1996 nor its Scheme has defined adjudication. Most of the legal scholars have tried to define adjudication based on its process and mechanism. John Uff describes it as 'Pay now, argue later'.[121] Judiciary-the court had considered the adjudication provisions of the HGRA 1996("the Act") in the first time in *Macob Civil Engineering Ltd v Morrison Construction Ltd.*[122]The adjudication was defined in a descriptive way in this by Dyson J, as he gave a semi- definition of adjudication when he tried to describe the intention of the Parliament in enacting the Act as introducing a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by means of arbitration, litigation or agreement.[123]

The ambit of Dyson's description reveals a definition for adjudication in the sense that it is an interim, speedy mechanism for provisionally setting disputes in construction contracts, provided that the adjudicators' decisions to be enforced after the dispute are finally determined by the arbitrator, the judge or by the parties' agreement.

The Victorian State Government defined adjudication as the process that allows for the rapid determination of progress claims under building contracts or sub-

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[120] John Redmond, *Adjudication in Construction Contracts* (Blackwell Science, 2001) 6.
[121] John Uff, *Construction Law* (9th edn Sweet & Maxwell, 2005) 63.
[122] [1999] BLR 93, (1999) 1 TCLR 113.
[123] Dyson J said:"This is the first time that the court has had to consider the adjudication provisions of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"). The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement".

contracts and contracts for the supply of goods or services in the building industry, without parties getting tied up in lengthy and expensive litigation or arbitration.

Nevertheless, the precise definition to be given to adjudication, in my view, is the one made by Derek Simmonds when he stated[124] that adjudication is just a process under which a dispute between contracting parties is decided by a neutral person (the adjudicator) after examining the arguments of the parties.[125]

The latter definition corresponds with Osborn's Concise Law Dictionary, in which adjudication is defined as:

(3) A form of Alternative Dispute Resolution (q.v.). It is used widely in the construction industry and allows disputes to be determined by an adjudicator comparatively swiftly while work progresses. The adjudicator's decision is binding, unless and until the dispute is finally determined by legal proceedings, arbitration (q.v.) or the agreement of the parties. The parties may, however, accept the adjudicator's decision as finally determining the dispute.

In the jurisdictions of Middle East countries such as Kuwait, Egypt[126] and the others, adjudication is still nascent and its mechanisms do not enjoy due respect by the concerned people because adjudication has not yet been adopted in legislation or incorporated into contract models, and has not yet been precisely defined by any law resources, i.e. legislation, courts or scholars. Dr.Hani Salah El-Din (a reputable Arab expert in the field of BOT projects), in his book Altanzeem Alkhanony wa ataakody limashroaat albonyah alasaseya almomawala an tareeq alqetaa alkhass (The Legal and Contractual Regulation of Infra-Structure Projects Financed by Private Sector), did not translate the word

[124] Derek Simmonds, *Statutory Adjudication: A Practical Guide* (Blackwell Publishing, 2003) 3.
[125] ibid, "Adjudication is a process whereby, when a dispute between contracting parties arises, a neutral – that is, basically, person who has no connection with either side- is engaged to examine the arguments of the parties and to decide the dispute. The decision may be temporary pending final determination by some other process or it may become final and binding if the dispute is not referred on within a specified period or if the parties have agreed that it should".
[126] In Egypt, the word adjudication is used to signify a different sense in tendering and biddings.

"adjudication" properly when he dealt with adjudication under the FIDIC model contracts. He called it "Al-Khebrah" ("Expertise"), which we think has exactly the meaning of expert determination, while Dr. Mashael Alhajeree gave adjudication a very suitable name in Arabic which is closer to the definition under the English legal system: Lejan Atasweyah ("Adjudication Boards").[127]

Importance of Adjudication – Why Adjudication?

Adjudication, being a private process, provides a simple, elegant and effective tool to resolve complex legal disputes. It is better for the contracting parties to adopt such marvelous means for the sake of the following:

1- Experience:

The adjudicator to be chosen to resolve a dispute is definitely an experienced one. His selection by the parties is attributable to such experience which pours into the wise judgment of the file and reaching an acceptable decision. Thus, experience adds to the confidence of the parties in the adjudicator and constitutes one of the characteristics of adjudication's importance.

2- Expeditiousness:

As time limit is confined to 28 days for the adjudicator to deliver the decision, it appears to have no time wasted in partisan legal tactics and delays. The adjudication will commence immediately with an analysis of the applicable legal authorities and identification of the evidence that supports the positions of each party to the dispute. The adjudicator shall promptly examine material witnesses under oath in the locations where they are found. There is no need to repeat the process years later in an expensive litigation. The speed of the adjudication is one of the most important characteristics of this method of dispute resolution as a preliminary procedure where speed is given priority over accuracy.[128]

[127] Mashae'l Alhajeree, Journal of Law, ed.No.1, vol.3, p.69
[128] *Hart Investments Ltd v Fidler & Anor* [2006] EWHC 2857(TCC).

3- Enforceability:

When the adjudication is completed the decision may be quickly confirmed as an enforceable court judgment if it is recognized by its parties. It may be appealed as permitted by the parties' agreement and applicable law.

4- Cost Efficiency:

Since fees of adjudication are always capped and the process is timely limited, this represents cost efficiency for both parties who may as well agree to split the fees. So cost efficiency is available all over the process.

Characteristics of Adjudication

The concept of adjudication, although being a type of alternative dispute resolution means, is different to some extent. Adjudication characteristics can be summed up as follows:[129]

- it is not regulated by legislation or rules of law.
- it is not supervised by the State authorities.
- its decisions do not have an immediate binding effect.
- its decisions are not executable with immediate effect.

Adjudication Process

[129] Alhajree (n 126) 104.

During the last decade, the adjudication system has become global and used by various bodies of law and modern countries. This section will focus on the adjudication under Pt II of Housing Grants, Construction and Regeneration Act 1996 (the "Act") and on adjudication under Kuwaiti jurisdiction in particular.

Adjudication under Pt II of the Act

The rules of adjudication under the Act only apply to disputes arising out of construction contracts for the carrying out of construction work in England, Wales and Scotland.

The right to apply adjudication under the Act is set out in section 108, which provides as follows:

(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose "dispute" includes any difference.

In *Rok Build Ltd v Harris Wharf Development Co Ltd,*[130] it is confirmed that only the parties to a construction contract have the right to refer their dispute arising out of the contract to adjudication or if one of the parties thereto may have assigned the contract to a third party.

In *Andrew Wallace Ltd v Artisan regeneration Ltd,*[131] it was clearly held that it is only a party to a construction contract that can refer its disputes or differences to the adjudication.

In this case, it is also required that any challenge or argument regarding the identity of the adjudication's parties should be raised at an early stage of the

[130] [2006] EWHC 3573(TCC).
[131] [2006] EWHC 15 (TCC).

proceedings. And if there is any real question about the identity of a contracting party, this should be raised clearly at an earlier stage before the publication of the adjudication's decision. There are some behaviors of one of the contracting parties that can be impliedly construed as recognition of the other party, i.e. the party who paid substantial sums of money to a certain company as a contracting party cannot at a later stage of adjudication challenge his entity.

It should be noted that the reference to "legal representative" for the purpose of CPR 6PD 3.2(a) is a reference to a person who is retained or nominated by a client to give it legal advice and to represent it in certain proceedings.[132]

It is also added in *Total M&E Services Ltd v ABB Building Technologies Ltd,*[133] that the differences, incorrect or the mistake of a proper party does not make a basis or grounds for challenging the jurisdiction of the adjudication as long as [the mis-description where the parties (claimant and defendant) at all stages were aware of the true and real identities of the contracting parties and no one could be misled.

A similar concept is adopted by the courts and the laws of Kuwait. The pleas pertaining to the form of proceedings ought to be produced and expressed initially before dealing with the facts and objective pleas. Hence, in a later stage of proceeding, the parties are not allowed to discuss or challenge the pleas of form, i.e. the name of the company cannot be challenged in a later stage during the objective pleas so long as such question has not been raised in the stage of expressing the pleas of form.

(2)The contract shall:

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

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[132] *Hart Investments Ltd v Fidler & Anor* [2006] EWHC 2857 (TCC).
[133] [2002] EWHC 248 (TCC).

In accordance with this sub-clause and the following sub-clause it was decided in *Aveat Heating Ltd v Jerram Falkus Construction Ltd*[134] that the exact meaning of referral should take place from the date of receipt date not from the date of sending or dispatching the notice. It was also decided that the provisions of s.108(2)(c) and (d) are mandatory rather than directory, so the parties should comply with such provisions and any contrary agreement will be excluded and the scheme will be applied.

For the purpose of the mechanism of account the duration of time for either the referral notice time or the adjudicator decision time, the fractions of a day should not have been taken into account.

Even more, in respect of counting the weekend days off (Saturday and Sunday) it was held in *Godwin v Swindon BC*[135]that the two weekend days shall not be calculated, while in *Anderton v Clwyd CC*[136] the court held that calculation of the two days should not disregard the weekend and the reference to the word "day" in CPR 6.7 meant calendar day for the notice, which is also upheld by Coulson J in *Hart investments Ltd v Fidler & Anor.*[137]

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

As a result of the above principle it is also mentioned in *Aveat Heating Ltd v Jerram Falkus Construction Ltd*[138] that the adjudicator has no jurisdiction to reach his decision out of the time set in this Section without the approval from the parties or from the referral party for the first extension.

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[134] [2007] EWHC 131 (TCC).
[135] [2001] EWCA Civ 1478, [2002] 1 WLR 997.
[136] [2002]EWCA Civ 933, [2002] 1 WLR 3174.
[137] [2006] EWHC 2857 (TCC).
[138] *Aveat* (n 132).

This indicates the importance of setting a time table in the contract through which the appointment of adjudicator and the referral of the dispute to him shall be done. Such timetable shall not take more than seven days.

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

It is worthy analyzing the conditions that are required by this section to refer the dispute to the adjudication.

These rules of adjudication only apply to construction contracts according to the definition which has already been demonstrated in chapter one.[139] The section sets

[139] 'Text to page 3 in ch 1'.

out certain minimum procedural rules to be followed as well as giving the parties (by removing the traditional role and authority of the engineer and architect to make a decision on the disputes or differences during the contract) the right to refer their dispute to an independent party who restricted to issue his decision within the time limit, otherwise the Scheme for Construction Contract will apply pursuant to section 114(4) of the Act which states: 'Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned'.

It is also provided under the Act that the contract between the parties should be in writing. Section 107 of the Act states:

(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing:

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means. Adjudication"

Although this section clearly widens the ambit of the Act as it qualifies there will be an agreement in writing, if the agreement is " evidenced in writing " and where the effect of an oral agreement " is alleged in adjudication proceedings and not denied by the other party in his response", it has considerable difficulty since the Act came into force. It is provided that the provisions of the Act apply only where the construction contract is in writing. The most difficult question is whether and to what extent oral contracts may be subject to the provisions of the Act. In *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd,*[140] the oral agreement had been made between the parties to undertake design input by the appellants. Since the dispute arose between the parties the respondents commenced adjudication proceedings against the appellants, who challenged the right to seek adjudication by denying that the agreement was in writing and therefore within Part II of the Act. The case came before the Technology and Construction Court in Liverpool, where Mackay J concluded that it was not necessary that the evidence submitted in support of the agreement should identify all terms of that agreement. He said 'I hold *that it is not necessary to have the terms identified and the extensive documentary evidence in this case is well sufficient to bring it within the adjudication proceedings'*. Accordingly, the declaration sought by *RJT* that the agreement was not an agreement in writing pursuant to the Act was refused.

[140] [2002] EWCA Civ 270, [2002] 1 WLR 2344.

This decision was overturned by the Court of Appeal in which it was held that, in order to meet the requirements of section 107 of the Act , all the terms of contract had to be in, or evidenced in, writing.

Lord Ward stated that under section 107, the whole of the agreement and not part of it has to be evidenced in writing with the exclusion of the instance falling within sub-section 5 where the material or relevant parts alleged and not denied in the written submissions in the adjudication proceedings are sufficient. Lord Ward concluded that sub-section 5 cannot dominate the interpretation of the section as a whole, and that the need for writing is a pre-condition for the application of the other provisions of part II of the Act not just the jurisdictional threshold for a reference to adjudication.

On the other hand, in *Treasure & Son Ltd v Dawes,*[141] there was distinction between a contractual adjudication and a statuary adjudication and it was held that in case of a contractual adjudication, the adjudication process is not undermined by the fact that the terms of original contract were varied orally and that the principal adopted by the Court of Appeal in *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd*[142] was not applicable to a contractual adjudication.

Akenhead J stated that under a contractual adjudication where the terms of the original contract (containing the adjudication clause) were orally varied, such contractual adjudication could only be undermined if it was an express term of the contract itself to the effect that oral variations of the terms were not to be considered valid unless recorded or evidenced in writing. Essentially the parties will have agreed in a binding contract that disputes will be referable to adjudication. If there is some oral variation to the terms of that contract, that does not itself undermine the contractual enforceability of the adjudication process. If the original agreement is binding and whether or not the oral variation is binding,

[141] [2007] EWHC 2420 (TCC).
[142] *RJT* (n 138)

there still remains a binding adjudication agreement of which either or both parties may make use from time to time.

In determining whether there is an obligation to adjudicate in an arrangement, stated that one has to look at the contract.

If there is a written obligation to adjudicate you need to adjudicate.

If there is a written obligation to adjudicate that written obligation may have been amended by a subsequent oral obligation to resolve disputes in a manner different than adjudication. However, the oral agreement does not undermine the written obligation to adjudicate.

If there is no written obligation (binds both sides) there may a statutory duty (on one or more parties) to adjudicate – this will not be written in the agreement but may impose a duty (as opposed to an obligation or a written obligation) to adjudicate.

In fact, section 107 of the Act typically follows section 5 of the English Arbitration Act 1996 and in particular sub-section (5). This approach is also adopted in the Kuwaiti law of arbitration, as these methods of dispute resolution are considered alternative ways to resolve the disputes other than the litigation as it applies for any dispute.

It is a worthwhile to refer to the "letter of intent" and whether it can be considered as an agreement in writing in accordance with section 107. In *Hart Investments Ltd v Fidler & Anor*[143] Coulson J deeply discussed this issue and came up with a holding that the "letter of intent" needs to be examined in every single case based on its own facts but there are several very fundamental elements that must be available in the "letter of intent" to accept it as an agreement in writing. Basically the work scope has to be completely identified in the "letter of intent" or in any referred-to document such as "tender document" that gives a plain discernible

[143] [2006] EWHC 2857 (TCC).

measure to the scope of work that is required to be done by the parties and the terms and conditions. The price of the contract and the time is also required to be specified[144]. In addition, recently it was confirmed by Akenhead J in the case of *Diamond Build Ltd v Clapham Park Homes Ltd*[145] that the "letter of intent" can create a contract between the parties who are bound by thereby unless agreed otherwise.

Nevertheless, it was noted that some difficulties may occurred to verify whether or not there is a contract "in writing" which could be sometimes impossible to be run by the adjudicator with such a limited timescale.

Therefore, a new regimen comes to exists by the Local Democracy, Economic Development and Construction Act 2009 (LDEDC Act). According to s. 139 a construction contract that enter on or after 1st of October 2011 does not required to be "in writing" in order to apply the rules of HGCA Act 1996. However, in compliance with current provisions of section 108 (2), (3) and (4) an adjudication procedure are still required to be in writing and accordingly the parties should include such provisions in their contract, otherwise the Scheme adjudication provisions will apply.

Definition of a dispute

It is always anticipated that any deal, agreement or bargain might face difficulties which lead to differences or disputes between parties. Therefore, as adjudication is an irregular means to resolve disputes, British legislators adopted a provision that a party cannot refer a matter to adjudication unless there is a dispute or difference between the parties in a construction contract. It is stipulated in section 108(1) of the Act that: "A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose 'dispute' includes any differences".

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[144] The concept was cited in the case of *Harris Calnan Construction Co Ltd v Ridgewood (Kensington) Ltd* [2007] EWHC 2738 (TCC).
[145] [2008] EWHC 1439 (TCC).

The wording of this section means if there is no dispute between parties then the adjudication does not have jurisdiction and its decision cannot be enforced. As a result it has become necessary to define the words "dispute" and "differences" precisely. This issue has been debated in several cases involving arbitration, as the same concept has been adopted in the Arbitration Act 1996 as well, to ascertain the applicability of arbitration agreement.

In the case of *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd,*[146] Court of Appeal, it was argued whether the failure to serve a withholding notice in accordance with section 111 of the Act may lead to the conclusion that there is no dispute which can be referred to arbitration or adjudication. In this case, *Collins,* the contractor, carried out work for Baltic, which neither paid *Collins* a certified amount nor served it a withholding notice. Then Collins started legal proceedings in respect of the amount not paid. Baltic applied to the court to stay a litigation proceeding in accordance with section 9(4) of the Arbitration Act 1996, which states: "On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed", on the basis that the parties had an agreement to arbitrate. *Collins* argued that in the absence of the service of a withholding notice, there was no "dispute" between the parties to be referred to arbitration as a pre-requisite to the applicability of section 9 of the Arbitration Act 1996. The Court of Appeal found that, in spite of the absence of a withholding notice pursuant to section 111 of the Act, the dispute existed as long as Baltic did not admit *Collins*'s claim and, as a result, Baltic was entitled to a stay in the litigation proceedings in accordance with section 9 of the Arbitration Act 1996.

The mere fact that a party (a claimant) notifies another party a (respondent) on a claim does not automatically give rise to a dispute. A dispute only arises when a claim is not admitted.[147]

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[146] [2004] EWCA Civ 1757, [2005] BLR 63.
[147] *Rok Build Ltd v Harris Wharf Development Co Ltd* [2006] EWHC 3573 (TCC).

A very important case in this regard is *Fastrack Contractors Ltd v Morrison Construction Ltd.*[148] In this case many principles and issues related to the meaning of “dispute” and the jurisdiction of adjudication have been discussed and established.

The Requirements of a "Dispute"

Essentially, it should be borne in mind that the HGCRA refers to a "dispute" and not to "disputes". As a result, the referring party can only refer a single dispute, although the Scheme allows the disputing parties to agree, thereafter, to add more than one dispute to the dispute reference under one contract and related disputes under different contract.

Usually, all through the performance of construction contract many claims, disputes, differences, failure, bad performance, delay or default that may arise. Many of these claims can be collectively or individually create or establish a dispute. Such dispute may consist of a different matters that cause a dispute.

But, it is necessary at the moment of referring this dispute to the adjudication or any competent jurisdiction such as arbitration (for the purpose of Arbitration Act 1996), these matters to eventually form a dispute which consequently will confine the adjudicator with this dispute.

So, the referred party should crystallize his dispute carefully ensuring it does not include any other dispute or any reference to any other contract, even it is related to this dispute, without a pre-agreement with his opponent.

In fact, this is a fundamental issue that may cause to raise a question in respect of the correctness of the dispute reference itself as well as the legitimacy of the jurisdiction of the adjudicator to decide on this issue. Therefore, the dispute reference should be examined carefully. The wording of the notice of adjudication, like any commercial document, must be construed against the

[148] [2000] EWHC 177 (TCC).

underlying factual background from which it springs and which will be known to both parties. Thus, at any one time, a referring party must refer a single dispute, albeit that the Scheme allows the disputing parties to agree, thereafter, to extend the reference to cover "more than one dispute under the same contract" and "related disputes under different contracts".

The statutory language is clear. A "dispute", and nothing but a "dispute", may be referred. If two or more disputes are to be referred, each must be the subject of a separate reference. It would then be for the relevant adjudicator nominating body to decide whether it was appropriate to appoint the same adjudicator or different adjudicators to deal with each reference. Equally, what must be referred is a "dispute" rather than "most of a dispute" or "substantially the same dispute".

However, it should be noted that the referring party can unilaterally cut out of the reference some of the pre-existing matters in dispute and shorten the notice of dispute to some matters less than the totality of those in dispute. This action actually does not meant that notice include a new dispute has not been raised previously provided that the dispute is substantially is the same as the pre-existing one.

It is essential to answer the question “what dispute?” a dispute only arises when the subject-matter of the claim had been notified and rejected by the opposing party. The way of rejection can be emerged in many forms. For instance, a) an express rejection, b) modifying the claim while it is discussed among the parties, or c) ignoring or keeping silent over an identified or reasonable period of time.

This is clear from a consideration of two decisions, one concerned with arbitration and the other with the dispute resolution procedure that is required to have been gone through in many civil engineering contracts before arbitration can be commenced. In the arbitration field, the Court of Appeal stated in *Halki Shipping Corp v Sopex Oils Ltd*[149] that a "dispute" with respect of the Arbitration Act 1996

[149] [1998] 1 WLR 726, [1998] 1 Lloyd’s Rep 465.

should be given its ordinary meaning and in order for there to be a dispute when any claim which the opposing party has been notified of which that party has refused to admit or has not paid, whether or not there is any answer to that claim in fact or in law.

In the civil engineering field, the Court of Appeal in *Monmouthshire CC v Costelloe & Kemple Ltd*[150] held that a rejection of a claim does not necessarily occur when the claim is submitted to the engineer or during subsequent exchanges of views in relation to that claim. A dispute only arises when the claim is rejected in clear language. An obvious refusal to consider the claim or to answer it can, however, constitute such a rejection. A dispute only arises when it emerges that a claim is not "admitted" by the receiving party.

These cases help in showing that a claim and its submission do not necessarily constitute a dispute, that a dispute only arises when a claim has been notified and rejected, that a rejection can occur when an opposing party refuses to answer the claim, and that a dispute can arise when there has been a bare rejection of a claim to which there is no discernable answer in fact or in law.

> However, the essential first step in determining whether jurisdiction exists in order to appoint an adjudicator under the HGCRA is to identify the content of the suggested dispute. Only then is it possible to consider whether the claiming party has fulfilled the necessary precondition of a submission of the underlying claims to the other party followed by that party subsequently rejecting them.
>
> … The wording of the notice of adjudication is in wide terms and includes the general reference of:
>
> "disputes that have arisen ...issues as to [*Fastrack*'s] rights to payment of the sums set out below ... or such other sums as the adjudicator shall find payable under the following headings ... caused ... by [Morrison's]

[150] [1965] 5 BLR 83.

> breaches of contract; ... loss of profit as a result of the repudiation ... such other sums as the adjudicator deems appropriate." __
>
> All these disputed issues had arisen separately to the issue of interim application no. 13 and all were in dispute by the date that the notice of adjudication was served.[151]

It is also necessary to mention the extent of facts and matters that can be relied upon in a dispute to make it ripe. A dispute only arises when the issue or claim, along with all related facts and matters, has already been served upon the other party, which should be given sufficient opportunity to respond, whether by admitting, rejecting or modifying the claim, before commencement of an adjudication. A mere allegation made in order to attempt to initiate adjudication that is not supported by sufficient facts is called an "adjudication ambush" in the UK and is harshly criticized by commentators and is not permitted by courts, as held in *Edmund Nuttall Ltd v R G Carter Ltd.*[152] Seymour J commented that in determining the difference in meaning between a claim and a dispute the ordinary use of English should be used. Hence a dictionary can be used to distinguish one from the other.

The difference between a claim and a dispute is that a claim is an assertion of a right but a dispute is an argument as to the validity of that assertion.

A dispute is a disagreement where opposing views (claims or assertions) are expressed (sometimes in a heated manner).

An adjudication is where each contending party has stated his claim (assertion or view) and put forward arguments – it is when both parties then argue that the dispute starts.

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[151] *Fastrack* (n 145).

[152] [2002] EWHC 400 (TCC).

Finally, in this context it is also worthwhile to talk about the word "dispute" as mentioned in Clause (66) of the ICE forms of contracts and subcontracts. In the case of *AMEC Civil Engineering Ltd v Secretary of State for Transport,*[153] Jackson J set out seven propositions about the definition of the word "dispute" for the purpose of applying clause (66) of ICE Condition which are:

-1- For the purpose of arbitration or adjudication the meaning of word "dispute" should be defined or described in a normal and simple way not in the that the lawyers would described.

-2- Although the meaning of word "dispute" is simple and plain, the litigation over the years contributed to develop the meaning of word "dispute" and make it much clear, even though it is not utterly identified.

-3- The notification of one party (claimant) to the other party (respondent) does not necessary give rise to a dispute. Pursuant to the judicial precedent, the dispute arises when the claim is not admitted by the opponent.

-4- He gives some examples about how it can be deduced that the claim is not admitted by the respondent whether it is expressly or impliedly inferred from the case.

-5- Remaining silent by the respondent for a while it does not necessary meant that the claim is not admitted. It is based on the fact and condition of the case and the structure of the contract.

-6- Imposes a deadline to that a respondent to respond the claim is not usually a period that can be posted/ exceeded unless it is a reasonable. In all cases the period is subject to the court discretion.

[153] [2004] EWHC 2339 (TCC).

-7- If the claim does not present clearly by the claimant that make the respondent neither be silent nor expressly reject it, then the claim can be considered not admitted and can be referred to arbitration or litigation.

In the *Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd,*[154] Akenhead J stated that though these seven propositions that have been raised in *Amec* are related to arbitration, it is also can be applied to adjudication because there is no good reason in principle to differentiate in law or in fact as to a dispute or a difference in adjudication as opposed to in arbitration.

For the purpose of accelerating the adjudication, the same adjudicated dispute should not be referred again to another adjudication if the first adjudicated dispute has been exhausted. This is meant to make the adjudication time-efficient on one hand and cost-effective on the other, unless otherwise agreed by the parties. This principle is adopted in *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd.*[155]

Such an approach (to re-adjudicate the same dispute) includes not only the word "same" but also substantially the same dispute or difference. This is in Ramsey J judgment that '*disputes or differences encompass a wide range of factual and legal issues*'; this is the reason the approach includes the substantial side of the word "same". If the factual and legal issues are completely identical, the possibility of substantially re-adjudicating the same dispute or difference would defeat the purpose of Para.9 (2) of the Scheme.

The nature of adjudication, as previously dealt with, necessitates speed of procedure in settling and sorting out the dispute. It is temporarily binding, but does not estop the parties from resorting to arbitration or litigation for final determination of the dispute.[156]

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[154] [2007] EWHC 2507 (TCC).
[155] [2007] EWHC 144 (TCC).
[156] *Herschel Engineering Ltd v Breen Property Ltd* [2000] EWHC 178 (TCC).

However, a crucial question pertains to what constitutes a decision, and whether a second adjudicator will be bound by the reasoning of a decision made by the first adjudicator. In a second adjudication between *WH Malcolm Ltd v Amec Group Ltd*[157]*, Amec* argued that the correct method for the claim's measurement was SMM7, and *Malcolm* contended that the question of measurement had already been decided by the first adjudication. Accordingly, it could not be seen again by the second adjudicator. The case came before the Outer House of the Court of Session in Scotland.[158] Lady Smith found that although the method of measurement of SMM&7 was part of the first adjudicator's reasoning in reaching her decision, this was not the issue of the first adjudication nor did it form a part of the decision of the first adjudication. She also recognized that the applicability of SMM7 was part of the parties' contention in the first adjudication; nevertheless, she decided that 'it was manifestly not an issue which was referred to the first adjudicator, although it could have been. Nor was it part of the decision'.

This gives reason for every concerned party to be cautious; they must understand very clearly the issue pertaining to adjudication when drafting the notice of adjudication.

Furthermore, in the case of *Redwing Construction Ltd v Wishart,*[159] the judge added that if the first adjudicator is martially different from the second adjudication, the reasons for his decision may establish a noticeable idea for the second adjudication. It would thus fall under one of the following cases:

1. Any decision which can be described as deciding the dispute, as referred or as expanded effectively within the adjudication process, is binding and cannot be raised or adjudicated upon again in any later adjudication.

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[157] *WH Malcolm Ltd, Petitioner* [2010] CSOH 152, 2011 SLT 239.

[158] ibid.

[159] [2010] EWHC 3366 (TCC).

2. In contrast, any decision or part of a decision which can be described as not deciding the dispute, as referred or as expanded effectively within the adjudication process, is not binding and can be raised or adjudicated upon again in any later adjudication.

As a result of the aforementioned, where the adjudicator gives an opinion in court terms of "obiter dicta",[160] on a matter or point which was not part of the dispute, such opinion will not be jurisdictionally considered part of his decision.

The Finality of adjudication

The nature of adjudication, as previously dealt with, necessitates speed of procedure in settling and sorting out the dispute. It is temporarily binding, but does not estop the parties from resorting to arbitration or litigation for final determination of the dispute.[161]

It was obvious that one of the objective of enacting the Housing Grants, Construction and Regeneration Act 1996 is mainly to establish a swift and speedy mechanism to resolve a construction contract dispute to ensure those construction projects running smoothly without disrupting the cash-flow of the projects. In fact, it has been said on a number of occasions by the Court of Appeal that the decision of an adjudicator is intended to be enforced summarily.

As result, a party of construction contract has to comply with the adjudicator's decision and to implement such decision immediately without delay as long as the adjudicator issuing his decision upon his jurisdiction. Consequently, the successful party can claim summary judgment to enforce the adjudicator's decision in case of any rejection may raised by his opponent.

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[160] This terminology defined as "a remarks of a judge which are not necessary to reaching a decision, but are made as comments, illustrations or thoughts".
[161] *Herschel Engineering Ltd v Breen Property Ltd* [2000] EWHC 178 (TCC).

Nevertheless, the adjudication system is not isolated from the whole legal system in UK but also to be complied with such legal system with special attention to be drawn to the civil procedural rules and regulations.

One of the major maybe face the immediate execution of the adjudicator's decision is when the successful party being in a financial difficulties position. The problem is here if the loser party is obliged to pay to the successful one, whom is becoming insolvent, the amount decided by the adjudicator then those money will be received by the liquidator and being part of the fund applicable to be distributed among the successful party's creditors. So, the question can be raised here whether it is possible to the court to stay the execution of the adjudicator's decision pending the outcome of the final determination by the competent jurisdiction, arbitration or litigation. The provision of Part 24.2 of Civil Procedure Rules enables the court to give summary judgment against either the claimant or the defendant on the whole of a claim or on a particular issue if the court considers the party, whom the award will be in his favour, has real prospect of succeeding his claim and there is no other reason why the case or issue should be disposed of at trial. In the case of *Rainford House Ltd v Cadogan Ltd*[162] Seymour J referred to the case of *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*[163] where the claimant in the latter case in the first instance was given a summary judgment while it was dismissed in the Court of Appeal and stay of the execution because claimant in liquidation in accordance with requirements of rule of 4.90 of the Insolvency Rules 1986 based on the evidence that submitted before them which prove that the claimant in liquidation.

So, Seymour J, by examining the evidence brought before him, he found that there is a compelling reason to refuse summary judgment while in the other case Wilcox J refused to stay execution of summary judgment because of the material submitted before him to the risk of future non- payment was not based on compelling and uncontradicted evidence.

[162] [2001] BLR 416.
[163] [2000] EWCA Civ 507.

However, in the case of *Wimbledon Construction Co 2000 Ltd v Vago*[164] Coulson J set a very important principles that the court should be taken into its account when it exercises its discretion regarding a stay of execution in adjudication enforcement proceedings as following:

- The adjudication is mainly enacted for a quick and inexpensive dispute resolution.

- As result to the above, the decision of adjudicator should be enforced immediately and the claimant should take his due money as soon as possible.

- When the court exercises its discretion should bear in mind the RSC Order 47 while it examines the application of a stay of execution of summary judgment.

- The inability of claimant to re-pay the amount awarded to him at end of the final determination by the competent jurisdiction can constitute a ground to stay the execution of summary judgment.

- If the claimant is in insolvent liquidation the stay of execution should be granted.

- Even the if the evidence suggests that the claimant party is in difficult financial position, it is not necessary to stay the execution of summary judgment, if these difficulties in his financial position:

(1) the claimant position is the same or similar to its position when signing the contract.

(2) this difficulties due to the defendant delay in his payment to the claimant.

We take another angle with respect to the nature of adjudication being temporary: the jurisdiction being exclusive, it would not prevent the English court from

[164] [2005] EWHC 1086 (TCC).

exercising jurisdiction to enforce the decision of an adjudicator or deciding matters related to the enforcement of such decision of a temporary nature.[165]

Further to the above discussion according to the finality of the adjudication's decision, it is worth to it on its own since it is one of the most crucial issues which reflects the efficiency of adjudication as a means of dispute resolution in the construction industry. In effect, under the HGCA Act of 1996, the adjudicators' decisions have been clearly made as provisionally binding and enforceable until the concerned dispute is overturned or confirmed by the ultimate competent tribunal – the court or arbitration - if the parties do not agree with the decisions.

The intention of Parliament to give such a speedy and temporarily binding dispute resolution was confirmed by the High Court in the case of *Macob Civil Engineering Ltd v Morrison Construction Ltd*[166] as stated that: "Parliament ... has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved". This is the general nature of the adjudication decision unless the parties agree to accept it as finally determining the dispute .The same tendency in a virtual way was taken by the Scheme for Construction Contracts in Paragraph 23(2), as it goes behind section 42 of the Arbitration Act of 1996, and commands the parties to comply with the adjudicators' decision - at least temporarily - until the disputes are finally determined by an ultimate competent tribunal. The Scheme allows the adjudicators to issue their decisions, if not complied with their decisions, in a way of peremptory orders requesting the parties to comply with their decisions. In a case of *Outwing Construction Ltd v H Randell & Son Ltd,*[167] the court affirmed that the provisions in the Scheme for the enforcement of peremptory orders and the abridgement of time where it is necessary would be appropriate and reflects the intention of Parliament to enforce the adjudicator decisions without delay.

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[165] *Comsite Projects Ltd v Andritz AG* [2003] EWHC 958(TCC)
[166] *Macob* (n 120).

[167] [1999] BLR 156.

Most of the adjudication decisions are dealt with money that is to be paid by one party to his opponent; therefore, the enforcement of such decisions would be greatly concerned by both parties. The adjudication decisions may be implemented amicably or otherwise the adjudication creditor party will proceed to claim for the enforcement of the decision. The way to obtain the enforcement of the adjudication decision is to file a claim before the High Court seeking a summary judgment under Part 24 of the Civil Procedure Rules. Usually the court, in general, abridges the time and issues a summary judgment within a very short period, unless, in accordance with the case of *Swain v Hillman,*[168] the defendant party who resists the enforcement of the adjudication has a real - and not fanciful - prospect for successfully defending the claim, or at least the material submitted by him supporting a prima facie case that the allegations were made out.

Nevertheless, this does not hinder construction contract parties who are ever inventive in challenging the adjudicators' decisions, which has become common in the construction industry. However, the notion for an immediate enforcement of the adjudication's decision would maintain while the unsuccessful party is bound to comply with the decision unless the adjudicator has acted beyond his/her jurisdiction, and has breached the rules of natural justice or the creditor party has become insolvent and the principle of an insolvency set-off would be applied to the concerned situation.

The aforementioned grounds to challenge the adjudicator will be elaborated in the following paragraphs except, the insolvency situation as it was discussed earlier in this chapter.

[168] [2001] 1 All ER 91.

- Lack of jurisdiction

Before the adjudicator approaches any dispute referred to him, the following conditions are required to exist in order to give him the jurisdiction to decide upon such a dispute; otherwise, the decision will not be enforced:

- The concerned dispute arises from the contract that has been formed after the HGCR Act of 1996 came into force (May 1998). Otherwise, it will be agreed between the parties to incorporate an adjudication provision into their contract.

- There is a dispute between contracting parties*.

- The dispute must arise out of the construction contract where its scope mainly falls under the definition of construction operations as it is specified in the HGCA 1996 Act*.

- The contract must be in writing*.

- The referral to the adjudication must be in accordance to the HGCA Act of 1996*.

- The adjudicator must be lawfully appointed*.

- The adjudicator must decide upon the dispute within the permitted time duration*.

- The adjudicator was complying with natural justice while running his duties during the trial*.

As a result, the decision of the adjudicator must be promptly enforced as long as the adjudicator has been empowered to look into the dispute and did not exceed his jurisdiction, nor was intrinsically unfair or in a serious breach of natural justice. Such principles have been provided by court as provisions to underpin any action for the enforcement of an adjudicator's decision, as it was enunciated by

Jackson J and approved by the Court of Appeal in the case of *Carillion Construction Ltd v Devonport Royal Dockyard Ltd.*[169]

Generally, the natural justice principle is based on two fundamental elements that are required to be considered by the tribunals while they perform their duties, which are: the trial must be conducted in an unbiased manner, and each party must be given a fair opportunity to present his case and argument. Nevertheless, it is not necessary to be counted as a breach of natural justice if the adjudicator declines to consider any evidence or argument which, on his evaluation of facts or law, is irrelevant. The task of adjudicator is not to act as an arbitrator or judge; he is usually chosen based on his technical expertise, not as a lawyer. Therefore, the Jackson J, in the case of *Kier Regional Ltd (t/a Wallis) v City and General (Holborn) Ltd,*[170] came to the conclusion that, as was well confirmed by the Court of Appeal: "At worst, the Adjudicator made an error of law which caused him to disregard two pieces of relevant evidence, namely the expert reports of Driver Consult and Precept. In the light of the Court of Appeal's decision in *Carillion* that error would not render the Adjudicator's decision invalid".

- Error of law

The fact that has been adopted by the Technology and Construction Court and entirely supported by the Court of Appeal is that the mere error in law is not itself sufficient to render the decision that the adjudicator is enforceable. In the case of *Bouygues UK Ltd v Dahl-Jensen UK Ltd,*[171] the adjudicator had made a mistake when he had made an order to pay monies for the successful party without making any deduction against the retention. The Court came to conclusion that the adjudicator had only made a "plain" mistake which did not substantially affect his decision, and he did not go outside his jurisdiction so long as he had merely given

[169] [2005] EWCA Civ 1358

[170] [2006] EWHC 848 (TCC)

[171] *Bouygues* (n 160).

a "wrong answer" to the "right question". Dyson J, robustly stated: "In deciding whether the adjudicator has decided the wrong question rather than given a wrong answer to the right question the court should bear in mind that the speedy nature of the adjudication process means that mistakes will inevitably occur and my view it should guard against characterising a mistaken answer to an issue that lies within the scope of the reference as an excess of jurisdiction".

Nevertheless, it is quite likely that the party will be eligible to resist the adjudication decision in case he made an error of law that goes to the root of his jurisdiction,which may contradict the concerned parties' rights or obligations as per law and contract. This is may be understood by the language used by Lord Kingarth that the adjudicator's parties may approach the way of challenging the adjudication decision on the basis of error of law. In the case of *Allied London and Scottish Properties Plc v Riverbrae Construction Ltd,*[172] Lord Kingarth stated that "whatever wide powers may be given to adjudication to facilitate speedy resolution of disputes before them, no power is given to make decisions contrary to the rights or obligations of the parties arising as a matter of law".

However, when challenging the adjudication decision on the grounds of the errors of law, fact or procedures must be scrutinised carefully before the court decides to accept that such errors constitute an excess of jurisdiction, or a serious breach of natural justice.

Some Important Issues According to the Jurisdiction of Adjudication:

- If the adjudication's award is not made within the agreed period, Section 108(2) states:" The contract shall-

(C) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;"

[172] [1999] BLR 346, (2000) 2 TCLR 398.

The language of this section clearly says that the adjudicator is constrained within the time period given to him by this section or as agreed by parties to issue his final decision, yet this provision is completely silent as to the consequences of an adjudicator failing to issue a decision within the 28 days that has been specified by this section or any agreed time.

In case *St Andrews Bay Development Ltd v HBG Management Ltd,*[173] the adjudicator reached her decision within the time period but she refused to intimate it until she receives her fees. Lord Wheatly expressed that although the adjudicator is not entitled to delay communication or intimation of a decision until her fees are paid, the decision of adjudicator, due to the silent of Act on the question of communication of the decision, it cannot be thought that it is of sufficient significance to render the decision a nullity as Lord Wheatly said:

A decision can be reached before (i) fees are paid; or (b) reasons are given or (iii) a time limit expires. That decision has still been made irrespective of any supplemental requirements.

A decision may however have been a nullity but that relates to how the decision was made not what happened subsequently which should not affect the decision.

Advising of a decision late does not nullify the decision but a null decision does nullify a decision made earlier.

Time Period for Adjudicator to reach a decision

The time limitation that is given to the adjudicator to reach his decision is a very strict rule that the adjudicator must comply with because the essence of adjudication is based on speedy dispute resolution that helps a construction project to keep its continuity. In *Balfour Beatty Construction Ltd v Lambeth LBC,*[174] it was suggested that where the adjudicator could not properly, reasonably and fairly reach his decision within the time limitation and the parties

[173] 2003 SLT 740.
[174] [2002] EWHC 597 (TCC).

were unwilling to agree further extension of time, then the adjudicator should [not?] decide on the case and should resign.

Section 108 of the Housing Grants, Construction and Regeneration Act 1996 provides that the adjudicator "shall reach his decision within 28 days of referral". While the Scheme for Construction Contracts provides that the adjudicator shall reach his decision 'not later than 28 days after the date of the referral notice". The JCT standard forms of contract directed the adjudicator to reach his decision "within 28 days of the receipt of the referral".

The axial notion of the above provisions revolves around the time period limit by which the adjudicator is committed to reach his decision. Such time period is the essence of the decision validity and its capability to enforcement. But, as it may be understood from the foregoing provisions, a consensus on the 28 days period laps as the maximum limit for the adjudicator to reach the decision, the date of commencement of the foregoing period has not been accurately specified whether from the date of the notice referral by the referring party or the date on which the adjudicator has actually received the referral notice.

In absence of a uniform language to indicate the time period cited in the three provisions, it becomes difficult to understand whether the validity of the adjudicator's decision consecutively counts down from the date of referring the notice to the adjudicator or from the date of the receipt date of the notice.

In *Richie Brothers v David Philip*[175] the court indicated that under the scheme for Construction Contracts, time starts to run from the date of the notice referral but because of a mishap in the post, the referral notice did not come into the adjudicator's hands until five days after posting. Those five days were effectively lost to the adjudicator as time had already started to run. This would not have been the case if a JCT contract had applied i.e.

[175] [2004]ScotCS 94.

The previous judgment revealed the difference point that can be existed between an adjudicator and another in terms of the application of the said provisions since the adoption of the date of notice referral to adjudicator, or the date of notice receipt by adjudicator, shall to a far extent impact the admissibility of the decision reached to enforcement.

The gap stretched between the two dates may cause validation or invalidation of a decision e.g. five or six days late in receiving the referral notice which was referred in a certain date "the date of referral" will cause the decision invalid as it shall be deemed delivered out of the 28 days.

In *Barnes and Elliott Ltd v Taylor Woodrow Holdings Ltd*[176] in June 2003, the adjudicator made his decision in time but sent it to the parties by post. It arrived after one day after the deadline had expired. Humphrey Lloyd J held that although technically the adjudicator's decision should have been delivered to the parties by the agreed deadline, the decision was nevertheless enforceable. The time limit set by Section 108 of the Construction Act were important for the effectiveness of the adjudication process, but compliance with the time limit was not a dominant factor, however, Lloyd J noted that the tolerance did not extend to any longer than a day or two.

Conducting of Adjudication

In addition to the principals that were discussed earlier in this chapter regarding the rules of adjudication, such as the adjudicators should deliver their decision within the time specified in the Act or as agreed by parties, there are other principals that govern the conduct of adjudication which need to be looked into carefully.

The first step to be taken to proceed with the adjudication is that the referring party (the party in the construction contract who wishes to commence adjudication proceedings) should serve the notice of adjudication in accordance

[176] [2003] EWHC 3100 (TCC).

with the requirements of the Scheme for Construction Contracts. The special attention should be given to what was set out in paragraph one of the Scheme:

(3) The notice of adjudication shall set out briefly-

(a) the nature and a brief description of the dispute and of the parties involved.

(b) details of where and when the dispute has arisen.

(c) the nature of redress which is sought, and

(d) the name and addresses of the parties to the contract (including where appropriate, the addresses which the parties have specified for the giving of notices)

These are strict rules to be followed by the referring party otherwise the decision of adjudicator might be unenforceable by the court. For instance, it is clearly mentioned in the scheme that the nomination and appointment of the adjudicator must follow the notice of adjudication and that the non-compliance with such rule deprives the adjudicator of authority, even though the responding party had suffered no prejudice. In case *IDE Contracting Ltd v RG Carter Cambridge Ltd,*[177] Havery J said:

"*If the provisions necessary to appoint an adjudicator have not been complied with then that such provisions will deprive the adjudicator of the right to make a decision unless the other party says the adjudicator still has the right to make a decision and that he will be bound by such decision*".

Furthermore, the adjudicator should act impartially and comply with the "natural justice". The natural justice simply can be understood when decision makers must act fairly, in good faith and without bias and must afford each party the opportunity to adequately state his case. Such duties are set out in paragraph 12 of the Scheme which states:

[177] [2004] EWHC 36 (TCC).

"*The adjudicator must act impartially, in accordance with the relevant terms of the contract and the applicable law and he must avoid incurring unnecessary expense*".

In fact, these duties are not identical to those which are required to be undertaken by the arbitrator while he/she exercises his/her authority within the arbitration as it is stated in section 33 of the Arbitration Act. Here, it uses slightly different language, stating that the tribunal shall "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent". The arbitral tribunal may consist of one arbitrator or three arbitrators, and when the section mentions the term "tribunal", it means that the arbitrator or arbitrators are bound to be fair and impartial between the parties.

As for the adjudication, unless agreed upon by parties, it is limited and squeezed by the timescale that was given to the adjudicator in order to reach the decision. It should then be recognized that the "natural justice" cannot be completely applied to the adjudication as in Courts or Arbitrators. The adjudicator has to reach his/her decision within 28 days, which can be extended to 14 days if it is requested by the referral party, otherwise, the adjudicator may have to inform the parties that he/she cannot decide the dispute within the time allowed or he/she has to resign. In *Discain Project Services Ltd v Opecprime Development Ltd*[178] Bowsher J said:

"*The rights of natural justice are important since they can be appealed over – whilst questions of fact or law cannot be appealed against. However some natural justice rules have to be placed secondary to the need to make the Act work.*"

In this sense Bowsher J has clearly indicated that the rights of natural justice though crucial to be observed, it comes in the second rank compared to the questions of fact and law in terms of the potentiality of being appealable, and based on that the adjudicator is to give priority to the questions of fact and law.

[178] [2001] EWHC 435 (TCC).

However, the adjudicator, while he/she is exercising his/her power within the time allowed, should not commit any serious or material breach of natural justice. Otherwise the adjudication's decision will not be enforceable by the court. In the case *Balfour Beatty Construction Ltd v Lambeth LBC,*[179] Humphrey Lloyd J affirmed that adjudication must be done in a fair manner. Adjudication is more like arbitration than an expert's decision but it is not the same as an expert's decision.

Adjudications may also involve asking questions rather than simply exchanging assertions. Nevertheless, it is obvious that as per the power that is given to the adjudicator by the Act and the Scheme to ascertain the facts and laws, the adjudicator is authorized to use the inquisitional procedure rather than the adversarial procedure. But the adjudicator must always take into consideration to act impartially, treat parties equally, and give each one the same opportunity. For example, in order to consume time, the adjudicator can use telephone communication but with limited administration matters only. In the case of *Discain Project Services Ltd v Opecprime Development Ltd*[180], Bowsher J said that adjudicators can use telephone calls to perform administrative tasks although it would be better for a clerk to do such tasks. More detailed telephone conversations and telephone decisions on matters of substance are more open to dispute.

According to the Scheme, the adjudicator is not required to provide written reasons unless it is requested by parties or by the terms of adjudication. However, if the adjudication decision contains an error it does not mean that the adjudication decision will not be enforceable as long as the matter that is referred to the adjudication falls within its authority, even if there are errors in procedures,

[179] [2002] EWHC 597 (TCC).
[180] *Discain* (n 175).

facts or law as per the statement of Thornton J in *Sherwood & Casson Ltd v Mackenzie:*[181]

The courts have made it clear that an adjudication decision will remain enforceable regardless of the alleged errors of law or facts which the adjudicator may have committed, provided that there is no breach of natural justice and that the adjudication was not decided without the proper jurisdiction.

On the other hand, if the adjudication decision is correct but to the matter that is not referred to it, then the decision absolutely will not be enforceable. In the case of *VHE Construction Plc v RBSTB Trust Co Ltd,*[182] Hicks J said:

An adjudicator can make a right decision even if it is right for the wrong reasons.

Nevertheless, according to s.140 of the LDEDC Act a "slip rule" has been formerly recognized as it has stipulated that the adjudicator to be authorized to correct a clerical or typographical error. Contracting parties must agree in advance to include a "slip rule" provision in their contract, if the same does not happen, then the Scheme will be applied which provides that any correction of the adjudication decision must be made within five days of the date of the delivery decision to parties.

Finally, similar to the arbitration, the adjudication remains valid even if the main construction contract is terminated. In case of *Connex South Eastern Ltd v MJ Building Services Group Plc,*[183] Havery J stated:

> The next question is whether acceptance of repudiation of an agreement brings to an end a provision as to adjudication. It is well established that an arbitration clause survives the discharge of a contract by acceptance of

[181] [1999] EWHC 274 (TCC).
[182] [2000] EWHC 181 (TCC).
[183] [2004] EWHC 1518 (TCC).

a repudiation: *Heyman v Darwins Ltd.*[184]The reasoning in that case in my judgment is equally applicable to an adjudication provision.

Additionally, he described the meaning of the phrase "at any time", which is mentioned in section 108(2) (a). Regarding the time that the referring party can proceed with the adjudication, Havery J said: 'Adjudications are supposed to resolve disputes quickly and will remain available for the duration of the underlying contract'.

In addition to the above, Havery J ultimately concluded that the principles which he adopted in the aforementioned case were found by asking questions such as the following:

"(1) Has there been an agreement to which the claimant and the defendant have been parties and which is an agreement "in writing" within the meaning of s.107 of the Act?

Answer: Yes.

(2) If the answer to question (1) is yes, did the defendant still have the right to refer a dispute to adjudication under s.108 of the Act on 24th February 2004 if the agreement has previously been discharged by the acceptance of the claimant's repudiation?

Answer: Yes."

Regarding *DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd,*[185] the court has an inherent jurisdiction to stay court proceedings as issued in the breach of an agreement to adjudicate. The same principle was adopted in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd,*[186] *Cott UK Ltd v FE Barber Ltd,*[187]

[184] [1942] AC 356.
[185] [2007] EWHC 1584 (TCC).
[186] [1993] AC 334 (HL).
[187] [1997] 3 All ER 540.

and Cape v Rosser.[188] Such a principle had been adopted where the court considered itself to have the full discretion to stay proceedings before it when such proceedings are in breach of an agreement to refer the dispute to an alternative method of resolution in the aim of resolving such a dispute between the parties prior to final determination either by arbitration or litigation.

Despite the jurisdiction being discretionary for the court, there was a presumption in favour of the parties' agreement to adjudicate, laying the persuasive burden on the party denying the stay of proceedings to establish good reasons for its stance (see *Cable & Wireless Plc v IBM UK Ltd* [189]*).*

Using the word "shall" gives an indication that the parties meant to make the provisions of the related clause mandatory.

The distinction between adjudication and other legal proceedings lies in the idea that adjudication is not required to be compatible with the regulatory rules of legal proceedings. In terms of arbitration it is worth mentioning that there is some similarity between the arbitration and the adjudication. It is correct that in general the principle rules of the arbitration can be applied to the adjudication. For instance, in terms of court proceedings, the judicial review of the adjudicator's decision is considered as species of arbiter. Consequently, it is essential that the court has the right to scrutinize the adjudicator's decision to check whether the adjudicator has made his decision in accordance with his jurisdiction or terms of reference and the applicable laws and regulations. However the judicial review in this regard cannot be extended to cover the correctness of any error or mistake in facts or law which had been made by the adjudicator.

The second type of court proceeding that can also be applied to adjudication which is comparable with the arbitration is an action to enforce the adjudication's decision. Neither the arbitration nor the adjudication is considered to be part of the state judicial system, thus, their awards are not treated as the court's award.

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[188] (1996) 46 Con LR 75.
[189] [2002] EWHC 2059 (Comm), [2003] LMCLQ 164.

The latter does not provide any further proceedings to be enforced although the arbitration's decision and the adjudication's decision require further support from the competent court to be enforced in case the concerned party was not willing to accept it.

However, on the other hand, there is an essential difference between the adjudication and the arbitration in terms of the nature of their awards. While the adjudication's decision is a provisional resolution ad interim that should be kept pending further determination by the competent jurisdiction, i.e. litigation or arbitration, the arbitration is a form of conclusive resolution of dispute.

On the other hand, there are highly essential differences between the regular court proceedings and the adjudication. This is obvious in some cases. For example, in *Austin Hall Building Ltd v Buckland Securities Ltd,*[190] the claimant sought a summary judgment to enforce an adjudicator's award that was granted after adjudication as per the Act 1996, s.108 in regards to a dispute over payment for building works that had been carried out for the respondent. The respondent argued that it had been denied the rights to a fair trial cited under the Human Rights 1998 Act. Sch.1 Part I Article (6); in essence, the opportunity to present its case had not been given thereto as well as a reasonable time in which to respond to the account.

Moreover, the statutory time limit (28 days) set for the adjudicator to reach his decision was unfair as to the lack of a public hearing (and pronounced judgment as well). Considering that the judgment was in favour of the claimant, it is held that an adjudicator appointed under the Act 1996 is not a public authority for the purpose of s.(6) of the Human Rights Act 1998 and therefore is not bound by such Act; the adjudicator did not make a judgment and consequently his decision is not enforceable without court proceedings being –not- final.

[190] [2001] EWHC 434 (TCC).

In addition to the above, Bowsher J held that even if the adjudicator had been a public authority and had applied s.(6) of the Human Rights Act 1998, it would have exempted the adjudicator conduct in regards to time limits because the adjudicator had acted according to primary legislation and the respondent would have not been able to use section (7)-(1)-(6) thereof in defence to the application. As for the right to a public hearing, this right had been waived due to the respondent failing to request it.

Adjudication under Kuwaiti jurisdiction

Adjudication has not been known under Kuwaiti jurisdiction. This is attributed to a lack of legislation to regulate adjudication and adopt it as a successful means in solving disputes in an early stage.

Despite the said fact, some individual attempts have been made in order to introduce this means into the commercial life; however, not being legislated proved to be a stumbling block in attaining the slightest progress towards the recognition of adjudication. Feverish efforts are being exerted nowadays by scholars and law practitioners to familiarize operating contractors in Kuwait with adjudication through seminars, workshops and conferences. Nevertheless, there is still some time to go before adjudication will gain the full satisfaction of the legislator and promulgate it under the package of legislations in force.

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Chapter Five

EXPERT DETERMINATION

Expert determination is a way to resolve a particular technical dispute in a binding fashion by an independent third party who is selected by the parties based on his/her special expertise in the field of the disputed matter. Such an umpire is commonly known as an expert. Expert determination is an old alternative dispute resolution mechanism that has been recognized by the English court since about 250 years ago. It has evolved to become widely accepted as a part of commercial disputes. Kendal defines expert determination as 'a simple procedure by which valuation and technical issues are referred to a suitably qualified professional to determine 'acting as an expert and not as an arbitrator'…Unlike alternative dispute resolution (ADR), expert determination guarantees a result which is final and binding'.[191]

In practical terms, expert determination describes a process by which a talented neutral third party's expertise is appointed and requires the disputant parties to answer a specific question or to decide on a particular matter. Therefore, the expert determination process - as an alternative dispute resolution - is supposed to be flexible, fast, binding and reaching the final resolution of the disputes. Expert determination is thus a dispute resolution process which assists disputants in resolving disputes without delay including the expense of going to court or arbitration.

Expert determination is flexible as it basically relies upon the law of contract, and its process is mainly set by the contracting parties who can shape the most convenient and suitable procedure which is protected by the judicial intervention. Contracting parties must set and tailor the process that they wish to have in a

[191] J Kendal and C Freedman and J Farrell, *Expert determination* (4th edn, sweet & Maxwell, London 2008) ch 1.

future dispute by incorporating the provisions of the expert determination earlier in the main contract; alternatively, such a process may be agreed upon when a dispute arises.[192] It is up to the disputants' agreement to have a comprehensive expert determination agreement or an ephemeral material agreement.[193] According to the Australian case *The Heart Research Institute Limited and Anor v Psiron Limited,*[194] Einstein J described the benefits of an expert determination as follows:

> Expert Determination has apparently been attractive, largely because it is less expensive and speedier, avoids the rigours of the application of the rules of evidence and procedure and offers a finality which avoids delays, potential re-hearing and appeals, which is particularly suitable especially where an expert knowledge of the subject is required or where the parties may have a continuing relationship.

Nevertheless, a typical expert determination agreement or clause mainly includes the essential components, such as the matter or matters that are to be determined by the expert whom in turn should be clearly specified to act as an expert and not as an arbitrator whose decision must be final and binding. Generally, the expert determination's rules, mandate, process and the remit to the expert are a matter of law of contract and subject to the contracting parties' agreement; therefore, such an agreement should be carefully drafted in advanced of the dispute. Lord Thomas in the case of *Nylon* said that: '*I…accept that if the parties have chosen such a process and the dispute falls within the jurisdiction of the expert, then they must be held to it, whatever view might be taken as to the appropriateness of the procedure for matters submitted to the expert'*.[195]

Although the expert determination is a very old mechanism that prevents lawyers from entering technical disputes,[196] it also provides a good response to the

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[192] Such principles are usually affirmed by the competent courts.
[193] ibid.
[194] [2002] NSWSC 646 (25 July 2002).
[195] *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826, [2011] 2 Lloyd's Rep 347 and see also in this regard the case of *Jones v Sherwood Computer Services Ltd* [1992] 1 WLR 277.
[196] J Kendal and C Freedman and J Farrell, *Expert determination* (4th edn, sweet & Maxwell, London 2008) 4.

alternative dispute resolution momentum in the field of construction.[197] Still, to what extent does the expert determination differ from other means and ways of alternative dispute resolutions, such as arbitration (as it is counted as a method of ADR), mediation, conciliation and negotiation? Expert determination methodology in resolving disputes is classified as a type of alternative dispute resolution. However, due to the most significant feature of expert determination - which is providing disputants with a final and binding decision - the expert determination is utterly different from non-binding dispute resolution means such as mediation, adjudication, early neutral evaluation and others, and is performed in a way of simulating a judicial means of dispute resolution such as litigation and arbitration.

In essence, the boundaries between expert determination and arbitration can appear somewhat blurred. Nevertheless, there are essential differences between expert determination and arbitration.

The first step to be undertaken by the court is to examine the words of the concerned agreement to identify whether the related case falls within the definition of arbitration or expert determination in order to apply the most suitable rules for each. Each case needs to be examined separately in accordance with its own words in a contract's provisions. The court should not stick to the title or the name that is given in the agreement, but should look at the substance of the provision rather than its title. The English courts came to the conclusion that in the case of an ambiguity regarding whether it is a dispute resolution arbitration or expert determination, the dispute process in which the according umpire is used should conclude the matter. If the process involves a judicial enquiry then it will be regarded as an arbitration and the rules of arbitration would apply. If there is no judicial enquiry required in the process then it will be an expert determination and would be subjected to its own rules and principles. This trend was understood

[197] Donald L Marston, 'Final and Binding Expert Determination As an ADR Technique' [2001] ICLR 213.

from the statement of the Court of Appeal in the case of *Re Carus- Wilson v Green,*[198] where the Court of Appeal stated that:

> The question here is, whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or arbitrator. If it appears from the terms of agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon the evidence laid before him, then the case is one of an arbitration.

Such a trend was also adopted by the Australian Court as declared by case of *Age Old Builders Party Ltd v Swintons Pty Ltd;*[199] irrespective of the name given to the tribunal, the substance of the dispute resolution agreement itself should be looked into. If such an agreement gives the umpire a power to exercise a judicial enquiry, and requests the umpire to come to the conclusion in accordance with the law not only upon his expertise, then the agreement would be most likely an arbitration agreement rather than an expert determination.

The arbitration is usually described as "litigation in the private sector" as it can be substituted for a court in the resolution of all disputes that may arise between contracting parties, and refers them to one chosen forum for the resolution of all their disputes. As a result, being consistent with the presumption of a sensible businessman, it would not be practical to draw a precise distinction between similar phrases in order to allow a part of the dispute to be outside the jurisdiction of the arbitration and allocated to the court.[200]

Contrary to such a broad delegation, which is given to the tribunal in approaching the arbitration process, in practice, in an expert determination a type of dispute or

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[198] (1886) 118 QBD 7.
[199] [2003] VSC 307.
[200] *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40.

matter that can be referred to the expert for his/her determination is usually specified. This, in essence, is most often a factual issue rather than a point of law, and leaves the other types of disputes to be resolved by the court.[201] It is often used to narrow the question that is to be referred and answered by the expert (whether it is an engineer, architect, certifier, etc). In the case of *Mercury Communications Ltd v Director General of Telecommunications,*[202] the license agreement was made between *Mercury* and *BT* to run telecommunication systems under Section 7 of the Telecommunications Act of 1984. This agreement was contained in a provision for a review of the terms of agreement if there is a fundamental change in the circumstances. If either party was unable to agree to any change, the dispute should be referred to the Director General of Telecommunications for his determination. An issue regarding the pilling was referred to the Director General and *Mercury* did not accept his decision on the ground of his misinterpretation of the construction of pricing clause.

The House of Lord held that the dispute was related to the contractual matter and would thus be appropriate to subject it to a private action rather than a judicial review; however, the license agreement was made by way of statutory power. Although the House of Lords held the conclusion that the court should have a jurisdiction to determine the proper interpretation of words at issue, and should examine the way the expert interprets the provisions of the agreement since the matter is a question of construction and therefore of law unless the parties expressly agree to exclude the intervention of the court.

Further, while arbitration provides an alternative forum to the courts for the resolution of all disputes, expert determination is an alternative forum for certain kinds of disputes. Thus, this leaves no room for presumption regarding the jurisdiction of the expert. The wide and generous approach to jurisdiction taken in

[201] *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826, [2011] 2 Lloyd's Rep 347.
[202] [1996] 1 WLR 48, [1996] 1 All ER 575.

arbitrations based is on the presumption that the parties had agreed to refer their disputes to the same body, and does not apply to expert determination.[203]

A comparison of the inherent characteristics and application of both arbitration and expert determination can be seen in the case of *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd.*[204] The disputants were parties to a building contract which has a dispute resolution provision that allowed for arbitration or expert determination alternatively, and expressly precluded an appointed expert to act as an arbitrator. Under a procedure formulated and modified by the expert and agreed to by the parties, the expert is allowed to determine matters of fact, law and quantum. IN addition to this, the expert should determine how oral evidence was to be taken, which were permitted to be tested in cross-examination. The court is to decide whether the expert has power to order cross-examination and whether the expert direction changed the nature of reference from an expert determination to arbitration. At first instance, the court found that the changes made by the parties to the role of the expert did not change his nature; in essence, it was only modified to the extent that the authority enables a cross-examination. This decision was resisted by the claimant before the Court of Appeal (Supreme Court of Queensland) which by majority has come to conclusion that the main difference between the arbitration and expert determination is that an arbitrator is obliged to act judicially whilst an expert is entitled but not bound to act judicially. They held that it was only can be considered as an arbitration if the agreement obliged the expert to act in a judicial way. Muir JA said that: '*The characterisation of a particular dispute resolution process as one of expert determination or arbitration must be undertaken by reference to the intention of the parties as manifested in the governing agreements, which provide the basis for resolving all fundamental questions concerning the proceedings'.* This was dissented by Atkinson J who was of the opinion that by approaching a judicial inquiry such as hearing an oral-evidence, and conducting cross-examination, the expert had moved towards not relying

[203] *Nylon* (n 200).
[204] [2008] QCA 160.

solely on his own opinion, which in consequence would be in breach of the agreement.

The most important feature of expert determination in the UK legal system is that the expert decision should be final and binding. Therefore, it is necessary that the expert himself should be specified under the agreement between the parties or at least the modality of electing him is clearly mentioned.

However, the finality of the expert determination process does not oust the jurisdiction of the competent court. The court has an ultimate jurisdiction to determine the jurisdiction of the expert, although in the case where the parties' agreement authorizes the expert to determine whether he has a jurisdiction to determine the dispute[205]the court should not be in a worse position than the expert to determine his position.[206]

Stay of Court Proceedings

According to section (9) of the Arbitration Act of 1996, any court proceedings that may be taken in breach of an arbitration agreement will grant to another party - when a legal proceeding is brought against him - a right to claim to keep such proceedings pending a dispute is concluded by the arbitration tribunal. This is a compulsory action to be taken by the court unless the arbitration agreement is found null and void, inoperative or incapable of being performed. In the case of *Al-Naimi v Islamic Press Services Inc,*[207] a dispute arose between the parties of JCT minor works which contained an arbitration clause. A claimant had commenced proceedings claiming payments due for work performed. A defendant contended that whilst the contract contained an arbitration agreement, the court proceedings must remain and a dispute to be referred to the arbitration in accordance with the Arbitration Act. The court found that the disputed had fallen within the arbitration agreement contained in the contract. The court then has an inherent jurisdiction to bring a temporary halt to court proceedings brought in

[205] *Re Carus-Wilson* (n 197).
[206] *AES Ust- Kamenogorsk Hydropower Plant LLP v Ust-kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647.
[207] [1999] CLC 212, (2000) 2 TCLR 160.

breach of that agreement. Accordingly, the court decided that such a dispute should be submitted to the arbitration and not be made a matter for decision by the court. Therefore, the proceedings remained for arbitration pursuant to section (9) of the Arbitration Act of 1996.

On the contrary to the arbitration process where the court keeps proceedings until the dispute is resolved by the arbitration, the expert determination does not have the same statuary privilege given to the arbitration. The expert determination in a court has a discretion[208] to decide upon each individual case as to whether or not to keep a court proceeding in favour of expert determination. The court will examine each case individually to find out the most appropriate decision to the relevant case to decide whether or not to grant a stay of proceedings, or proceed looking into the litigation. In the case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd,*[209] court proceedings had been commenced despite a term of the contract which provided for the initial reference of disputes to a panel of experts; thereafter the disputes are to be the subject of arbitration in Brussels. The House of Lords held that the court had a discretionary power to keep proceedings brought before it in breach of an agreement, and to determine disputes by an alternative method. In other cases such as the case of *Thames Valley Power Ltd v Total Gas & Power Ltd*[210]and the case of *Cott UK Ltd v FE Barber Ltd,*[211] although there was an expert determination agreement, the court for some reason - and by using its discretion - refused to keep proceedings and found that it is more appropriate to determine the issue rather than to refer it to the expert. For example in the case of *Bernhard's Rugby Landscapes Ltd v Stockley Park Construction Ltd,*[212] the court found that the contract did not make it a precondition to refer a dispute to the construction manager for his decision. Therefore, the proceedings before the court did not constitute a breach of such an agreement and accordingly refused to keep proceedings. Also the court may reject to keep the court

[208] *Nylon* (n 200).
[209] [1993] AC 334 (HL).
[210] [2005] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep 441.
[211] [1997] 3 All ER 540.
[212] [1997] EWHC 374 (TCC), [1997] 82 BLR 39.

proceedings in the case that the agreement signed between parties is an adhesion agreement or is included in unusual or onerous terms.[213] However, in other cases such as the case of *Cable & Wireless Plc v IBM United Kingdom Ltd,*[214] where the parties had agreed that in good faith they would refer any dispute arising out of their agreement through an alternative dispute resolution (ADR). Contrary to this provision, a contracting party may start proceedings claiming for compensation while the opponent applies to the court to keep the proceedings pending the dispute is referred to ADR in accordance to the agreement. The Colman J concluded that there was a sufficiently defined mutual obligation upon the parties to go through the process of initiating a mediation, selecting a mediator, and presenting that mediator with its case and attending any meeting called by the mediator. Since the claimant had declined to participate in any such process it was in breach of the agreement and the defendant was entitled to an order for the proceedings to be adjourned until the parties had referred all their outstanding disputes to ADR. Furthermore, in the case of *Edward Campbell & Others v Oce (UK) Ltd,*[215] the court came to the conclusion that since the parties had agreed that some matters would be resolved by an expert and others by the courts, the issues that have fallen within the expert determination should then be left for him, and any proceedings that may have taken before the expert submits his decision would remain.

Immunity of the expert

One of the most distinguishable features in the common law system is where a judge and arbitrator have been conferred immunity from being suit. With respect to arbitration which is regarded as "litigation in private sector" and in accordance with section (29) of the Arbitration Act 1996, an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been done in bad faith.

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[213] The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, *Picardi v Cuniberti* [2002] EWHC 2923 (TCC), [2003] BLR 487.
[214] [2002] 2 All ER (Comm.) 1041.
[215] [2005] EWHC 458 (Ch).

On contrary to such a privilege that is given to the arbitrators, the expert does not have such immunity and may sued for negligence unless otherwise expressly agreed by parties.

The concept of excluding an expert from being immune from suit for negligence or tort has been developed over the last century into various stages. In the first stage, the English court[216] decided that the rule of immunity should be extended not only to arbitrator but to quasi-arbitrator who is appointed to make a valuation under a duty to act fairly and to exercise judicial functions impartially between the parties in determining the matters specified in the clauses; accordingly, no action would lie against him for negligence in the performance of those duties.

In the next stage, this trend was overruled by the House of Lords in the case of *Sutcliffe v Thackrah.*[217] In this case the Court set the new trend that although it is difficult, an architect who was appointed in accordance to a standard form RIBA building contract did not have immunity and may be suing for negligence over-certification unless the architect could show that he was acting as an arbitrator in preparing the certificate. This judgment has become a precedent for the expert liability for negligence and sets the principle that the law would not afford the expert immunity from suit unless he successfully shows that he was acting as an arbitrator. It was not far followed by another case that affirmed this concept. In the case of *Arenson v Casson Beckman Rutley & Co,*[218] the House of Lords held that a valuer or auditor who appointed as an expert were not exercising any judicial or quasi-judicial function therefore, there is no basis to exclude him from any liability in case he had acted negligently.

Enforceability of the expert decision

[216] *Finnegan v Allen* [1943] KB 425, and *Chambers v Goldthorpe* [1901] 1 QB 624.
[217] [1974] 1 Lloyd's Rep 318.
[218] [1977] AC 405.

Generally, unlike arbitration the expert decision is not an outcome of a judicial test and process and there is no statutory basis to enforce it. According to the section (66) of the Arbitration Act of 1996 the arbitration's award can be enforced by way of application to the court for summary procedure in the same way as if it was a court judgment. Therefore, the way of enforcing an expert's decision is not a similar manner to a court judgment or arbitration award. As a result, and because of the expert's decision to come to exist by virtue of contract between the parties, the expert's decision is not enforceable without court action. On the ground of enhancing the law of contract, the courts will pursue to hold the parties to their agreement to be bound by the expert decision. In the case of *Campbell v Edwards*[219] the court held that where the parties had agreed that the matter to be determined by an expert on a final and binding basis and the appointed expert gives his bona fide decision, then in accordance with the principle of the law of the contract, the parties are bound by the decision which cannot be set aside. Lord Denning stood on what he decided in the case of *Arenson v Casson Beckman Rutley & Co*[220]and said that:

> *It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it.*

Therefore, if a loser party rejected to comply with the expert's decision, then, according to a Civil Procedure Rules, Part 24, a successful party should seek a summary judgment from the court where a decision is made at an early stage based on a swift trail.

[219] [1976] 1 WLR 403, [1976] 1 Llyod's Rep 522.
[220] [1973] Ch 346, [1973] 2 Llyod's Rep 104.

Jurisdiction and the Finality of Expert Decision

One of the features that distinguishes the expert determination from the arbitration is the capacity of each of them to determine the dispute. The expert determination not governed by legislation is a consensual process by which the parties agree to specify the roles of the expert and the ambit of his remit. Therefore, unless the parties agree otherwise, the expert has a very wide authority and power to choose the most suitable and convenient process. The expert is allowed to use his/her own knowledge and investigation to examine the facts and matters in a way of inquisitorial process rather than the adversarial process. This approach is quietly different from the process that is to be taken by the court process. But more closely, after the Arbitration Act of 1996 came into existence the approach may be taken by the arbitrators. Although the arbitrators are not allowed to decide the dispute based on the their own knowledge, the Arbitration Act of 1996 permits the arbitrators to take the initiative in ascertaining the facts and law; consequently the arbitrators, by such delegation, move towards the inquisitorial process. Such a fashion was adopted by the English court while it was trying to differentiate between the judicial decision and the expert decision in the case of *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd*[221] as Cooke J stated that:

> A person sitting in a judicial capacity decides matters on the basis of submissions and evidence put before him, whereas the expert, expert subject to the express provisions of his remit, is entitled to carry out his own investigations, from his own opinion and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves.

In addition, the scope of export jurisdiction needs to be precisely specified in the agreement. As a result, the decision of the expert cannot be challenged as long as

[221] [2004] 2 Lloyd's Rep 352.

the expert has done what he/she's been requested to do and has not departed from the parties' instructions(1).[222]

Nevertheless, and contrary to the arbitrator's award, the expert decision cannot be challenged on the ground that the expert's decision even was in error with law. Unless there is some allegation of fund (1),[223] the expert answered the right question in the wrong way as long as he/she performed the task assigned to him/her and not answered the wrong question(2).[224]

In the case of *Rhodia Chirex Ltd v Laker Vent Engineering Ltd,*[225] following a termination of contract by the claimant, a dispute had been arisen between the parties regarding the value of the termination certificate. The Court of Appeal held that the expert had a jurisdiction to determine the dispute and accordingly his decision must be final and binding. And, if the parties had had another intention, they should be expressly reflected in the contract's provision.

It is not unusual that the expert decision - in any occasion or matter - one party, or rarely both parties, may be disappointed by its outcome. Although the expert usually carries out his function in accordance to the preceding agreement between parties, it is meant that actually his decision is not saved from being challenged by either party. Nevertheless, resisting the outcome of the expert decision has been narrowed by the court to a very limited means.

Expert's mistake

Generally, the expert must run his functions in a fairly proper way. Committing a mistake by an expert does not simply mean constituting a grounds to challenge the expert decision nor striking it out. In the case of *Campbell v Edwards,*[226] in respect with lease agreement, the parties agreed that when the tenant decided to

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[222] *Jones v Sherwood Computer Services Plc* [1992] 1 WLR 277.

[223] *Mercury Communications Ltd v Director General of telecommunications* [1996] 1 WLR 48, [1996] 1 All ER 575.

[224] *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 2 EGLR 103.

[225] [2003] EWCA Civ 1859, [2004] BLR 75.

[226] *Campbell* (n 218).

assign the property, she should firstly offer it to the landlord on the price that would be valued by a third party. The agreed third party surveyor had made his assessment which was not agreed by the landlord on the basis that it was in excess to the other evaluations made by other surveyors. In the Court of Appeal, Lord Denning held that a mere mistake does not constitute grounds to resist the expert's decision since the parties had agreed to delegate him to such authority; thereafter he gave his opinion honestly and in good faith.

Furthermore, the court goes on to specify the mistake which may be accepted as a reason to resist the expert's decision when confined with a "manifest error". In the case of *Galaxy Energy International Ltd (BVI) v Eurobunker SpA,*[227] an agreement had been made between the parties for sale of low sulphur fuel oil with requiring a certain pour point (3°C) and a quality to be determined by a third party inspector. The buyer rejected the inspector's report on the basis that it did not conform to the required specifications stated in the agreement. Accordingly it can be amounted to an error that gives them the right to resist the inspector's report. The court held that to challenge the expert decision there must a "manifest error" which means, technically, a plain and obvious error. Thomas J decided that the finality of the expert decision is usually very important for the whole commercial transaction parties (including the contracting parties' lenders and banks). Consequently, the mere mistake does not constitute a ground to challenge the expert decision; it needs a "manifest error". Such an error is to be related to the expert decision itself, or to the procedure, and should come up with such a decision to be taken into account alongside the technical knowledge while examining the expert decision by the court itself.

What is more, in the case of *Dixons Group Plc v Murray- Obodynski,*[228] the court gave further clarification pertaining to the definition of "manifest error" as it is described in the "manifest error" as a plain and obvious error which may be easily seen by the eyes or perceived by the minds of the expert. Moreover, it is not an error manifested after a massive or extensive investigation and inquiry.

[227] [2001] 2 Lloyd's Rep 725.
[228] (1997) 86 BLR 16.

Furthermore, in the case of *Conoco (UK) Ltd v Phillips Petroleum* (unreported, 19 August 1996)), Morison J did not give any space for any argument regarding whether or not the oversight or blunder may or may not affect the ultimate decision of the expert. Therefore, in this situation, he would end this case. Morison J came to this conclusion while comparing a manifest error to the fraud which would absolutely vitiate the final decision regardless of whether or not it was affected by the fraud.

Simon Brown LJ, in the case of *Veba Oil Supply & Trading GmbH v Petrotrade Inc (The Robin),*[229] did not completely agree with the Morison J trend - especially the resemblance made between the manifest error and fraud. He found the manifest error to be rather different and should not be treated in the same manner that it had been applied to the fraud; in the former, it definitely frustrated the determination, irrespective of whether it affected the result. However, he suggested that the manifest error that wishes to be excluded from resisting is the one which is not significantly affected by the final decision and, therefore, he would rather recommend to define the manifest error as '*oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion*'. Nevertheless, in the course of the expert determination it is not obvious whether an error of law made by an expert may be counted as an excess of his mandate. In the case of *Barclays Bank Plc v Nylon Capital LLP,*[230] *Nylon Capital* was appointed by the *Barclays Bank* as a fund manager for two hedge funds pursuant to a Limited Liability Partnership Agreement (the LLP Agreement). A dispute regarding the allocation of profits had arisen prior to any formal allocation of profits had been made; *Barclays* quit the partnership and the dispute arose between parties regarding whether *Barclays* was obliged to pay *Nylon* the profit on its initial capital investment in hedge funds. *Barclays* asked the court for a declaration that it was under no obligation to do so. *Nylon* sought a stay of *Barclays* claim pending until a dispute determined by an accountant expert

[229] [2002] 1 Lloyd's Rep 295.
[230] *Nylon* (n 200).

according to the terms of the dispute resolution clause of the LLP Agreement provided that an independent expert (accountant) was charged with determining any dispute regarding profits - including disputes concerning the interpretation of any provisions of the LLP Agreement - and his decision is to be final and binding. At first instance, the court refused to stay the court proceedings on the ground that the dispute did not fall within the expert jurisdiction. This decision was challenged before the Court of Appeal which was to consider whether the court is able to determine an expert's jurisdiction before the expert makes such a determination himself. The Court of Appeal held that it is an ultimate power for the court to determine the jurisdiction of expert and therefore it is in the interests of the justice and it is convenient for the court to act first. The courts may intervene where there is a dispute solely of law relating to the scope of the expert's mandate. Lord Neuberger in particular believed there was a powerful argument for challenging the decision of an expert made on the basis of a mistake of law including a mistake as to the interpretation of principles in which the expert was meant to make his decision; therefore if a party wants the expert to be able to decide questions of law the expert determination clause should be drafted expressly to provide for this. Thus, Lord Neuberger's judgments suggests that he would perhaps prefer to give parties to an expert determination the same ability as those in an arbitration to make representations to the court, and the same rights of appeal for errors of law. Such principles were discussed further in the following case of *Wilky Property Holdings Plc v London and Surry Investments Ltd,*[231] where the judge reminded the parties of the context in which the Court of Appeal in case of *Nylon* had taken it. In the former case (*Wilky*) where the parties had agreed to refer any dispute as to the interpretation of the terms of agreement to an independent expert which his decision was to be binding on the parties. An expert was appointed after a dispute had arisen between the parties, however, the other party commenced CPR Pt 8 proceedings before the High Court which sought a declaration regarding the dispute on the grounds that the expert did not have a

[231] [2011] EWHC 2226 (Ch).

jurisdiction to determine the issue. The court had to decide whether to stay the proceedings pending until the dispute determined by the appointed expert. Snowden J disagreed with the perception that the judgment in (*Barclays*) was intending to set a prescriptive rule to that effect that any decision made by an expert regarding his jurisdiction would unavoidably be subject to review by the court, and therefore it would be wasteful for the expert to look into this issue first. He found that the Court of Appeal did not suggest that an expert determination was always inappropriate for the resolution of general questions of interpretation. Snowden J referred to the recent case law that agreed with the comments in the case of *Mercury Communications,*[232] in which it was said by Hoffmann LJ that '*in question in which the parties have entrusted the power of decision to a valuer or other decision-maker, the court will not interfere either before or after the decision',* this is would a general approach that to be taken unless *"the decision-maker goes outside the limits of decision-making authority"*. He come to conclusion that principle and guidance given by the Court of Appeal may help the disputants decide an appropriate approach that should be taken ahead of the adjourned hearing at which he heard further argument as to whether to exercise his discretion to stay the claim. It *was* also added in the case of *Exxonmobil Sales and Supply Corp v Texaco Ltd*[233] that a manifest error may be shown on the face of the determination by an error of arithmetic or by a misplaced decimal point or other typographical error.

As result, a critical concern may arise regarding a clerical error or slip that may be included in the expert determination. With respect to the adjudication under the HGRC Act of 1996, it is, as we discussed earlier in the Adjudication Chapter, where the adjudicator is authorized to correct a clerical errors or arithmetical slip that may contained in his decision provided that the correction does not involve any second thoughts regarding substantial issues and must be done within a reasonable time limitation and without prejudicing any party. The same concept is

[232] [1994] CLC 1125 (CA).
[233] [2004] 1 All ER (Comm) 435.

also expressly adopted in the Arbitration Act of 1996, section 57(3) which gives the arbitrators a power to correct or remove any clerical mistake or slip.

With respect to the expert determination, it is not as obvious as it is under the adjudication or arbitration. In some expert determination cases, such as in the case of *Gosden v Funnel,* [234] it was considered that an implied term that gives the expert a right to correct an admitted slip in a decision - as it most likely exists in the adjudication. However, in the case of *Soules CAF v Louis Dreyfus Negoce SA,*[235] it was averred that regarding the international transaction, where a chain of sales is commonplace, the valuer who is appointed to the contract that has its own procedure dealing with any discrepancies is not allowed to correct the acknowledged errors after the elapse of the time limitation. Steel J left open the question whether or not correcting an obvious error would be permissible if it is discovered within an agreed or reasonable time.

However, the question may arise as to what extent the court - while examining the validity of the expert's decision - can scrutinize the documents and evidence submitted before the expert. In the case of *Dixons Group Plc v Murray-Obodynski,*[236] Bowsher J took the same approach that had been adopted by Potter J in the case of *Healds Foods Ltd v Hyde Dairies Ltd,*[237] as he ascertained not to widen the ambit of the court investigation and, in general, the court may not go beyond the expert decision itself due to the reasons given by the expert in justifying his determination. Nevertheless, such a limited tendency does not mean that the court may not have a jurisdiction to consider all the subsequent clarifications of the reasons or any other related material.

Still, is the expert required to provide reason for his decision as it is required by the judges in a normal litigation? Generally, it is a matter of an agreement, and it

[234] (1899) 15 TLR 547.
[235] [2000] 2 Lloyd's Rep 307.
[236] *Dixons* (n 227).
[237] (unreported, December 1, 1994).

is based upon the pre-agreement between the parties and what they had agreed to remit to the expert and whether his requirement by such an agreement provides reasoning to his determination or applies a certain mechanism of valuation. For example, in the case of *Doughty Hanson & Co Ltd v Roe,*[238] the court was to look into a dispute between shareholders in claimant company. A resignation of one of shareholders a directorship triggering an obligation to give a transfer notice under the Article of Association in respect of his shares. The valuation process according to these articles was that a shareholders could give a transfer notice that specified price would acceptable to it, or a willingness to sell at a third party valuation. This would be considered as an offer given to other shareholders for their acceptance at the specified price or elect for a valuation. An expert (accountants) was appointed to provide an opinion of a "fair value" which was not agreed by the seller and therefore he sought to withdraw his transfer notice and challenged the experts' valuation on the grounds that they had departed from their instructions by valuing something else other than that which they were supposed to adhere to. The court held that the valuation was not open to challenge. Given that it was a 'non-speaking' valuation, it was not possible to infer how the experts had come to their decision and consequently to see whether they had adopted any particular approach or taken any particular facts into account. There was no doubt that the valuer had valued the correct shares in the correct company. The mistake attributed to the expert was not as to the identity (as the only mistake to attack on the valuation in accordance with Walker LJ in the *Morgan Sindall*[239]) of either of those things, but the attributes that the valuer gave to the company for the purposes of his valuation hypotheses. This is was happened following the judgment in the case of *Morgan Sindall Plc v Sawston Farms (Cambs) Ltd,*[240] where the Court of Appeal dismissed and ascertained that it is impressible to attack the reasons of the determination where there were no reasons given by the expert regarding his decision. However, the situation would be treated differently

[238] [2007] EWHC 2212 (Ch).
[239] [1999] 1 EGLR 90.
[240] ibid.

where the parties' agreement requires the expert to provide reasons for his decision. In the case of *Halifax Life Ltd v Equitable Life Assurance Society,*[241] pursuant to the agreement between the disputants, the expert was required to provide adequate reasons for his determination; therefore, the court had adjourned the course of trial until the expert provided the court with detailed reasons of his decision for further evaluation by the court.

Expert Failing to Adhere to his Instructions

The expert determination, as a technique of amicable dispute resolution, is a contractual arrangement which is subject to the terms of its contract and based entirely on the parties' agreement. As such, any attempt to breach, which goes beyond its provisions, may lead to invalidate the outcome.

In spite of the principle discussed in the previous point which states that the mere mistakes do not invalidate the expert's determination, the expert must obey and follow his instructions; otherwise, his decision would be most likely considered as invalid.

In the case of *Jones v Sherwood Computer Services Plc,*[242] an agreement made between parties regarding a sale of share capital in the company is a case that is to be evaluated in terms of a certain calculation to be carried-out by an independent chartered accountant who is running his task as an expert - not as an arbitrator - and his decision would be bound and final.

The expert's determination was resisted by one party on the basis that the expert failed to take certain matters into his consideration when forming his opinion; hence his decision is no longer valid.

The Court of Appeal held that where the parties had agreed to be bound by the determination of an independent expert, his decision could not be challenged on the grounds that mere mistakes had been occurred in the formation of the decision unless it could be proved that the expert had departed from his instructions in certain material respects.

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[241] [2007] EWHC 503 (Comm), [2007] 1 Lloyd's Rep 528.

[242] [1992] 1 WLR 277.

Such a conclusion did not provide precise criterion to what may or may not be considered as a material departure.

In the case of the *Veba Oil Supply & Trading GmbH v Petrotrade Inc (The Robin),*[243] the expert was consensually engaged to determine the quantity and quality of the sold goods (gasoil) at the loading installation in accordance to the contractually specified methodology of the test which was known as D 1298. Rather than employing such an agreed test methodology, the appointed expert used another more accurate and modern test which was known as D 4052. This movement was challenged by the buyers on the grounds that the expert had materially departed from his instructions and thus the determination is longer binding. Brown LJ, after looking at and observing the previous related cases, came up with the following rules:

- The difference between the mistake and the departure from the instructions is quite obvious. The mistake can be considered to exist when the expert merely moves wrongly through the process while carrying out his instructions.
- Under the law a mistake may invalidate the expert's decision if it could be proven that a mistake had affected the outcome, which is not so in the case of a departure from instructions.
- Contrary to committing a mistake, the position of the expert who departs from his instructions has not changed under the modern cases. Such doctrine has been clearly stated by Lord Denning in the case of *Campbell v Edwards.*[244]

- The test of materiality devised for identifying vitiating mistakes does not carry across to the quite separate field of departures from instructions.

[243] [2002] 1 Lloyd's Rep 295.
[244] *Campbell* (n 218).

- Although it was rightly decided in older cases such as *Dean v Prices*[245] *and Frank H Wright (Constructions) Ltd v Frodoor Ltd,*[246] this is must be no longer considered as authoritative with respect to an expert's mistake as it is mostly overturned in *Jones v Sherwood Computer Services Plc.*[247]

- Once the court found there was a material departure from the expert's instruction, it will not take into consideration its impact on the ultimate decision of the expert, and the expert's determination in those cases is plainly not binding on the parties.

Nevertheless, the court held that although a material departure vitiates the expert determination irregardless of its effect on the result, any departure will be considered material unless that departure was truly trivial and *de minimis* such that it was clear that it could make no possible difference to either party. Moreover, Lord Dyson suggested that the best test to judge whether the departure from instructions was material or not is to check if the parties would reasonably have considered such departure as sufficient to invalidate the expert's determination.

Fraud and Collusion

It is very unusual to resist the expert's determination on the basis of fraud or collusion. However, the right to challenge the decision of the expert on the ground of fraud or collusion - which may be committed by an expert with the other party - is expressly given to the suffered party. *Campbell v Edwards*[248] is one of the leading cases that affirms such ground to vitiate or set aside a decision of the expert in the case of perpetrating a fraud or collusion. Lord Denning while

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[245] [1954] Ch 409.

[246] [1967] 1 WLR 506.

[247] *Jones* (n 241).

[248] *Campbell* (n 218).

examining the expert determination, averred that a fraud or collusion performed by the expert reflects his bad faith and could not be forgivable. His decision, therefore, would not be binding on the injured party, and he stated that "if there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything". In an Australian case, *Crusader Resources NL v Santos Ltd,*[249] if it could be proven there was a breach of fiduciary obligation, then the outcome of the valuer would be invalid and not binding on the parties. It is also averred that the agreement would be validly rescinded for misrepresentation and deception.

Attention must also be drawn to the distinction between expert decision as opposed to an arbitration award since it is one of the main differences between the expert determination. Although arbitration is regarded as a means of private dispute resolution, it is clearly and profoundly organised by the statute. As a result, and with respect to the arbitration award in particular, it sets out the mechanism for enforcement of the arbitration award nationally as well as internationally. However, the expert determination mechanism does not have the same privilege that is given to the arbitration by law, as it does not rule the statute nor is it regarded as a result of a judicial examination. Therefore, expert determination is less likely to be protected and enforced as arbitration.

The expert determination as a private dispute resolution method has been set out to determine the matter from the fact, and is from a technical point of view rather than from a law point of view.

Furthermore, the outcome of the expert determination process would be agreed as being binding and enforceable regardless of its conformity with law as long as the expert himself had not departed from his/her instructions.

Nevertheless, the enforcement of a decision of expert does not have the same privilege or power that is given to the award of arbitration or to any decision that comes out of judicial evaluation.

[249] (1991) 58 SASR 74.

An expert decision is unlikely to be an award as such; it is more likely to be a fact-finding decision, which is thus relevant to the resolution of the dispute between parties. Therefore, attention should be drawn to the case where the expert mostly has the evaluation regarding the facts, rather than the law point of view since the expert's finding may be used by parties or a concerned tribunal as conclusive evidence, or may be against the expert himself in the case that he is sued for damages by either party.

An expert must comply with his jurisdiction according to the terms of reference that are agreed by parties. An expert authority shaped and identified in accordance with his jurisdiction can give him/her the power to decide on facts and law matters, or limit him with technical and fact matters. Thus if an expert goes beyond the jurisdiction and the terms of reference, then all the consequences may not be readily enforceable.

According to the case of *Jones v Sherwood,*[250] the decision of the expert is not open to challenge in courts and the court will not look at such matters as long as the expert had not departed from his instructions and the evaluation was made in accordance with his/her jurisdiction.

However, according to Australian courts, as in the case of *Fletcher Construction Australia Limited v MPN Group Pty. Ltd,*[251] an agreement to refer both the issues of facts conclusively to the technical expert with no legal experience may be regarded void as an ouster to the court's jurisdiction. While he was examining the expert determination agreement, Rofle J said:

> The effect of the clause is to make the decision of the expert final and binding provided the matters referred to him are ones which the agreement contemplates. The expert's decision is, however, susceptible of attack in a Court if there is a failure to comply with the contract or there is some vitiating factor relevant to the decision.

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[250] *Jones* (n 241).

[251] NSW Sup Ct, 14 July 1997, unreported.

As a result, if the expert did not do so, then the determination would be more susceptible to be resisted; consequently, the court may use its discretion to intervene and examine the subject matter. In the case of *Campbell v Edwards,*[252] Lord Denning stated:

> It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything.

In the event where the expert was not required to give reasons for his determination, the court may not constitute its judgment upon his final on the grounds that the evidence 'properly before the court' did not include oral evidence or justifications by the appointed valuer in the face of resistance from the opponent .

Conducting the Process of the Expert

Generally, similar to any type of an umpire who is engaged to resolve a dispute or conflict, there are essential rules that are applied and which govern the conducting of expert processing. Although the expert determination process is mildly different from the judge and the arbitrator, there are important principles that an expert must bear in mind and comply with while carrying out his duty - from the outset of the trial until reaching his decision.

The doctrine of natural justice is the main principle that must be taken into consideration by an expert while running the procedure. But to what extent must the expert comply with such rules? Is it at the same level that is required by the judge in a regular judicial procedure or required by the arbitrator in the arbitration trial?

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[252] *Campbell* (n 218).

In essence, breaching natural justice is one of the most common concerns in the field of construction contracts due to the nature of the dual function of the architects, engineers and construction managers since they generally carry out a dual function - both to act as an agent for their employer and to act independently as a decision-maker. In the case of *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd,*[253] Jackson J raised such a concern while examining such dual functions regarding the appointed construction manager. He ascertained that the duties allocated to the construction manager have two separate types of duties which require him to act individually and separately for each of them. He had to act firstly as an agent for one party in accordance to the principal's instructions; and secondly as an independent certifier (decision-maker) who is required to act impartially, fairly and to hold the balance unbiased between the employer and the contractor. Jackson J had come to such a conclusion in accordance to some old cases which dealt with the matter, and clearly said that:

> the decision-maker is required to act in a manner which has variously been described as independent, impartial, fair and honest. These concepts are overlapping but not synonymous. They connote that the decision-maker must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer.

Fairness

[253] [2006] EWHC 89 (TCC).

Generally, anyone who carries out the judicial function, whether it is an arbitration or process that so-called "quasi-arbitration", must act fairly. In the case of *Sutcliffe v Thackrah,*[254] the House of Lord affirmed that when a certifier carrying out judicial functions as "decision-maker" for the construction project rather than as an agent to the employer, then the functions should be regarded as a so-called quasi-arbitration which in turn requires him to act fairly and independently from the employer - making a fair balance between the parties. Nevertheless, with respect to expert determination, there is no general requirement for the rules which natural justices or due process should follow. As per the case of *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd,*[255] it is usually impossible to resist the expert determination on the basis of breach of natural justice unless there is an apparent bias on the part of expert; in essence, there is no certain standard of fairness that must always be obeyed by the expert. In this case, the parties entered into an agreement for purchasing a number of liquefied petroleum gas (LPG) vessels. In accordance to the provisions of the agreement, the price of the vessels may adjust upon the outcome of inspection of vessels and any downward adjust to be decided by an expert. An expert was nominated by the vessels' class society to provide his opinion on the certain vessels. The expert decided a price reduction for some inspected vessels. The claimant requested payment and brought proceedings accordingly to the defendant who resisted proceedings on the grounds that the expert had acted impartially and did not give them an adequate opportunity to defend their case and failed to consider their submissions. The court held that there is no requirement for the rules of natural justice or due process to be followed in an expert determination for the purpose to have a valid and binding decision. This is was averred by the Court of Appeal in the case of *Homepace Ltd v Sita South East Ltd*[256] *that* each case depends on its particular terms of contract and the appointed expert has to carry out his duties in accordance to the express provisions of his

[254] [1974] AC 727, [1974] 1 Lloyd's Rep 318.
[255] [2004] 2 Lloyd's Rep. 352.
[256] [2008] EWCA Civ 1.

merit. In this case, the Court of Appeal refused to enforce an expert's decision because he had answered the wrong question. In the judgment, Lloyd LJ noted that the enforceability of an expert's determination turns on the terms of the agreement under which the determination is made. These terms govern what the expert has to decide and the extent to which that decision is binding on the parties. In this case, the expert was asked to state whether minerals in a particular area were economically recoverable. He considered only those minerals which were currently being extracted by one of the parties, rather than all types of minerals. The Court of Appeal concluded that the expert had answered the wrong question. Therefore, the expert is generally required - to some extent (not actually the typical standard of natural justice that is normally applied to the regular judicial proceedings) - to heed the rules of natural justice. Comments made by Lloyd LJ on the importance of the exact terms of the agreement were reinforced by the judge in the case of *Owen Pell Ltd v Bindi (London) Ltd.*[257] However, this time the court was not looking at whether the expert had answered the right question. Instead, it had to determine other arguments as to why an expert's determination may not be enforceable. In this case the applicant was a building company contracted by the respondent to execute various works at its property. The applicant left the site before the work was complete and a dispute arose between parties regarding the payment of a final account and a deduction amount for the defected work. The expert had been appointed by the RICS under the Agreement between the parties that included a term that the parties would be bound by the decision of the expert. The appointed expert moved to the site and attended the premises and gave detailed written decision in favour of the applicant. The defendant did not agree with the expert decision and persisted in its refusal to pay for the applicant. This led the applicant to seek an enforcement of the expert's decision according to the Agreement. The defendant contended that the Agreement to refer a dispute to an expert determination, it was actually contained an implied provision that the decision of expert was only enforceable if free from

[257] [2008] EWHC 1420 (TCC).

gross or obvious error or perversity in its decision as well as that the expert acted partiality and on perceived bias on a number of occasions and in consequence the expert's conclusions contained "gross and obvious errors" and were perverse. The expert's determination was challenged on the basis that the expert had failed to act fairly in accordance with principles of natural justice. It was argued that there was an implied provision that the expert must comply with. In terms of the rules of natural justice being unbiased, it should not give an appearance of being biased. Kirkham J decided that the term for applying natural justice would not be implied in the contract. The judge also found that there was no evidence showing that the expert had acted against the challenger party, or that he was influenced by partiality or prejudice in reaching his decision. The court found that there was no evidence of real bias and by applying the test in *Porter v Magill,*[258] decided that a fair-minded and informed observer would not conclude that there was a real possibility that the expert was biased.

Impartiality

Principally, everyone is entitled to a fair hearing by an impartial tribunal. With respect to the litigation and arbitration, as it is very rare to prove there is an actual-bias, the court has adopted the principle that the only appearance of partiality in proceedings is quite enough to invalidate the judgment.[259] However, in the process of an expert determination there is different and more stringent requirements to disqualify the expert's determination, and to prove that there is an actual partiality that had been conducted by the expert. In accordance with the case of *Barber v Kenwood*[260], proving actual partiality requires evidence of actual influence by partiality proving the implied or actual prejudice in acting against one party or in favour of the other one. Therefore, due to the nature of the expert function, an expert is not strictly required to treat parties equally.

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[258] [2002] 2 AC 357 (HL).
[259] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 2 WLR 870.
[260] [1978] 1 Lloyd's Rep 175.

In the case of *Midland Montagu Leasing (UK) Ltd v Tyne & Wear Passenger Transport Executive and Ernst & Whinney,*[261] although the expert had held a meeting and communication with one party without the presence of the other, the court did not invalidate the expert's determination on the basis of partiality. However, the court emphasised that the expert should act impartially and keep himself aloof from discussion. In the two cases which were discussed in the previous paragraph (*Macro* and *Bernard)* it was affirmed that it is required to prove that an actual or conscious bias had been conducted by the expert - not only the apparent bias to justify a disqualifying of his determination. Nevertheless, the court in the case of *Owen*[262] has given, in a very rare case, some space to imply the obligation of apparent impartiality in the process of expert determination in the case that the expert had no relationship with either party.

In essence, as the expert is appointed as a valuer or appraiser and is required to ascertain a matter and prevent a dispute rather than a judicial arbiter who is required to settle a matter, he is not obliged to carry out an enquiry that is worked out in a judicial manner. Therefore, it is unnecessary for the expert to hear evidence, and the parties are to determine judicially between them. The expert's decision typically would be made through specialist knowledge or skill, and rely on his own investigation from his own opinion to come to his own conclusion irregardless of any submissions or evidence rendered by the parties[263].

Nevertheless, in some particular cases - and upon to the contract itself and the expert's instructions and depending on individual situations - the expert may be required to some extent to hear the evidence adduced by the parties[264].

Expert Evidence under Kuwaiti Law

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[261] Unreported, Chancery Division, February 23, 1990.
[262] *Owen* (n 256).
[263] *Hounslow LBC v Twickenham Garden Developments Ltd* [1970] 3 WLR 538, *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] 2 Lloyd's Rep 352.
[264] *AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm)* [2006] EWCA Civ 1601.

Expert witnesses play an important role in legal proceedings by sharing their expert knowledge of a particular specialist field. In doing so the expert witnesses help the tribunal interpret the factual evidence it has heard and understand all of it its application.

As a result, the general purpose of expert evidence pertains to facts and not as much to law . Therefore, with particular respect to the construction of the contract, expert evidence is not appropriate to assist the court to interpret the terms of the contract, nor is it appropriate to for advising the court as to whether a particular head of claim is admissible.

With respect to the construction industry, the expert evidence becomes highly relevant as it relates to the majority of - if not all of - cases, primarily in order to express his/her opinion regarding matter in the construction contract.

In accordance with the Kuwaiti Evidence Law No.39 of 1980 and the Law of Rules of Expert Evidence No.40 of 1980, the means of evidence in the civil procedure are limited with seven tools that are prioritized in certain categories. One means of evidence is the expert witnesses. Due to the importance of the expert witnesses in civil litigation (and in criminal procedural as well) the Kuwaiti legislator gives a special treatment through issuing an individual enactment that only deals with rules of the expert witnesses.

Different from the process that governs the expert witnesses in the English legal system, the law of expert witnesses in Kuwaiti sets the rules for how or where the court may be obliged to consider the expert to assist persons or parties looking for the most appropriate valuation or assessment of the dispute in a certain field of expertise that the court could not conclude it solely without assistance from a professional specialised expert.

Features of Expert Witnesses under Kuwaiti Law

- Generally the court is fully authorised, and it is up to its discretion to decide whether the expert witnesses are necessary in order to reach an informed

judgment on the facts. The court is not obliged to accept either litigant's application to instruct an expert witness for his/her opinion.

- The court has an ultimate jurisdiction to regard the expert witness's opinion as a whole, or dismiss it partially or as a whole.
- If the court decides to take into consideration the opinion of the expert witnesses, then it should include it in its judgment as an essential part of the judgment and its reasons.
- The competent court can call an expert other than whom the litigants identified, or reject the application of parties to call another expert.
- And the court is not required to stick with the opinion of the parties' selected expert and its discretion to measure and select between the experts' opinions.

Admissibility of the Expert Witness

Generally, contrary to other comparative civil law systems, the Kuwaiti court is fully authorised to overrule the opinion of the expert. The court is not required to contend the opinion of the expert or to give any justification for dismissing an expert opinion.

Such jurisdiction reflects the power of the court. In general, where there are matters of issue before the court which requires expertise for their observation, analysis or description, the court may apply for aid regarding the expertise which it concerns. However, the court is not obliged to accept an application to pursue the aid of concerned expertise.

As a result, where the court does so and calls for an expert, the court is then completely delegated to specify all the aspects and restrictions of the expert's duty, such as the extent of an expert's role, time limitation, or oral or written opinion.

In addition, the court may, at any stage of the trial, change the scope of the expert either by expanding or narrowing his role, time duration or any other important matter.

The court may also apply for aid of expert at any stage of the trial, whether in the beginning, middle or even at the final stage - as long as the court has not come to its conclusion.

Contrary to the other civil law jurisdiction systems, neither the Kuwaiti Court of Cassation nor the Kuwaiti legislators expressly limit such power or jurisdiction. However, there are implied exemptions that may be conceived of by some rules scattered over other laws which require the tribunal to seek the aid of specific sciences or faculties. For instance, the court is required to call for an assistance of an expert in a medical matter regarding medical expertise, such as the provisions of Articles (91-97) of the Kuwaiti Labour Law. Such Laws require the court to refer an injured employee to a specialized medical committee to examine his case, including the percentage of his disability, in order to calculate his compensation. Furthermore, although litigants have been granted by the Law of Expert Witness to agree upon a specific expert, the court still has the discretion to call the agreed expert or another one, provided that it gives reasonable justification for such a decision.

Additionally the court, according to the Article (16) of the Law of Expert Witness and its discretion and jurisdiction, has full authority to discuss with the expert(s) his/her conclusion regardless of the matter (i.e., technical or legal).

The Roles of the Expert

Due to the importance of expert witnessing due to the tribunal's reliance upon the opinion of an expert witness, a body of rules and legal principles have developed which regulate the manner of how the expert conduct's himself.

The most important rules and principles are found in the Law of Expert Witness and the Kuwaiti Court of Cassation, which are the rules that apply to the conduct of the expert witness. These rules can be summarised as follows:

- The expert should be, and should be seen to be, independent and not influenced by others.

- The expert is required to provide independent assistance to the court by way of an objective unbiased opinion.
- The expert must consider and identify all material facts upon which the opinion is based or detracted.

- He/she should not look into any issues that fall outside his/her expertise and should inform the court if he/she does so.
- If the expert needs any judicial assistance, he should call the court for such assistance if the concerned parties resist to do it voluntary.
- The expert must be open as to the way in which he/she has reached the opinion, so that it may be understood and challenged.

Chapter Six

Mediation

What is Mediation?

Conflicts commonly arise between two or more corporations or groups when their interests or needs become incompatible; at such a point, an intervention is inevitably required to settle the conflicts, which is a regular occurrence in life.[265]

Mediation is plainly defined as a process conducted by an independent third party in a strictly confidential manner where the objective is to assist the parties in resolving their dispute. The outcome of successful mediation is a deed of agreement that is accepted by all disputants.[266]

Mediation is the use of a third party intervention to assist the parties in a dispute through facilitating in their reaching an agreement which, unaided, they may never reach, or may reach but much later in the dispute where both parties have lost much.[267]

The essence of mediation is the common-sense idea of a 'shuttle diplomacy', whereby disputants invite an experienced, independent, neutral third party to assist disputants in their disagreement via a negotiation in an amiable and less aggressive or defensive way rather than an adversarial way.[268] The Centre for Effective Dispute Resolution (CEDR) has defined mediation as 'a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution'.

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[265] Michael Noone, *Mediation Essential legal skills* (Cavendish Publishing limited 1996, reprinted 1998) 3.
[266] John Haynes, *Alternative Dispute Resolution :The Fundamentals of Family Mediation* (Old Bailey Press Ltd 1993, reprinted 1996) 1.
[267] Alexander Bevan, *Alternative Dispute Resolution* (Sweet & Maxwell 1992) 18.
[268] Noone (n 264) 5; *Arbitration Law*, para 6.6.

The idea of mediation is to enable people to talk to each other in a way of good will and with a problem-solving objective; to clear up misunderstandings; to fill gaps; to clarify difficulties; and to facilitate negotiation by bringing realism and objectivity to a dispute.[269] It is open to the mediator, when in a private caucus meeting with one or more parties, to ask searching questions designed to encourage parties to face-up to issues and difficulties in the dispute.

Mediation is an extremely effective method by which parties to commercial disputes can resolve their differences without going through the cost and disruption of a lengthy trial. These objectives were judicially emphasized by the courts such as in the case of *Halsey v Milton Keynes General NHS Trust.*[270] Regarding this, Dyson LJ said*:*

> We recognize that mediation has a number of advantages over the court process. It is usually less expensive than litigation which goes all the way to judgment… Mediation provides litigants with a wider range of solutions than those which are available in litigation: for example an apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without any existing legal obligation to do so.

The mediation agreement addresses the issues with a mutually acceptable solution, and is structured so that it is not necessarily based on the underlying legal rights or obligations, but rather is structured in a way that helps to maintain the relationship of persons involved. With the assistance of mediation the parties may reach the most appropriate solution that is acceptable to all parties in the dispute, so they may tailor a solution or a combination of solutions in order to meet their needs and interests.[271]

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[269] Bevan (n 266) 18.
[270] [2004] EWCA Civ 576, [2004] 1 WLR 3002.
[271] Haynes (n 265) 1.

Mediation is mostly a management of other people's negotiations or contentions and the mediator is a manager of negotiation. The parties will maintain control over the dispute and its settlement, and the mediator will be responsible for organizing the arguments regarding issues to be settled. A more coherent and organized process will help parties reach an agreement in a timely and cost-efficient manner.[272] The mediator is in charge of the process, while the parties are in charge of the results.

Mediation is essentially a technique for an alternative dispute resolution that is closest to the negotiation's meaning rather than a dispute determination. Generally, a mediator assists parties to understand each other, clarifying an ambiguity and removing obstacles to help them find their own solution (facilitative mediation). In some cases, mediators may introduce a view of the merits regarding what might be a fair or reasonable solution, where all the parties agree to delegate the mediator to do so (the 'evaluative mediation'). Then, as a facilitator or evaluator a mediator may become much closer to each side of the type of mediation in accordance to what parties had agreed upon, and to the extent of their delegation.

Facilitative Mediation (Interest Based)

In this way of managing the dispute resolution, a mediator does not give an opinion on the issues. A facilitator mediator assists the disputants to explore the most appropriate options. The mediator asks the questions, validates and alleviates the parties' claims, and tries to lighten the negotiation environment, searching for the interests behind the positions and assists the parties in finding the outcome by themselves from the interests' point of view, rather than the rights and obligations. The facilitator mediator does not give any recommendations nor advises or predicts the outcome of the final resort tribunal. However, some commentators find such a criteria as 'interest-based' to be deceptive as many

[272] ibid.

facilitative mediators may also consciously or unconsciously focus on legal rights and obligations and the predicted results in case of not reaching an agreement.[273] In such a manner of mediation, disputants and their representatives will play an objective role in the process in persuading each other while the mediator's roles will be restricted to managing the process and helping the disputants to understand each other. Indeed, the facilitative mediator - by influencing and leading the process - would make the negotiations between the parties more amiable and comfortable, which consequently enables the mediator to utilize the parties' own efforts to formulate their resolution.[274] However, facilitative mediators should not deliberate or judge the merits of the issues.

The facilitator mediator should be an expert, highly talented in the process of dispute resolution and negotiation rather than an expert in the field of disputed matters. Conciliation is sometimes used as an alternative term for the facilitative mediation, as it involves neutral third party intervention. It is the neutral third party's role to distinguish between conciliation and mediation as it may be shown as a continuum.

Evaluative Mediation (Right Based)

In such a way of dispute resolution method, a mediator - by figuring out the strengths and weaknesses of the parties' cases - predicts what the final resort tribunal would possibly decide, and assists in reaching a resolution. Evaluative mediators exert more influence over the process, and in trying to re-open the communication between disputants, searches for the most appropriate options and ultimately provides his recommendations in settling the dispute. The evaluative mediator relies on his/her expertise and specialist field more than his/her skills. He is usually a lawyer or legal expert that focuses on the parties' rights and obligations, and provides them with his opinion on such a basis; he might also act as an expert regarding the disputed issues who can also provide the disputants with his opinion according to the normal rules and practices of the field.

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[273] Allan Stitt, *Mediation a Practical Guide* (Cavendish Publishing 2004) 2.

[274] Karl Mackie and others, *The ADR Practice Guide Commercial Dispute Resolution* (3rd edn, Tottel Publishing 2007) 11.

The evaluative mediator approaches the process by assessing the parties' positions in accordance to the facts and applicable laws and regulations and gives his opinion accordingly. He makes it look like an early neutral evaluation (ENE), and the non-binding judicial appraisal or expert opinion carries on an initial assessment of the facts whilst measuring the evidence presented to the situation. This in turn helps the parties to anticipate what their future position would be in case the dispute goes to the final resort of dispute resolution - litigation or arbitration.[275]

Essentially, the evaluative mediator could not approach such a way of managing the mediation without prior consent of the parties since they may stipulate that the mediator should give his opinion in a caucus meeting rather than an open meeting. Moreover, sometimes he/she may not be allowed to express their opinion on the merits of the dispute or provide a clear indication of the possible outcome as it may raise a dispute regarding his malpractice which may occurr due to a shortage of information, facts and documents.[276] Nevertheless, some interested parties, e.g. disputants, commentators, mediators and judiciary people prefer this form of mediation due to its speed and decisiveness. The Law Society's Code of Practice provides that:

> While impartiality is fundamental to the role of the mediator, this does not mean that a mediator may never express a comment or view that one party may find more acceptable that another. However, the mediator must not allow his or her personal view of the fairness or otherwise of the substance of the negotiations between the parties to damage or impair his or her impartiality. The mediator must appreciate that his or her involvement in the process is inevitably likely to affect the course of the negotiations between the parties… this would be the case whether the mediator intervenes directly or whether he or she deals with issues directly, for

[275] ibid 13.
[276] S Blake and J Browne and S Sime, *A practical Approaching to Alternative Dispute Resolution* (OUP 2011) 198.

example, through questions. Consequently, all mediator intervention needs to be conducted with sensitivity and care in order to maintain impartiality.

The mediator and the parties should agree, as far as practicable, at the outset whether the mediator's role will be purely facilitative, or whether the mediator may at his or her discretion provide an evaluative element based on his/her knowledge of the subject matter or legal issues involved.

The mediator should not impose his/her preferred outcome on the parties. The mediator may suggest possible solutions and help the parties to explore these options.

Transformative Mediator

In practice, it is not completely right that the mediation is only limited with the previous mentioned approach (facilitative and evaluative). Mediation does not have a rigid process to be followed, like litigation or arbitration, and therefore it is not required to strictly follow a specific approach of either facilitative or evaluative mediation. An approach that falls in between these common forms of mediation is a transformative mediation that focuses on the process and considers it as important as the outcome of the resolution itself. As a result, transformative mediation is more close to the facilitative mediation rather than evaluative. It is mainly based on the identification of the opportunities that are possible for empowerment and recognition, and how it can be reflected in the outcome of the negotiation in order to maintain the relationship between parties as much as possible.

As a result, mediators usually use various techniques to assist disputants to have an informative and productive dialogue which may help them understand each other and to run a successful negotiation. This very much depends on the mediator's skill and training, where he should be well trained in negotiation techniques, and understand how to break any deadlock that may be faced as well as having an understanding of the commercial and technical aspects of the conflicts.

Most of the dispute resolution institutions offer various means of training and teaching that help mediators become more constructive with conflicts, and more skilled with running and managing negotiations and dialogues.

Since mediation began to be utilized as a means of an alternative dispute resolution for various type of fields - especially in the construction field - it has become very successful and considered by high-expertise observers to be an efficient integral part of the legal process.[277] Most of the commercial field comes to rely upon the mediation rather than litigation as the primary means for peacefully resolving disputes.[278]

The Benefits of Mediation for the Construction Industry

Cost Saving

The main object of mediation and other ADR is to mitigate the expenses of the litigation. Due to the complexity of construction projects, a dispute that arises out of one requires the involvement of experts and lawyers which may in turn exceed the amount of judgment itself. According to the experience of one of the mediators, the cost of the experts and lawyers approached 11 million with no settlement expected, which led the disputant to settle the case amid trial with a great deal of pain.[279] On contrary, it is proven that mediation is cost-effective and avoids the high cost of litigation or decreased productivity due to unresolved disputes.

Time

The mediation is an informal process that can be arranged very quickly. Typically a resolution can be reached within a minimum amount of sessions, and can be held within a matter of days or weeks from the date of agreement to being the

[277] <http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf.> accessed 10 May 2012
[278] Noone (n 264) 5.
[279] Edward Lightburn, 'Mediation in International Construction Dispute' [2000] ICLR 202.

process of mediation. As the settlement conforms to the wishes of parties rather than being confined by the elements of judiciary requirements, mediation often lasts for one day to reach a settlement.

Business Collaboration

In the construction projects, parties usually focus on building a strong partnership that enables them to keep projects going under their own momentum. A non-adversarial dispute resolution, such as mediation, would help to preserve ongoing business relationships between parties rather than a litigation or arbitration. It is a win-win means of settlement since all participants participate in the resolution, and everyone has a vested interest in the outcome as well as a stake in its success. It is a foreseen expectation that if the parties would be satisfied with the outcome of the resolution, their business relationships would remain active and strong.

Main Features of Mediation

To achieve the objective of utilizing the mediation as an amicable dispute resolution, disputants must feel comfortable to speak openly and unimpeded about any of their needs, concerns and/or interests. Parties are usually concerned about their issues being aired in public, in particular where it involves confidential business information; accordingly, they are interested in being ensured that what they say and disclose - within all stages of the mediation - will be treated as strictly confidential, and will not be used or produced before any judicial or arbitral proceedings.[280]

Furthermore, whenever the mediator is with a party in private caucus, whatever is said is never revealed to the other side unless the party and the mediator expressly agree to transmit particular information, e.g. when one party wishes to make an offer to the other party. This means that each party can be honest with the mediator about how they see the case, including their view of the weaknesses in their own position. Only when the mediator is privy to such information is he be able to work most effectively.

[280] Noone (n 264) 8.

Confidentiality

Confidentiality is to be operated in two stages. First, confidentiality would be applied between the parties themselves and their advisors, protecting them from third party knowledge of what they disclose or reveal in all sessions. Secondly, confidentiality must also be applied between the parties and the mediator himself, whether the information was disclosed in private sessions or caucuses, and should not be produced or disclosed to any other party without prior clear consent.[281]

Confidentially is vital and is the most important and attractive feature of mediation to its users, which makes it much more workable than the other comparative means of alternative dispute resolution.

Obligations on the parties and the mediator to treat what is revealed in mediation as confidential are usually found in all mediation agreements. Generally, the court upholds confidentiality in the interest of concerned parties and does not allow the production of any evidence without an express consent of parties except where such information would be necessary for the interest of justice.

In the case of *Farm Assist Ltd (in Liquidation) v Secretary of State for the Environment, Food and Rural Affairs,*[282] the court was to consider an application by a mediator - who had led a successful mediation between the disputants - to set aside a summons issued by the defendant seeking her to provide evidence at the trail of action following the mediation.

A settlement agreement had been agreed between disputants following the successful mediation. A long time after the settlement was reached, the claimant had gone into liquidation and claimed that the settlement agreement should be set aside on the grounds that they were subjected to the economic duress during the mediation proceedings. The defendant (the Secretary), in its defence, wanted the mediator to give evidence and a witness statement together with the release of any

[281] Arbitration Law, para 6.6.
[282] [2009] EWHC 1102 (TCC).

notes or papers provided to her from the mediation process. Although the claimant did not object to such an application, the mediator refused to comply with the defendant's request on the basis of the confidentiality provisions of the mediation agreement. Then, the defendant served a witness summons to the mediator seeking her presence at the trial of the action.

The mediator applied to the court to have the witness summons set side on the grounds that according to the mediation agreement between the mediation and all the parties, not only the mediator but also the other parties are obliged to keep confidential all information, and documents produced or disclosed during the mediation process, including all the parties, are barred from calling the mediator as a witness in any future trials. In addition, any notes, papers, documents or other evidence produced for, or arising in relation to, the mediation were legally 'privileged'.

With respect to 'confidentially', Ramsey J found that the obligation to keep confidential all matters produced or discussed during mediation proceedings was binding on the parties and the mediator. This obligation could not be ordinarily waived by the parties themselves without the consent of the mediator. However, taking into consideration previous cases and authorities on the matter, Ramsey J held that such exceptions could be made to this general rule, particularly where it is in the interests of justice and for the fair disposal of the case.

Furthermore, in dismissing the application of the mediator to set aside the witness summons, Ramsey J found that the provisions of confidentiality in the mediation agreement - which prevent the mediator from being called as a witness - was applicable only in relation to 'the dispute'. And according to his judgment, the matter before him was not 'the dispute' which had been the subject matter of the original mediation, but an entirely different dispute as to whether the claimant had been subjected to the economic duress during the mediation process. By having found such a distinction, the parties were not barred from the confidentiality

provisions of the mediation agreement from calling the mediator as a witness in this case.

Without Prejudice

Under the English legal system, it is required, as a matter of general public policy, for the application to contain certain rules requiring discovery and disclosure of documents in civil proceedings. These have been carried through according to the Civil Procedure Rules. The purpose of the disclosure of documents is to provide the concerned parties with relevant documentary material before a trial, thus helping them in assessing the strength or weakness of their respective cases and providing for the disposal of proceedings before or at the trial.

Nevertheless, the obligation to disclose documents is subject to exceptions, where documents of certain categories may be privileged from being disclosed. For instance, the content of discussion and the communications of a party and its lawyers or advisors - whether for the purpose of legal consultation or in connection with proceedings - are privileged from disclosure.

In the previous case Ramsey J also noted that there was an overlapping and unfortunate tendency for the words of 'confidential', 'privileged' and without prejudice' to be used in conjunction when referring to the rules which apply to the conduct of mediations. Therefore, it is important to consider each term separately.

Regarding the term 'without prejudice' privilege, Ramsey J cited Kirkham J in the case of *Cumbria Waste Management Ltd v Baines Wilson (A Firm),*[283] in which she stated that there was a long line of authorities encouraging the parties to settle disputes through 'without prejudice' communications and mediation, which accordingly the courts would be slow to find exceptions to the rule of the term 'without prejudice'.

[283] [2008] EWHC 786 (QB).

'Without prejudice' plays a very important and critical role in the success of any mediation and ADR. It is a principle that provides parties with the environment in which arguments, suggestions and documents can be freely exchanged among parties during the mediation process and treated as privileged and would be conducted on the same basis as without prejudiced negotiations in an action in the courts or similar proceedings. So, the main purpose of 'without prejudice' privilege is to enable parties to negotiate without risk of their proposals being used against them if the negotiations fail. Documents exchanged between parties during the course of negotiations when attempting to settle the disputed matters, whether or not labeled 'without prejudice', may be privileged from disclosure during subsequent proceedings. The underlying rule is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be disheartened by the concern that anything produced in the course of negotiations may be used to their prejudice in any subsequent legal proceedings.

In the case of *Cutts v Head,*[284] Fox LJ said that:

> *As to public policy it obviously is desirable to facilitate compromise rather than forcing the parties to litigate to the end, but to achieve a compromise one of them has to make an offer. He might be apprehensive that his offer might be used against him if the negotiations failed, so he would make his offer 'without prejudice' to his position if the offer was refused.*

The term 'without prejudice' has been examined by the English courts in a different aspect. For example in the case of *Rush & Tompkins Ltd v Greater London Council,*[285] the Court of Appeal had reviewed a different sense of exception which applied to 'without prejudice'. In this case the claimant was the main contractor to carry out work under a contract with the defendant who was

[284] [1984] Ch 290, [1984] 2 WLR 349.
[285] [1988] 2 WLR 533.

the owner. Following a claim by one of the subcontractors, the claimant came to a compromise agreement with the defendant according to the liability of the defendant in order to pay any sum which the claimant was liable to pay to its subcontractor. Disputants had entered into a compromise agreement under which the defendant paid a sum of money to the claimant who was responsible for meeting all the subcontractors' claims. One of the subcontractors applied for specific discovery of 'without prejudice' correspondence regarding the negotiation of the compromise between the main parties and how the whole settlement had been arrived at and in particular how his own claim had been evaluated. In the first instance, the court refused the order to disclose the correspondence between parties on the basis that it was a 'without prejudice' correspondence and therefore privileged from disclosure. It was overruled by the Court of Appeal where it held that a privilege from disclosure would be ceased when the negotiation 'without prejudice' complete and came to fruition in a final agreement. The Court of Appeal set the following guidelines regarding 'without prejudice': 1) the main purpose of the 'without prejudice' privilege is to give the parties opportunity to negotiate without fear that their correspondence may be used against themselves if the negotiation failed; 2) it is possible for the parties to use the label of 'without prejudice' on their correspondence, although there is no final settlement has been reached. For example, on the issue of the parties' liability as to costs; 3) the 'without prejudice' privilege will enable a party to make statements and correspondence which cannot afterwards be used as evidence against him in the course of any litigation. Therefore, such privilege would be limited to the circumstances that the documents include statements that might be considered as admissions of liability; 4) use of 'without prejudice' too liberally may give rise to a situation where a party is precluded from relying upon a letter which contains no material admissions against its interest but rather helpful statements which that party might benefit from disclosure.

Nevertheless, the question may arise regarding the documents prepared for the purpose of negotiation, whether it is necessary to be labelled 'without prejudice'

in order to have be privileged from disclosure in subsequent proceedings. In the case of *Schering Corp v Cipla Ltd,*[286] the court was to assess - on a reasonable basis - the intention of the producer of the document whether or not to be part of or to promote negotiation. The defendant in this sent a letter to the claimant labelled 'without prejudice' stating that it wished to launch a product but it was aware of the claimant's patent in relation to such a product, and would not like to face any confrontation without seeking a commercial solution. It was mentioned in the letter that no response to this letter within a specific time would be considered since there is no confrontation; accordingly, it would proceed as deemed appropriate. The claimant did not respond but alternatively commenced the proceeding alleging patent infringement based upon the contents of the letter. The defendant, by resisting this allegation, argued that the contents of the letter were to be treated as privileged, and that being the case, the claimant had no material that it could rely upon for its action. The court was to examine the letter as whether it was a negotiation document and therefore should be treated as a privileged document or not. The court was to take into account the approach taken by the Court of Appeal in some authorities; in the case of *Standrin v Yenton Minster Homes,*[287] the court stated that:

> *The principle to be derived from these authorities, if it can be called a principle, is that the opening shot in negotiations may well be subject to privilege where, for example, a person puts forward a claim and in the same breath offers to take something less in settlement…but where the opening shot is an assertion of a person's claim and nothing more than that, then prima facie it is not protected.*

Additionally, in the case of *Cutts v Head*[288] the court affirmed that: "a) the heading 'without prejudice' does not conclusively or automatically render a document so marked privileged; b) If the privilege is claimed but challenged, the

[286] [2004] EWHC 2587 (Ch).
[287] Unreported (Court of Appeal (Civil Division) 28June 1991).
[288] *Cutts (*n 283).

court can look at a document so headed in order to determine its nature; c) Privilege can attach to a document headed 'without prejudice' even it is an opening shot".

Following these principles, the court was able to determine whether or not the communication was bona fide and whether it intended to be part of or to promote negotiations. To determine that, the court had to work out what was the intention of the offer and how it would be understood by a reasonable recipient and to examine all the factors and circumstances that provide the indication of how the parties intended their document to be treated, and the court should not only be limited with the label of 'without prejudice' as conclusive evidence.

Mediation against Litigation

Mediation as a way of an alternative dispute resolution is strongly encouraged by the courts either before, or during, the litigation process. The court may, in certain events, stay proceedings for the favor of mediation and also may penalize the costs on a party who refuse to participate in mediation.

Agreement to Agree and Negation in Good Faith

What would happen if a provision in the agreement contains an undertaking by the parties to enter into good faith negotiations to resolve any conflicts?
In the case of *Willis Management (Isle of Man) Ltd v Cable & Wireless Plc,*[289] the appeal had come before the Court of Appeal against the decision of the first instance judgment declaring that a binding agreement had been concluded between the parties regarding the appellant's acceptance of liability for the conduct of its employees. Under a management agreement, the appellant was employed by the respondents as an underwriting manager. Some of the

[289] [2005] 2 Lloyd's Rep 597.

appellant's employees had allegedly entered into a fraudulent scheme to divert premium income from the respondents to companies which they beneficially owned.

Respondents commenced proceedings against these individuals claiming damages. As a direct manager, the appellant agreed to cooperate with investigation and provide them with all information that may help them assess the claim. The respondents intimated to the appellant to be liable for its employees' breach of duty and the appellant accepted the legal responsibility for such acts and would not argue the facts. However, there would need to be a mechanism - such as arbitration or mediation - agreed between the parties to quantify the extent of its liability since it concerned the 'deep pocket' defendant such that they might have to pay the whole of the loss. After further negotiations, the appellant signed and returned a letter put forward by the respondents with a covering email saying that the acceptance of legal responsibility was intended to be an undertaking of full responsibility for the damages suffered, but in effect was an acceptance of a share in them which the parties were agreeing to negotiate at a later stage in good faith. The effect of those exchanges came before the court. The appellant argued that such exchange documents were no more than the agreement to agree which required further discussion and agreement between the parties. Therefore, there was no binding agreement between the parties because it lacked certainty. The court at first instance found that the parties had agreed that the appellant would be responsible for a 'fair' share of loss and there was no difficulty in the courts determining what that 'fair' share should be. Therefore, the court held that the agreement was quite certain enough to be enforced. The appellant challenged the award on the basis that as long as the parties had not agreed yet the extent of its liability which was the subject of their negotiations, then no certainty comes to exist between the parties and consequently there is no binding agreement but merely an agreement to agree. The Court of Appeal agreed with the appellant's submissions. It was clear to Tuckey LJ that the agreement that the parties had made intended that the parties would discuss and agree the way in which the

appellant share of liability would be determined and the parties never did so. Moreover, up to that time the agreement was incomplete in an essential issue. Although the parties' exchange described the appellant's share as a 'fair' share, there was no suggestion in the agreement that the parties intended for the court to determine the matter. The Court of Appeal came to the conclusion that although the court must strive to give legal effect to what the parties have agreed, an agreement to agree an essential term or terms was not an agreement which could be held to be binding upon the parties.

Furthermore, the debate may come to surface according to the enforceability of an agreement to enter into good faith to resolve essential terms for the making of a contract.

It is usually difficult, at the end of any negotiation, to figure out whether the termination was brought about in good faith or in bad faith. Also, as it can never be seen whether good faith negotiations could come up with an agreement - or what the terms of any agreement might have been - it would be most difficult to determine any loss caused by the breach of the obligation. For these reasons, the courts of England would be reluctant to enforce an obligation to negotiate in good faith.

The most popular and dominant case in this regard was the case of *Walford v Miles,*[290] where in a course of a sale of property the vendor for consideration agreed not to negotiate with anyone else and to negotiate only with a prospective purchaser. This undertaking was agreed although there was no concluded agreement between the parties as it was deferred to be 'subject to contract'. It was said by the House of Lords that such an agreement is not enforceable as it did not specify for how long such an undertaking would last, and held that in the absence of an express term, it would become impossible to imply a term that the parties would negotiate in good faith, as it is unworkable in practice as it is inherently inconsistent with the position that the parties were negotiating 'subject to

[290] [1992] 2 AC 128 (HL).

contract'.[291] Lord Ackner stated: '*While negotiations are in existence, either party is entitled to withdraw from those negotiations at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a proper reason to withdraw. Accordingly a bare agreement to negotiate has no legal content*'.

This approach was ascertained in the case of *Pitt v PHH Asset Management Ltd,*[292] where the court emphasized that there is a lack of necessary certainty in the agreement to negotiate the same as to the agreement to agree. A negotiator must remain free to withdraw if he is not satisfied with the terms on the table and it is not possible for the court to assess whether any failure of negotiation was not for a reasonable reason or even to force the negotiators to reach an agreement.

However, in the case of *Petromec Inc v Petroleo Brasileiro SA Petrobras (No. 3),*[293] the Court of Appeal has taken a distinguishable approach where suggested that the obligation to negotiate in good faith may be enforceable in certain situations, and particularly in the circumstances of express terms. The facts of this case were related to the agreement between the parties to the payment of 'reasonable costs' and in particular that the parties would negotiate in good faith on the evidence produced as to such costs. This approach is unlike the case of *Walford v Miles*, where no express agreement had been held to negotiate in good faith and everything was 'subject to contract'. In this case, it was derived from the provisions of the agreement that the parties expressly agreed to negotiate in good faith. Lord Longmore, who raised such a demarcation, found that it would be a strong thing to declare unenforceable a clause into which the parties had deliberately and expressly entered. The court admitted that it is difficult, if not impossible, to the court to figure out whether the negotiation had been brought to an end in bad or good faith since that would always be fairly elusive. Nevertheless, the court dismissed the argument that loss caused by breach of

[291] Sir J C Smith, *The Law of Contract* (2nd edn, Sweet & Maxwell 1993) 48-49.
[292] [1994] 1 WLR 327.
[293] [2006] 1 Lloyd's Rep 121.

obligation could not be ascertained, on the grounds that courts are regularly required to assess such matters. The Court of Appeal has come to the conclusion that the position of the *Walford* position remains good law in the absence of an express term to negotiate in good faith, and then would consider the undertaking merely as an agreement to agree and as such it would be enforceable due to lack of certainty. However, where there is an express written agreement containing a provision to negotiate in good faith, and in particular where it has been drafted by a legal advisor, the Court of Appeal held such provisions to be enforceable. This was enhanced in a less liberal way recently in the case of *Daventry DC v Daventry & District Housing Ltd.*[294] The parties in this case had involved complicated negotiations regarding the calculation of the contract price. Both parties shared mistakes concerning the construing of the provisions of the agreement. It was demonstrated by the decision of the Court of Appeal just how important it is to review contracts thoroughly and very carefully before being entered into it as they may not be able to do anything regarding mistakes at a later stage.

Mediation and Civil Procedure Rules 1998 (CPR)

In the mid-1990s the courts began to request that lawyers discuss with their clients all available solutions and the expected time and costs. This approach led to its incorporation into the final Access to Justice Reform according to the Lord Woolf Reforms and was consequently reflected in the Civil Procedure Rules of 1998 (CPR). Under the CPR, Part 1.4, the court - in order to further the overriding objective - is required to manage cases actively such as encouraging the parties to use, prior issuing proceedings, the most appropriate alternative dispute resolution

[294] [2011] EWCA Civ 1153.

(ADR) if the court regards that suitable and the facilitation of the use of such a procedure. The principal that the litigation or arbitration should be a final resort of dispute resolution had been adopted by the court. In the case of *Re (Cowl and other) v Plymouth City Council,*[295] Lord Woolf CJ said: 'Insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible'. Thus, if the court does so, a refusal by either party to consider the ADR may be in breach of the CPR and could be penalized by the court exerting its authority for the award of costs to the successful party. In the case of *Dunnett v Railtrack Plc,*[296] when the Court of Appeal granted permission to appeal, it had been strongly advised that the disputants should consider the possibility of alternative dispute resolution. However, it appeared to the court that the respondent had refused such a way, and the Court of Appeal refused its costs of the Appeal although it was successful. As far as the respondent was concerned, it would win the appeal and could see no point in an alternative dispute resolution, which no doubt included the payment of its costs. Lord Brooke noted that a skilled mediator might have been able to reach results satisfactorily in many cases, which are quite beyond the powers of courts or lawyers to achieve. Therefore, he held that the failure of respondent to proceed in this manner was sufficient for being penalized in costs. Lord Brooke emphasized the duty of lawyers in advising their clients of the overall objective that if they refuse the chance of alternative dispute resolution suggested by the court, they may have to face uncomfortable costs in consequence.

The mediation process can be approached at any time of the dispute whether the disputants have already commenced the litigation or not. However, if the mediation is planned to proceed at a very late stage of the litigation, then it may become reasonable to refuse as it was decided in the case of *Palfrey v Wilson*[297] for refusing adverse costs due to unrealistic views of the claimant about his case proposed only two months before the trial. Also, by applying its discretion, a

[295] [2001] EWCA Civ 1935, [2002] 1 WLR 803.
[296] [2002] EWCA Civ 303, [2002] 1 WLR 2434.
[297] [2007] EWCA Civ 94.

court may refuse adverse costs if it found that the atmosphere between the disputants provide an indication that the mediation would not likely succeed.[298]

Nevertheless, the courts may, in exceptional circumstances, accept justification for a refusal to attempt mediation where it can be proven that there was no real prospect for success. In the case of *Hurst v Leeming,*[299] the court gave clear principle upon the basis that might justify a refusal to mediate. The claimant had lost his claim in this case, and the respondent would normally be entitled to his costs. However, the claimant argued that no such order should be made because before and after the commencement of proceedings he invited the respondent to proceed to mediation, but the respondent refused. The court had come to conclusion that the critical factor in this case was whether there was any real prospect of success. If mediation can have no real prospect of success a party may refuse to proceed to mediation for this reason. According to the facts of this case, the court was persuaded that - quite exceptionally - the respondent was reasonable in taking the view that mediation had no real prospect of success. Therefore, it awarded the costs in favour of the respondent. Nevertheless, in general, the court could not compel the parties to proceed in the mediation if they do not agree to do so. It is one thing to encourage the parties to mediate, even in the strongest terms, but quite unlikely to order them to do so. To compel the parties to mediate would be to impose unacceptable obstacles on their right of access to the court and may achieve nothing. Dyson LJ the case of *Halsey v Milton Keynes General NHS Trust,*[300] said: '*It would be wrong to compel parties to use ADR since that would amount to an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6 of the European Convention on Human Rights*'.

In general, the courts actively encourage the parties to attempt to settle their dispute through the means of ADR. However, the courts cannot compel the

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[298] *Re Midland Linen Services Ltd* [2004] EWHC 3380 (Ch).
[299] [2003] 1 Lloyd's Rep 379.
[300] [2004] EWCA Civ 576, [2004] 1 WLR 3002.

parties approaching the ADR procedure, but have discretion to penalize a party who unreasonably refuses to agree to the ADR. As a consequence, the unsuccessful party will bear a burden to show that the successful party had acted unreasonably in refusing to consider ADR before proceeding with a trial. In the case of *Halsey v Milton Keynes General NHS Trust,*[301] the appellant claimed for bereavement damages against the hospital under which her husband died. Her solicitor offered to mediate to settle the claim which was rejected by the Trust and as a consequence wrote to the Department of Health warning them of the expected unnecessary high cost of trial proceedings. Throughout, the Trust had assured its stance that there had been no negligence and the mediation was inappropriate. At the trial the claim was dismissed as the mediation approach was considered as somewhat tactical and the court held that the CPR was not designed to force the parties, who have a solid stance, to settle the dispute that they would not. The court came to the conclusion that the Trust should not be deprived of any of its costs on the basis of its rejection to the pre-trial mediation. Although the Court of Appeal affirmed the general support for mediation and pointed out that the CPR included: '... encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of that procedure', it was in agreement with the view of the first instance court in refusing to impose a cost sanction against a successful party on the grounds that it had refused to approach mediation. Lord Dyson held that the burden to satisfy the court through mediation had no reasonable prospect of success, and it should not lie on the party who refused the mediation.

Further, these principles have been discussed recently in the case of *Rolf v De Guerin.*[302] In this case, the claimant contracted with the defendant for the construction of a domestic property. Work began at the property but the contract subsequently broke down due to the claimant's circumstances. The work with the

[301] ibid.
[302] [2011] EWCA Civ 78.

defendant had been suspended although it was substantially constructed and the claimant continued the rest of work with other contractors.

The claimant initially proceeded a claim of a certain amount against the defendant which was followed by an offer to settle the claim amicably. Subsequently, the claimant offered to settle the claim according to the CPR Part 36 in a lower sum, which was ignored by the defendant who had not responded until very shortly prior to the trial, indicating that the amicable settlement may be accepted in a lower amount.

The proceedings commenced before the county court where the defendant at the same time preferred to have his day in court so he could prove his position.

The county court awarded the claimant part of her claim, and it was found that the claim had been exaggerated much more than what the claimant had been awarded; the claim held that there should be no order of costs for the claimant, and the defendant was right to refuse the claimant 's invitation for the amicable settlement.

The claimant appealed to the judgment. According to the review of the precedent authorities - specifically *Halsey v Milton Keynes General NHS Trust,*[303] as well as the dicta in *Dunnett v Railtrack Plc*[304] - the Court of Appeal reversed the costs, and substituted no order for costs. By referring to *Halsey*, Rix LJ said: '… This court there held that an unusual order on the ground of a refusal to mediate always had to be justified, with the burden on the party seeking such an order to show that the refusal was unreasonable...'.

The refusal to mediate was examined by the Court of Appeal and had taken into consideration the fact that the claimant was the all-out winner, and the defendant was unreasonably refused the claimant's offer to settle the issue amicably.

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[303] *Halsey* (n 299).

[304] *Dunnett* (n 295).

Moreover, it affirmed that the court, while exerting its discretion to costs, should take into account the facts surrounding the issue and considered the litigation or arbitration as the last resort to solve the disputes.

When he had come to his conclusion, Rix LJ mentioned the following note:

> It is possible of course that settlement discussions, or even mediation, would not have produced a solution; or would have produced one satisfactory enough to the parties to have enabled them to reach agreement but which Mr Guerin [the defendant] might now, with his hindsight of the judge's judgment, have been able to say did him less than justice. Nevertheless, in my judgment, the facts of this case disclose that negotiation and/or mediation would have had reasonable prospects of success. The spurned offers to enter into settlement negotiations or mediation were unreasonable and ought to bear materially on the outcome of the court's discretion, particularly in this class of case.

In the case of *Ardentia Ltd v British Telecommunications Plc,*[305] the parties entered into a project agreement relating to the provision of information technology to the NHS. The claimant sought an injunction against the defendant who in turn applied to stay such proceedings on the grounds that the claimant did not follow their own contract escalation of dispute resolution procedure which requires precedent steps to be taken prior to filing a case as stipulated in clause 66, which says '... shall not institute court proceedings until the applicable proceedings have been exhausted'. A dispute had arisen between the parties and the claimant bypassed the dispute escalation procedure and applied for interim injunction on the basis that the escalation procedure does not apply in this regard, and the interim injunction procedure allowed them to bypass the escalation procedure. The court held that in accordance with the agreed dispute resolution procedure that, the court will not look at the matter until the dispute resolution

[305] [2008] EWHC 2111 (Ch).

procedure had been exhausted by the parties prior to commencing proceedings before the court or arbitration.

Further, with respect of the pre-action protocol in the field of the construction industry, in the case of *TJ Brent Ltd v Black & Veatch Consulting Ltd*[306] the defendant alleged that the claimant had failed to comply with Construction Pre-action Protocol. Akenhead J held that it is not necessarily required to the Letter of Claim to provide information in 'ultimate detail' unless it is critical to the claim. It should be tested out by the court whether the lack of information was such as to prevent or at least make it difficult for the opponent to respond in detail. Akenhead J said that: '*What the Court should do in considering the Pre-action Protocol is to look at the matters in substance, not as a matter of semantics…and not for technical non-compliance with the letter of claim requirement in the Pre-action Protocol.*

It was also added by the court that a party who wishes to succeed such application must establish that there was some realistic prospect, before commencing the proceedings, of (a) a mediation taking place and (b) some prospect (but no certainty or even necessary probability) that a resolution would be achieved.

It is not unusual that the court may stay the proceeding in favour of mediation. In the case of *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd,*[307] the defendant resisted the claimant application for enforcement of an adjudication decision to be stayed in favour of mediation pursuant to clause 39.1 of the Contract which states that:

> *Either party must identify to the other any dispute or difference…that it considers to be capable of resolution by mediation and, upon being requested to do so, the other party shall within 7 days indicate whether or not it consent to participate in the mediation…The objective of mediation*

[306] [2008] EWHC 1497 (TCC).
[307] [2008] EWHC 3029 (TCC).

under clause 39 shall be to reach a binding agreement in resolution of the dispute….

Coulson J refused to grant a stay on the grounds that the mediation's provision was nothing more than 'an agreement to agree' and therefore lacked certainty. However, Coulson J emphasized that if there was a binding agreement to mediate, he would only granted a stay of proceedings in events where (i) the claimant was not entitled to summary judgment and (ii) a reference to mediation was considered as the best way of resolving the dispute.

Mediation under Kuwaiti Law

Before defining mediation under Kuwaiti law, we will look for its origins in the Arabic language, including how it has been utilized in the legal context. The terms 'mediation' and 'reconciliation' have no particular difference in the Kuwaiti legal system, and are often used interchangeably.

Mediation - which is called 'Alsolh' in the Arabic language - is a noun that is opposite to 'adversarial'. It is derived from the term 'good', as in 'goodness', and is the opposite of the term 'corruption'.

Kuwaiti law does not differentiate between mediation and conciliation as both are based on the same term, whether or not mediation or conciliation has been conducted by intervention of a neutral third party. The same rules are applied to both methodologies, regardless of the involvement of a neutral third party. In reality, Kuwaiti law only recognizes the compromise that takes place within

mediation - such a compromise, as far as we are concerned, could also be called 'mediation'; therefore, we will focus on this type of mediation (or, compromise) in this section.

Similar to Egyptian law, Kuwaiti legislators define mediation in Article (552) in the civil law as being 'an agreement under which the disputants thereof shall settle an existing dispute between them, or avoid thereby a probable dispute, by means of release by both parties, as a way of compromise of each part of his/her allegation'.

Kuwaiti law grants parties the right to agree on a process of resolving their dispute through way of mediation either before or after the dispute has arisen, which is similar to an arbitration agreement.

Furthermore, the language of this article allows disputants, in addition to resolving an existing dispute, protection from any possible dispute by agreeing in advance not to approach the court or arbitration proceedings.

Such a trend taken by the Kuwaiti legislators runs contrary to some Arabic jurisdictions, which define mediation as being 'an agreement between disputants to find a determined solution for their disputes'. The notion of this approach was taken from Islamic law, particularly the Hanafi jurisprudence which only deals with existing disputes, and not future ones. Therefore, a debate regarding parties' rights to agree in advance to mediate their future disputes could not be exist under Kuwaiti law as it obviously gives the parties such power.

The Definition of Dispute

There are three essential elements required to validate the agreement for mediation or reconciliation.

Regarding conflict between parties, it can be a conflict or dispute that has arisen, or may arise, between the parties, whether it comes before the court or is still among the parties themselves.

Kuwaiti law differentiates between existing and predicted disputes; it is stipulated that for any conflict to be regarded as an existing dispute, it must have two essential elements. Moreover, in addition to the conflict or disagreement regarding an issue, court proceedings must have already taken place by one or both parties before a competent tribunal. This is contrary to the predicted dispute which assumes that if there is a conflict or disagreement between the parties regarding rights or obligations, they may be ultimately resolved by the final tribunal even though the parties may prefer not to approach court proceedings. As result, under Kuwaiti law, there are two sorts of mediation: a judicial mediation that is made during the trial and authenticated by the tribunal, and a non-judicial or mediation that is made by the parties themselves without any intervention by the court.

In conclusion, Kuwaiti law recognises two types of mediation/conciliation. The first is a judiciary meditation that is made during the trial of case and authenticated by the tribunal itself; therefore, it ultimately becomes enforceable and cannot be resisted by either party. Regarding the second type, it is a non-judiciary mediation and may called an amicable mediation which can be taken as evidence to prove the agreement for settlement.

Good Faith to Mediate

Under Kuwaiti law, parties should approach mediation on good faith in order to settle their dispute. They must also have the intention to conclude their dispute in a most appropriate way - a way which would not delay the resolution or utilize a delaying tactic. However, this does not mean that the mediation agreement must conclude on the entire issues; rather, the parties may agree on the outlines or on the principles and leave the details for the final resort of the dispute resolutions.

Characteristics of Mediation under Kuwaiti Law

The features of mediation under Kuwaiti law are almost typical to mediation in other comparative jurisdictions. This can elaborated as follows:

- Consensual. The main feature of mediation is that it is a sort of consensual agreement that is a required agreement between the concerned people. This is essentially formed in the same manner as forming a regular contract, which is made on the exchange of offers and acceptance by the disputants, who seek commercial solutions by themselves or in assistance by their advisors and a neutral third party. Kuwaiti law does not set certain formalities to form a mediation agreement.

- In a distinguishable way, the mediation agreement is non-binding unless the parties expressly and clearly agreed for it to be considered so. Then, the general principles and rules of the law of contract would be applied.

- Mediation is a sort of barter deal as both parties are setting off their rights and obligations against each other.

- Speedy. Since mediation is an alternative to the normal litigation proceedings, the time is very important and the settlement must be achieved in a speedy manner. The solution should be decisive and conclude the issue(s) without any further proceedings.

Mediation and Arbitration

The study of mediation is sometimes attached to the study of other private systems of dispute resolution. A distinction has to be drawn, in particular, between mediation and arbitration. The distinction is crucially important to specify the rules that are applied to each system. The Law of Arbitration 11 of 1995 applies only to arbitration while the mediation is subjected to the rules of the Civil Law of 1980. Accordingly, the distinction between mediation and arbitration is essential in order to figure out which rules are applied to the procedure of dispute prior to moving on in approaching the settlement.

Arbitration is a process of dispute resolution that requires the parties to refer their dispute to another, who in turn will determine the matter and impose a legally

binding decision. Moreover, while in the mediation process the parties are to approach the outcome by themselves with no influence from others.

Mediation is a mechanism of dispute settlement aimed at compromise and a win-win situation rather than on the grounds of rights or obligation. On the other hand, arbitration - although it is a private system of dispute resolution - favors the court's judgment and decision regarding the dispute on the grounds of technical/ legal rights and obligation.

In mediation a settlement is based upon the parties' agreements and their decisions, whereas in arbitration the ultimate decision is be shifted to the tribunal which has the discretion to decide on the dispute with no influence on the parties.

Therefore, the arbitrator must conform to the rules of the natural justice, where it is not strictly required in a way of mediation as long as the mediation agreement has been made on good faith and without any fraud or massive error.

In accordance with Kuwaiti law, both mediation and arbitration are strictly required to be proven in writing. Oral communication, or any other way of evidence cannot be accepted to prove mediation and arbitration, and would not be enforceable unless the basic agreement has been made in writing.

Further, both mediation and arbitration need an intervention and authentication from the court in order to be enforced in the case of a resistance by either party.

The Nature of the Mediation Agreement under Kuwaiti Law

Similar to any normal agreement, a mediation agreement is subjected to the general rules required for the forming of a contract. Therefore, the exchanging of offer and acceptance between parties must certainly be done. Both parties must be capable; have a power to do the same without any legal restrictions; and must have the authority to compromise or to make concessions with a counter party. Similar to arbitration and other private methodologies of dispute resolution,

mediation shall not be permissible by the law in public order matters except in respect to financial issues that come out of such matters. Such matters relate to general disciplines such as nationality; eligibility; status of the persons; civil interests; bankruptcy; divorce; inheritance; wills; administration; or any penal matters that cannot be brought for arbitration. This is called the subject matter of mediation. The agreement to mediate must not fall within these categories, and the subject matter must be clearly identified in the mediation agreement.

The nature of mediation under Kuwaiti law is unique as it has two main aspects that shape its profile. It is a mechanism of dispute resolution means that forms one side, and is a type of agreement that is subject to general rules of the law of contract, in addition to its specific rules that are applied individually to it from the other side.

According to the nature of mediation in Kuwaiti law, a mediation agreement does not constitute any rights or obligations, and it only reveals what the parties agree to be bound to. Therefore, the following examples may come out of the mediation agreement:

- If the mediation is related to ownership of a real estate property, it will be required that a registration of title - at the Real Estate Registration Office at the Ministry of Justice - is an authentication provision.

- Rights and obligations - the subject of mediation agreement - would be transferred along with descriptions, appendants, insurances and defenses.

- Such an agreement should not be affected

- The most salient feature of mediation according to Kuwaiti law is to conclude the case between the parties. Accordingly, the dispute between parties would be concluded and neither party has a right to unilaterally rescind the settlement agreement (mediation agreement) without prior consent of the other party.

Furthermore, neither party is eligible to commence a litigation or arbitration proceeding against the same other party for the same mediated subject matter which already had been settled by the mediation. This is a real implementation to the principle of privity of mediation agreement, and as a consequence the mediation would be limited to the concerned parties and will not be extended to the third party who is not involved in the precedent process.

Mediation or conciliation as a condition to litigation or arbitration is also applied globally, such as in France. The French Court of Cassation validated an escalation dispute resolution by accepting a provision that stipulates a mediation or conciliation process as a precedent step that must be taken prior to commencing any legal proceedings and, therefore, held that any legal proceeding would be stayed in favor of such mediation or conciliation.

Mediation and International Business Law

London Court of International Arbitration

The London Court of International Arbitration (LCIA) has its own rules pertaining to the procedure of mediation which came into existence on the 1st of October 1999. Such rules assist disputants and concerned parties for proceeding with the mediation. They also pertain to either how the dispute came into existence in the present or past, and provides them with recommended provisions that help them in this regard.

LCIA rules set the procedure for mediation that must be followed from the time of commencing the mediation until the matter has been concluded. The rules include the Schedule of Mediation Cost (the "Schedule") in effect at the commencement of the mediation. In accordance to Article 4 of the rules, the disputants are free to agree with how they will set out the shape of their own matter, and in what form they will file and commence their respective case.

LCIA rules for mediation provide the procedure with how the mediator must conduct the case, which impliedly ensures that the mediation moves in conformity

with general rules, while the advantages of mediation include confidentiality, time saving, flexibility, etc. This may be regarded as one of the strongest advantages of these rules, and can be seen in the following rules:

5.2 The mediator may communicate with the parties orally or in writing, together, or

individually, and may convene a meeting or meetings at a venue to be determined by the

mediator after consultations with the parties.

5.3 Nothing which is communicated to the mediator in private during the course of the

mediation shall be repeated to the other party or parties, without the express consent of

the party making the communication.

5.4 Each party shall notify the other party and the mediator of the number and identity of those persons who will attend any meeting convened by the mediator.

UNCITRAL Model Law on International Commercial Conciliation

The most popular rules for international arbitration are the UNCITRAL Arbitration Rules, which agree with the United Nations General Assembly and took effect in 1976.

On 24 June 2002, UNCITRAL adopted the Model Law on International Commercial Conciliation as a uniform for rules pertaining to the conciliation process in order to urge international disputants to use the conciliation, and ensures the predictability and certainty in such an approach. Such rules were set out to be applied for the international commercial disputes only. As it is adopted in this regard, the meaning of a ‘commercial’ matter has a very wide meaning, and interpretation can include engineering and construction of work.

The disputants are free to exclude the applicability of the rules of this law. However, according to Article 1(9)a, the Model law does not apply in the case of a judge or arbitrator and in the case that judicial or arbitral proceedings attempt to facilitate a settlement.

Also, in accordance with the Model law, the parties are free, in general, to shape their own process for conducting the conciliation. Nevertheless, if the parties cannot come to agree on their own procedure, then the facilitator or mediation can step in and take the initiative and determine the procedure.

Similar to the general principles that are applicable to mediation and conciliation, the Model law sets out the rules of disclosure of information and confidentiality relating to the conciliation procedure among the parties themselves, as well as the conciliator . Such confidentially will also be extended to include any further proceedings that may be taken by either party subsequent to conciliation, and all information and documents that have been exchanged during the conciliation proceedings would be regarded as privileges, and will be admissible in further litigation or arbitration proceedings . In accordance with Article 12 of the Model law rules, a way of Med-arb is not acceptable as this article prohibits that the conciliator should be acting as an arbitrator in subsequent proceedings unless both parties agree otherwise.

There are many international cases that have been mediated through international institutional organizations such as CEDR. It is becoming usual for international disputes to be settled on means of mediation rather than litigation or arbitration proceedings. This actually has been done due to the advantages of international mediation which mainly can be summarized as follows:

- Avoiding the complexity of the conflicts of laws which may lead to the difficulty to resolve the case.

- Trying to short the distance between the differences through gifted and experienced mediators who are supposed to have a very high quality of

knowledge, and have high technical skills that help persons deal with various cultures, and appreciate their different needs and interests.

- The concern of losing cases may not arise in the mediation as it is usually based on the parties' agreement rather than what the tribunal finds.

Med-arb

The main duty of any judge is, at the end of the day, to realize the the truth and the real issues. Within the capacity given to them by the rules and regulations, judges embark upon their journey to come to a conclusion by utilizing all the tools that elicit the facts that they are looking for.

In some cases, the parties agree in advance to have the same person mediate their issue first, and if he could not conclude the issue he may transform to arbitrate the issue in a way of binding resolution rather than on a friendly basis.

To understand this way of dispute resolution, one should be acquainted with both means of dispute resolution: mediation and arbitration. It is a hybrid process where the parties agree to resolve their dispute in a way of combination between a mediation and arbitration.[308] Med-arb is divided into two stages, starting with mediation by the person who appointed by the consent of both parties to mediate and, in case of unsuccessful, is subsequently to arbitrate a dispute.[309] In some jurisdictions, such process may be taken either concurrently or in parallel by the same or different empire,[310] however, it may not practical or unacceptable in the another jurisdiction to do the same as it may on contrary to nature of med-arb

[308] A Netto and T Ping and A Christudason, 'Med-Arb in the Catbird Seat of ADR' {2003] ICLR 517.
[309] *Arbitration Law,* para 6-7.
[310] *Ardentia* (n 304).

process which constitute on the two stage of mediation and arbitration that taken after each other.

In essence, med-arb is not an exact multitier dispute resolution process that involves different stages of the process which are conducted by different person. Actually, it is a hybrid procedure consisting of various processes conducted autonomously by one party.

Med-arb has been proven to be an old mechanism of dispute resolution. Professor Derek Roebuck who states that 'everywhere in the Ancient Greek world, including Ptolemaic Egypt, arbitration was normal and in arbitration the mediation element was primary'.[311]

Basically, the objective of gathering between mediation and arbitration in a combined process is trying to overcome all the pitfalls and gaps that are faced by each of them individually. Cost and time consumption are the biggest disadvantages that may occurr in the arbitration process, while the enforceability of mediation is the main concern that may weaken the mediation and make it less sufficient. Nevertheless, although it does not move fast, med-arb has started to take place in the arena of dispute resolution.

Meanwhile, rules and requirements for both mediation and arbitration would be both applicable to the med-arb and must be taken into consideration while approaching such methodology to avoid any prejudice.

A problem of the med-arb is that the parties are tentative or unwilling to resolve their dispute amicably. In such an event, the med-arb method may not assist disputants in coming to a conclusion so far as each party may be defensive rather and may not move forward to any settlement. Such a concern may be overcome if the parties are really willing to solve their conflict quickly and amicably.[312]

[311] Derek Roebuck, 'The Myth of Modern Mediation' (2007) 73 Arbitration (1) 105, 106.
[312] Bevan (n 266).

Each process, mediation and arbitration, has its own rules and principles that are to be followed in order to validate them; otherwise they may be vulnerable and challengeable. Nevertheless, by combining these two processes and applying their rules, there may arise a contradiction between them which consequently affects the new process. As a result, it is essential to consider such concerns and to set ways to overcome them.

As a med-arb encompasses an arbitration process, an agreement to apply a med-arb is required to be in writing and in accordance with section (5) of the Arbitration Act of 1996.

In the case of *Acorn Farms Ltd v Schnuriger,*[313] the parties entered into an agreement that stipulated in the event of a dispute, it is may be referred to a Mediator/Arbitrator, with the person who performs both functions via conducting a conciliation process will resolve a dispute amicably along with consensus of the parties. If he/she could not do so, then he may act as an arbitrator who may issue a final and binding decision.

The dispute arose and it was concluded through these two stages by the same practitioner who had a decision in favour of the defendant. In turn, the claimant did not accept the decision and applied to be dismissed on the grounds that he was confused over the nature of the dispute resolution method which caused him not to defend his case in an appropriate way by missing an opportunity to present crucial evidence as he thought it was mediation rather than arbitration.

Generally, it is arguable whether that, in spite of all precautions, a mediator can act in accordance with natural justice as an arbitrator and vice versa.[314] Holding a caucus meeting and considering the information received by the mediator as confidential and not to be disclosed to the other party, is in contravention of the arbitrator rules.

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[313] [2003] 3 NZLR 121.
[314] A Netto and T Ping and A Christudason, 'Med-Arb in the Catbird Seat of ADR' {2003] ICLR 517.

The court determined the case and noted that it is unusual that the process of mediation could be joined together with arbitration in the same dispute by the same practitioner. However, such a combination of these two processes may be workable if the following essential precautions had been taken into consideration prior to pursuing this procedure:

a) It must be made clear to the parties from the beginning that if there is no agreement the mediator-arbitrator will impose a binding solution;

b) The mediator-arbitrator may not receive information without the knowledge of both parties. This rules out the possibility of caucusing at any stage of the process.

c) The parties must be warned from the outset that anything said to the mediator-arbitrator could be sued against that party as the basis for an award, including offers and confidential information disclosed for negotiating purposes.

d) The mediator-arbitrator must avoid the expression of final views until all evidence and argument is complete.

e) If the process moves into arbitration mode, both parties must be given full opportunity to present their cases. This includes a clear indication when the process switches from mediation to arbitration and of the timing and process for presenting evidence and argument.

During med-arb the neutral will be in the know about confidential information that must be protected and not to be disclosed under the label of “without prejudice”.

In such an event, the position of the neutral impartial may be compromised by the role of the mediator. Hence, med-arb may not be recommended to be conducted by the same person in the common law legal system.

For instance, in English Law, a case of *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd,*[315] was a good example as the court in duty evaluated the process of combining mediation and adjudication. In this case the appointed adjudicator was asked to assist negotiation between the parties, and thereafter if no amicable settlement had been reached, then the mediator would continue his mission as an adjudicator. Actually, the negotiation failed with no positive progress and the mediator resumed his duty with no objection, at that time, from either party and ultimately he made his decision in favour of the claimant.

The claimant proceeded with the court enforcement which in turn was resisted by the defendant who alleged that the decision of the adjudicator was invalid due to his participation in the preliminary stage of the negotiation which influenced his perception and with no doubt alluded to consider him as no longer impartial. The court was of the opinion of the assessment of apparent bias rather than actual bias to be applied, therefore it was to be ascertained whether the surrounding events would lead to a fair-minded and informed observer to conclude that there was a real or possible danger that the neutral was not impartial.

Such concern may overcome by applying, further to the precautions that mentioned in the case of *Acorn Farms Ltd v Schnuriger,*[316] some rules that adopted by international organization. For example, one of the prominent requirements to be taken account in the med-arb, is the contemplating of the Article 7.2 of the ICC ADR Rules which prohibits, unless otherwise agreed by parties, to produce as evidence any of the following documents:

1) Any documents, statement or communications which are submitted by another party or by the Neutral in the ADR proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitration or similar proceedings;

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[315] [2001] BLR 207.
[316] *Acorn* (n 312).

2) Any views expressed or suggestions made by any party within the ADR proceedings with regard to possible settlement of the dispute;

3) Any admissions made by another party within the ADR proceedings;

4) Any views or proposal put forward by the Neutral; or

5) The fact that any party had indicated within the ADR proceedings that it was ready to accept a proposal for a settlement.

Under Kuwaiti Law

As illustrated earlier, the med-arb is not a very common and practice. Although it is appropriate to use med-arb by the same individual, in some jurisdictions, it is restricted by some safeguards to ensure that such approaches do not breach strict rules of natural justice.

For instance, med-arb is expressly organized in some common law countries such as the province of Alberta. The Alberta Arbitration Act provides:

35(1) the members of an arbitral tribunal may, if the parties consent, use mediation, conciliation or similar techniques during the arbitration to encourage settlement of the matters in dispute.

(2) after the members of an arbitral tribunal use a technique referred to in subsection (1), they may resume their roles as arbitrators without disqualification.

Kuwaiti law does not move far from these trends in handling this matter. It is remarkable that the arbitration procedure in the Kuwaiti legal system is tailored to give concerned parties some flexibility to meet their needs.

However, such flexibility is not unlimited, according to Kuwaiti law, and there are a number of rules that are to be complied with in the event that the arbitrator would act as a mediator during the process of arbitration.

The arbitrator may not be authorized to proceed with a negotiation or with an attempt to settle a dispute amicably unless he is expressly delegated to do so by virtue of the parties' consent in a way of writing documented.

If the arbitrator is authorized to act as a mediator then he will not be required to comply with the provisions of the pleadings procedures, save those relating to the public order (Article 182 of the Procedural Law 38/1980).

Nevertheless, there are no precise specifications for the meaning of public order in terms of the arbitration process, which could draw the boundaries of the duty of arbitrator. However, the rules of natural justice must be taken into consideration while carrying on the process of med-arb to the extent that does not constitute any manifest of breaching natural justice. Hence, the neutral shall be subject to the minimum requirements that are applicable to the arbitrators, such as one that is necessary to protect the allegation and the parties. Furthermore, the neutral as his duties are combined between the mediation and arbitration, should render his decision in accordance with the arbitration procedure.[317]

Generally, the neutral has very wide power and does not have to stick with a specific substitute law nor a procedural law saving that related to the public order.

The med-arb agreement must be in writing pursuant to Article 176 of the Procedural law 38/1980 which states that "arbitrators may not be authorized to compromise, conciliate or render award as compromising arbitrators unless they are mentioned namely in the agreement on arbitration". Such a requirement also stems from the Article 173 which expressly does not accept any arbitration unless it is in writing. Thus, according to these articles the med-arb agreement must be in writing and the name of the arbitrator who authorized to act as a mediator must be mentioned in such agreement. The legislators' requirements to name the arbitrator in the med-arb process was reasoned by some authors as a step to protect such processes and ensure that it has been done according to parties' consent and

[317] Yaqaub Sarkhoh, *Alosos Alaamah fee Altahkeem Altejari: General Principles of the International Commercial Arbitration*, 1996.

consciousness. Further, there is a debate regarding if the parties have not taken such action earlier, whether the agreement would be rescinded or if it could be rectified by agreeing at the time of commencing the process.

In terms of mediation, it is unusual that there is more than one mediator who mediates the case. However, it is not prohibited by the law to have more than one mediator. Thus, the language of Article 176 does not limit parties with any number who could act as mediator/arbitrator as it refers to the mediator/arbitrator in plural. This trend is adopted by some intentional institutions such as Article 3 of UNCITRAL Conciliation Rules which states that: 'There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly'.

The subject matter of med-arb must be identified specifically in the agreement. An agreement to med-arb in an unspecified matter would be considered null and void.[318] Furthermore, such matters shall be ones that could be conciliated. Such a concept is comprehended in light of the principle derived from the civil law code which contemplates that in case the object of obligation is in violation of law, the public order or good morals, a contract shall be void.[319]The same meaning is provided under the principle which reads that matters related to public order may not be conciliated and that conciliation only is valid where there are any financial rights generated thereof .[320]

The most significant advantage of med-arb is the enforceability of the neutral award. According to Article 186 of the Procedural Law the med-arb decision is final and binding and may not be appealed unless otherwise agreed by the parties. This may attract litigants to approach the med-arb internationally as its award and conclusion may be enhanced by the New York Convention within the states that

[318] Article 173 para. 3 of the Law of Civil and Commercial Procedures.
[319] Article 172 of the Kuwaiti Civil Law.
[320] Article 554 of the Kuwaiti Civil Law.

ratified the convention. The New York Convention has been counted as the most effective system in the spectrum of international business law.[321]

[321] Lord Mustill, 'Arbitration: History and background' (1989) 6:2 Jour Int Arb 43.

Chapter Seven

Kuwaiti Law (Case Study)

Part I

Since Kuwait discovered and started producing oil 80 years ago, the country has become entirely dependent on oil resources, and oil is considered to be perhaps the sole and main resource for state revenue.

However, it has been recognized that the country's petroleum resources are finite and would eventually run out. Such recognition has prompted state decision-makers to call for drastic changes to the fundamental development of the country's economic and business model and direction.

Transition to the said direction began in the last decade against the backdrop of the era of booming oil prices, where the income of individuals and the nation dramatically increased. As a result, Kuwaiti law-makers brought forth new legislation to achieve such objectives. One of the remarkable initiatives that has been taken in this regards was passing the Law 8/2001 of Foreign Direct Investment which allows foreign investors - for the first time in Kuwait history - to venture into business in Kuwait without the requirement of having a specific percentage of Kuwaiti shares, nor a Kuwaiti agent. According to Article 2 of the Law 8/2001, the Council of Ministers shall determine the economic activities and projects that foreign investors are allowed to undertake in Kuwait whether independently or in participation with local enterprises. In essence, the economics of Kuwait has been significantly reshaped by this law. Moreover, according to Law 8/2001 foreign investors can be granted some privileges that may encourage or motivate them to make investments in Kuwait. One of the most important privileges that have been given to foreign investors is an exemption from income

or any other taxes, as well as an exemption from customs duties on imports for a period not exceeding ten years from starting the actual operation of the project.[322] In accordance with Amiri Decree No. 3 of 1955 regarding income tax, corporate income tax is levied on income of foreign companies operating in Kuwait and the tax is imposed on foreign company's Kuwaiti-source income only. The Kuwaiti income tax rates range up to 55%, corresponding to different taxable profit criteria.

In light of the aforementioned factors, the most phenomenal piece of legislation in the history of the State of Kuwait which has been passed is the Public Private Partnership (PPP) Law (Law No. 7 of 2008), or in other words, Build Operate Transfer (BOT).

According to this law, the private sector is allowed to be the primary financial funder to the infrastructure projects that are to be financed and managed by the public sector. The common concept is that the only countries that have limited financial resources or commercial means will choose to outsourcing its major projects on a way of BOT route. Through such a law, Kuwait showed no such tendencies. The BOT/PPP route can be utilized to improve efficiency in carrying out infrastructure projects; it is a tool that helps to promote the quality of the services rendered by the major projects as the private sector - particularly in Middle Eastern cultures - mainly pay careful attention to the customers' satisfaction more than the public sector. The BOT/PPP model also helps the state to provide job opportunities for the high numbers of the Kuwaiti workforce that the government or public sector may not be able to deploy over the next 20 years.

Article 5 of Law 7/2008 specifies the formula for allocating the special purpose of company's shares (SPV) as follows:

[322] Article 13 of the Law 8/2001.

- The concerned government department will offer 40% of its shares of the SPV in a competitive open auction for the companies listed on the Kuwait Stock Exchange and any other companies that are approved by the Higher Committee for the BOT projects.
- 10% would be offered to the entity that unsolicited the proposal of the project; if the project was the same and did not propose public authority, it would be given the privilege of a 50% discount of the successful bidder rate if it would prefer to take it.
- The remaining 50% of shares will be allocated to the domestic general public, specifically for Kuwaiti citizens.

The above means that foreign companies which are listed on the Kuwait Stock Exchange or any other companies that may be interested or specialized in a specific area of the project are allowed to participate in such a competition.

The relationship between the project company (SPV) and the concerned government authority would entail various aspects and risks of contracting arrangements that should be carefully drawn up.

Among many key points in a concession agreement (BOT Agreement), the dispute resolution procedure will be the case of this study.

It is prudent to recognize at an early stage of agreement the arrangement that having a well-defined dispute resolution framework and process is crucial to avoid unnecessary actions or steps that may cause further losses or damages for both parties.

Due to the nature of PPP/BOT projects and overlapping duties and liabilities between the parties of the agreement, it is imperative that the dispute resolution process be clear and early-stipulated - specifically in a concession agreement - and by a delegated and authorized entity.

The key feature of the dispute resolution provision has been set in Article 15 of Law 8/2008 which is partial to BOT/PPP projects; government authority and the SPV; and the right to agree, either in advance or after the dispute occurred, to refer to a dispute arising under the contract of arbitration.

According to such an article, all BOT/PPP projects and their agreements shall be subjected to the rules of 7/2008 and its by-laws and all other laws of the State of Kuwait.

However, Law 7/2008 gives the parties' agreement rights to set and choose appropriate tools and mechanisms to resolve any dispute that may arise out of or in connection with such an agreement, and are also allowed to agree as to what may be the most suitable rules for construing the agreement.

This movement is deemed to be a new trend in the Kuwaiti legal system towards changing the legislative philosophy of the administrative law. In combination with the context of Article (16) of Law 8/2008 concerning Foreign Direct Investment in the State of Kuwait, it states:

"Any dispute arising between foreign investment projects and third party, (according to explanatory note of this law a third party included also any government department), shall be under the jurisdiction of Kuwaiti Courts. Nevertheless, the parties may agree to refer such disputes to arbitration".

Prior to the passing of Law PPP 7/2007 there was a highly controversial debate regarding whether a BOT/PPP would be considered as an administrative contract or a civil/commercial since it was signed with a government department for the purpose of public construction and procurement. The core of the debate was focused on whether the BOT/PPP agreement could be referred to the arbitration (domestic/international) or whether the Administrative Court has an exclusive jurisdiction for BOT/PPP agreement. Despite such a controversial debate, the Kuwaiti government incorporated an arbitration clause in the BOT project for the waste water treatment plant that was entered into with the private sector in

2000.[323] Such a provision had raised an argument as to whether it prevented the government department from the approach of the Administrative Court. There were two different opinions in this regard: the first one goes that an arbitration provision would be valid and should be applied in conformity to the parties' Accord; according to this view, the ambit of validity of such an arbitration agreement would be extended to include any aspects of issues that the parties agreed whether that the issue was related to administrative or commercial matters.

This tendentious leaning toward the language of sub-Article 2-3 of the Arbitration Law 11 of 1995 grants a jurisdiction to the arbitration tribunal to look into any dispute submitted before them by individuals or the private sector against any government department or public authority unless the dispute has already been filed and brought before the administrative courts, i.e., being presented to courts at the time of proceeding for arbitration.[324] There is also no exemption given to the administrative disputes from being referred to arbitration. Additionally, this tendency has been affirmed by Article 16 of Foreign Direct Investment in the State of Kuwait 8/2001 which gives the parties (foreign investor and government department) the right to agree to refer any arising that may arise out of the investment to an arbitration.

Additionally, this was confirmed by the arbitration panel which had been impanelled to determine the case brought before it.[325] The panel decided that according to Article 2 of the Arbitration Law 11/1995, it has unlimited jurisdiction to decide on a case that may arise among public departments themselves or its companies, or a dispute that may arise between any one of them with a private sector entity as long as the case has not been filed before the courts.

[323] Clause 4-14-1 of the Waste Water Treatment Plant Project.
[324] Explanatory Note to the Arbitration Law 11/1995.
[325] Arbitration case no. 12/1995, 21/5/1996.

However, other law scholars go with a different opinion that gives the Administrative Court an exclusive jurisdiction to determine the administrative issues that arise out of administrative contracts. Such opinion has been said according to the following reason: a decision of the Kuwaiti Court of Cassation [326] which held that the Administrative Court has a regular and exclusive jurisdiction to look into the disputed administrative issues between a government department and its contractor that arises out of or in connection to an administrative contract. In addition, the exemption that is given by Article 2 of the Arbitration Law 11/1995 does not extend to include administrative issues, and is only limited to the civil and commercial issues such as the financial issue. This opinion has been taken on the grounds that the Administrative Court jurisdiction is an inherent jurisdiction that is given by law according to the nature of the administrative cases. Furthermore, in accordance to Articles 1 & 2 of Law 20/1981 for the Organizing of Kuwaiti Judiciary System, the Administrative Court has been given an exclusive jurisdiction to determine administrative cases. This trend has been most likely adopted by an arbitration tribunal[327] while it was examining an arbitration dispute as it is stated that "although the Administrative Court has an original jurisdiction to look at administrative cases, a financial dispute which arises out of the administrative court may be referred to the arbitration if the parties do the same".

Nevertheless, after the BOT/PPP Law of 7/2008 had been passed and published, the position had been changed.

In the Egyptian legal system, which is the origin for the Kuwaiti legal system, a similar situation had been argued. According to Article 13 of the Egyptian Arbitration Law 27 of 1994, it was provided that, in civil and commercial matters, if there is an arbitration clause or arbitration agreement the courts will not have jurisdiction to hear the case. However, this Article gives the parties, in civil and commercial matters, the right to agree to refer their disputes exclusively to the

[326] 155/1996, session 7/4/1997.
[327] Arbitration case 3/95, 30/12/1996.

arbitration and prevents the courts from looking at them. It was strongly debated whether such a situation could be extended to include the administrative contract where it is signed with the government department. This debate had led ultimately to amend the Arbitration Law[328] which affirmed obviously that the disputes that arise out of administrative contracts could be referred to and settled through arbitration if the parties agree so.

In order to keep moving at the same pace that is approaching the Egyptian legal system, after passing the recent Law of BOT/PPP 7/2008, the Kuwaiti legislators concluded that such a debate regarding the possibility of settling an administrative contract case should be settled through arbitration or even by any other amicable settlement. In essence, promulgating such new legislation reflects how the change has been made to the philosophy of the administrative contract in the Kuwaiti legal system.

Nevertheless, in terms of this change to the position of the administrative contracts, or in other words the public projects, the most important question that may arise is whether the provisions of arbitration of the aforesaid laws are enough to organize the dispute resolution in the public projects.

In the following part of this chapter, we will recommend the proper procedure that should be incorporated in the recommended standard model of a public construction contract which may assist in avoiding or at least resolving a dispute in the quickest and most cost-effective manner.

According to the nature of BOT projects which involve a very complicated overlapping relationship among concerned parties, it is not appropriate to approach a regular method for resolving disputes by referring to only one and final resort of dispute resolution, such as litigation or arbitration. A two-tier system of dispute resolution has become widely preferred by all related parties as well as interested professional researchers.

[328] Law No.9/1997.

Therefore, due to the absence of any dispute resolution arrangements for BOT/PPP projects in the State of Kuwait, the standard dispute resolution provision for the Kuwait Oil Company[329] LSTK/Turnkey Contract will be taken as a recommended example to be adopted in the public BOT project.

Kuwait Oil Company Model

Hereunder is a dispute resolution model adopted in one of the biggest national oil companies in the Middle East namely in State of Kuwait, incorporated and numbered in the Contract as Clause (55). We observe the escalation cascaded up from friendly negotiation passing by mediation and ends up with the binding arbitration:

1. The Model Clause

55. DISPUTE RESOLUTION

55.1 Friendly Negotiations, Mediation and Binding Arbitration

Any dispute between the Parties arising out of or in connection with the Contract shall be resolved as follows:

55.1.1 The Company and the Contractor shall each appoint a qualified senior employee or representative to a standing two (2) member board (the "Disputes Review Board") within thirty (30) days of the Date for Commencement. The Parties shall keep the members of the Disputes Review Board reasonably informed from time to time of the progress of the Works and shall provide to each member of the Disputes Review Board such information about the Works and such access to the Site as such member may reasonably request.

[329] Very well renowned state company in the State of Kuwait which has its own standard forms of contracts.

55.1.2 If the representatives of the Parties are unable to resolve a dispute within forty-five (45) days after notice of the existence of the dispute from one Party to the other (the "Dispute Notice"), either Party may, by a second notice to the other Party, submit the dispute for review to the Disputes Review Board. The Disputes Review Board shall immediately consider any dispute referred to it and shall make a recommendation within twenty (20) days of the date of such second notice. If the Disputes Review Board has not resolved the dispute to the satisfaction of both Parties within thirty (30) days of such second notice, then either Party may, by a third notice to the other Party, submit the dispute to the most senior executive officer of the Contractor and of the Company (collectively, "CEOs"). A meeting date and place shall be established by mutual agreement of the CEOs. However, if the Parties are unable to agree, the meeting shall take place at the Company's offices in (Ahmadi-Kuwait) within twenty-one (21) days after the date of such third notice. The CEOs and their representatives as necessary shall meet in person and shall in good faith attempt to resolve the dispute.

55.1.3 If the dispute remains unresolved following such meeting of CEO's pursuant to Clause 55.1.2 (Friendly Negotiations, Mediation and Binding Arbitration), the Parties shall within ten (10) days take the necessary steps to commence mediation under the then-current London Court of International Arbitration ("LCIA") procedures. The Parties will within ten (10) days of the receiving of a request for mediation agree upon a mediator. If the Parties cannot agree, one will be selected by the LCIA pursuant to the procedures then in effect.

55.1.4 If the dispute remains unresolved following such mediation, either Party may commence arbitration as set out below. Nothing herein shall prevent a Party from commencing arbitration at any time (i) when the delay required for performance hereunder might materially and adversely affect such Party's interest; (ii) when the other Party fails to fulfill its obligations under this Clause 55.1 (Friendly Negotiations, Mediation and Binding Arbitration); or (iii) if the

dispute remains unresolved after one hundred twenty (120) days of the issuance of the Dispute Notice.

55.1.5 The arbitration shall be held in London and, subject to the provisions of Clauses 55.1.6, 55.1.7, and 55.1.8 (Friendly Negotiations, Mediation and Binding Arbitration), shall be conducted in accordance with the arbitration rules of the LCIA as in effect on the date hereof.

55.1.6 The arbitral tribunal shall consist of three (3) arbitrators. Each Party shall appoint one arbitrator. The claimant in any such arbitration shall give notice of its party-appointed nominee within twenty (20) days of filing its notice of arbitration. The two party-appointed arbitrators shall appoint the third arbitrator who shall serve as the chairman of the arbitral tribunal. If a Party fails to appoint its arbitrator within a period of twenty (20) days after receiving notice of the opposing party's selection of its party-appointed arbitrator, or if the two arbitrators appointed cannot agree on the third arbitrator within a period of fifteen (15) days after appointment of the second arbitrator, then such arbitrator shall be appointed by the LCIA.

55.1.7 In the event that the LCIA is required or requested, whether under the said LCIA arbitration rules or otherwise, to appoint an arbitrator, it shall appoint only a person who has knowledge and experience in technical matters and with experience in international commercial agreements and, in particular, the implementation and interpretation of contracts relating to the design, construction, operation and maintenance of petroleum production facilities.

55.1.8 No arbitrator appointed under this Clause 55.0 (Dispute Resolution) shall be a present or former employee or agent of, or consultant or counsel to, either Party or any Affiliate thereof or any applicable Governmental Authority.

55.1.9 The arbitration shall be conducted in English. All documents or evidence presented at such arbitration in a language other than in English shall be accompanied by a certified English translation thereof.

55.1.10 The arbitrators shall decide the dispute in accordance with applicable law of the Contract by majority of the arbitral tribunal and shall state in writing the reasons for its decision. Any monetary award of the arbitral tribunal shall be denominated and payable in Kuwaiti Dinars and in immediately available funds. The decision of the arbitrators shall be binding.

55.1.11 The costs of such arbitration, including the fees for the Parties' legal counsel and technical experts shall be determined by and allocated between the Parties by the arbitral tribunal in its award.

2. Nature of the Dispute Resolution Process of Clause 55

The Company has adopted for their Lump Sum Turnkey Model Contract as part of the General Conditions of Contract for Turnkey Contracts a sophisticated dispute resolution process at clause 55.1 of the current edition introduced in 2012 which is the first revision of terms first promoted to the contractor market in 2007.

The dispute resolution model adopted in the clause evidences an escalation cascaded up from friendly negotiation passing through mediation and, if issues are still not resolved, ends up with the binding arbitration in London. This process is flagged by the clause heading. The clause is divided into the three phases of friendly negotiation, mediation and arbitration, although the friendly negotiation phase itself envisages three stages: an initial discussion between the party representatives, a Dispute Review Board ("DRB") and lastly a meeting between CEOs.

The structure of the clause evidences a strong emphasis on early resolution of disputes through a range of relatively informal stages with arbitration as the last resort, although sub clause 55.1.4 preserves for either party the right in appropriate circumstances to leapfrog the informal stages.

This focus and the extensive nature of the pre-arbitral process are best suited to major project works executed over an extensive period, where the benefits of

early identification of issues and their prompt resolution is potentially of most value, particularly from the Company side, where a significant problem on major projects is the late notification of substantial claims by Contractors, often with limited prior notice.

The analysis below recognises that the law of the State of Kuwait is the governing law of the contract and the place of any eventual arbitration is to be London. English law will therefore be relevant to determine whether the steps required prior to arbitration taking place have been satisfied and how the arbitration will be conducted.

1. Friendly Negotiations

(a) Dispute Review Board

The first stage in the overall dispute resolution process is the establishment of a DRB. The KOC approach follows contemporary US practice whereby a DRB is appointed and constituted from the commencement of the works i.e. before any disputes have arisen.

In contrast to the US practice to have neutral persons appointed to the board, the DRB in these terms and conditions is made up of senior employees of each party. This aspect probably has the effect of rendering this a more informal process than that seen on major tunnelling projects such as the Boston Corridor and the Channel Tunnel and more closely resembles a stage in a process whereby disputes are referred to employee representatives of the parties, with those employees having levels of increasing seniority, as the process unfolds.

Here, the DRB can be seen as the second stage following an initial process between party representatives. The reference to CEOs pursuant to sub clause 55.1.2 follows as the third stage.

The sub clause 55.1.2 makes clear that the DRB is to have access to the works so that they build up knowledge over time, which they use for the benefit of any disputes that may arise at a later stage.

There is express provision that the Parties keep the DRB reasonably informed of the progress of the Works from time to time. If the circumstances justify, the party against whom the claim is made could be provided with an additional ground of defence in any case where a claim emerges significantly after the events in question and the DRB could be shown not to have been informed. This is more likely to benefit the Company side, as cases of late notice of delays to the programme are the most common occurrences.

However, the obligation to keep the DRB notified is not absolute.

(b) Dispute Notice

The process for any dispute commences with a Dispute Notice served by the claiming party on the other which the party representatives then have 45 days to discuss. This provision establishes a clear and we believe enforceable benchmark for the initial discussions. Often dispute resolution clauses envisage pre-discussions between the parties, but often without any clear parameters, with the result it is impossible to insist on this in practice.

Historically, provisions requiring particular steps to be taken prior to commencement of the formal dispute resolution process are considered enforceable by the English courts, provided there is sufficient certainty and there is no question that the provision merely seeks to impose an obligation on the parties to agree on a point at a future date. Such a provision *(an agreement to agree*) is unenforceable in the English courts.

These principles have been re-emphasised in the context of alternative dispute resolution processes and were restated in *Cable & Wireless Plc v IBM United*

Kingdom Ltd[330] and later followed in *Holloway v Chancery Mead Ltd.*[331] In paragraph 81 of the judgement in the latter case Ramsey J set out the test as

"*It seems to me that considering the above authorities the principles to be derived are that the ADR clause must meet at least the following three requirements:*

First, that the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed.

Secondly, the administrative *processes for selecting a party to resolve the dispute and to pay that person should also be defined.*

Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain."

At this stage of negotiations between the parties, only the first of the above points is likely to be directly relevant. However, no question of uncertainty nor an agreement to agree should be an issue in the context of an agreement to a period of discussion.

The clause does not impose any obligation on the parties in respect of the discussion and English procedural requirement would probably involve little more than that any participation should be in good faith. Anything more would be close to an agreement to agree. In the context of an ongoing project this should not give rise to issues in practice.

(c) DRB Review

[330] [2002] EWHC 2059 (Comm).
[331] [2007] EWHC 2495 (TCC).

The DRB process is initiated by a second notice, which either party may give, but equally the structure of the provision would permit the parties to take extra time if the nature of the issue suits a longer period of deliberation.

The DRB have a relatively short period for deliberation, no doubt reflecting the advantage of the background knowledge they are expected to have.

The clause does not identify any particular procedures which the DRB is to follow or apply. In the US standard procedures apply but English law does not have any recognised code outside that for the statutory equivalent process of Adjudication, which would not be applied in this context.

Unlike the US practice, as already noted, the DRB consists of party representatives rather than neutral persons. This is a further pointer to the parties envisaging a more informal process, but the way the DRB is established suggests this entails some expectation of an independent assessment and hence a partly quasi-judicial role being undertaken by the party representatives.

English law has imposed duties to the other parties where one party's representative, such as a construction manager, has had a role in determining disputed issues. It may be sensible for the DRB to establish a rule that, at a defined stage (and at least once a Dispute Notice (First or Second) is issued) any communications involve both parties and individual lobbying is prohibited as a minimum procedure.

The other essential basic principle required by English law is that each party will be given an opportunity to put forward its case. Whether this is in writing or verbally can be left to the DRB, providing they give the same opportunity to each party.

From the terms of the clause, an essentially two stage determination is evident with the DRB:

- first preparing recommendations within 20 days

- then a final decision after 30 days

From this, it is legitimate to infer that the parties also have at least an opportunity to respond to the DRB's provisional conclusion. Time pressures may dictate whether each party gets the chance to reply to the other's comments.

(d) CEO Meeting

The final stage of the friendly negotiation stage of the process is the reference, if one party remains aggrieved with the DRB decision, to a meeting of the parties CEOs. This is triggered by a third notice.

Unlike the DRB phase, this is probably not to be viewed as an independent or quasi-judicial process and no formal rules need to be implied.

As with all stages in the "friendly negotiations" element, time limits are relatively short in the context of a process which seeks to identify disputes at any early stage and address them whilst the evidence is fresh and there is no reason why this should not be workable in general. More difficult issues may arise in practice where there are difficulties in identifying the underlying problem or its solution.

A similar approach of applying strict timetables is adopted by the UK adjudication process without necessarily having the benefit of the early warning given under the clause 55 process by the DRB element.

Nevertheless, there are likely to be matters from time to time where the nature of the issue, or its solution, demand a longer consultation process. The goodwill of both parties will then be needed on timing if the dispute is not to lose the advantage of the process and be propelled to arbitration earlier than is appropriate.

2. Mediation

The intermediate stage of the KOC dispute resolution process is a contractually prescribed reference to mediation under the auspices of the London Court of International Arbitration ("**LCIA**") Mediation Rules (the "**Mediation Rules**").

The current rules were updated (including a new costs schedule) on 1 July 2012, although no substantive changes were made.

(a) Condition Precedent to Arbitration

This provision is, we believe, a binding condition precedent to arbitration under the KOC terms (unless a party is able to show exceptional circumstances to justify immediate reference to arbitration under clause 55.1.4).

The extent to which such provisions are enforceable have been the subject of a recent review of the English Court of Appeal on 16 May 2012 in *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA*.[332] At paragraph 33 and 36 of the Appeal Judgment:

"Before the judge the insured submitted that condition 11 of the policy contained an enforceable obligation to mediate and that compliance with its terms was an essential precondition to arbitration. In the present case that condition was not satisfied and the insurers had therefore not validly commenced an arbitration which called for protection by the grant of an injunction. The judge held, however, that condition 11 did not give rise to any binding obligation. He referred to, and was content to follow, the decisions of Colman J. in *Cable & Wireless Plc v IBM United Kingdom Ltd*[333] and Ramsey J. in *Holloway v Chancery Mead,*[334] in each of which the court expressed the view that an agreement to enter into a prescribed procedure for mediation is capable of giving rise to a binding obligation, provided that matters essential to the process do not remain to be agreed.

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[332] [2012] EWCA Civ 638, [2013] 1 WLR 102.
[333] [2002] EWHC 2059 (Comm).

[334] [2007] EWHC 2495 (TCC).

[The Judge] held, however, that condition 11 of the present policy did not meet those requirements, because it contained no unequivocal undertaking to enter into a mediation, no clear provisions for the appointment of a mediator and no clearly defined mediation process. Essential matters therefore remained for agreement between the parties. Accordingly, condition 11 did not give rise to a legal obligation of any kind, and in the absence of a binding obligation there could be no effective precondition to arbitration"

In the present case, unlike *Cable & Wireless v IBM* and *Holloway v Chancery Mead*, condition 11 does not set out any defined mediation process, nor does it refer to the procedure of a specific mediation provider. The first paragraph contains merely an undertaking to seek to have the dispute resolved amicably by mediation. No provision is made for the process by which that is to be undertaken and none of the succeeding paragraphs touches on that question...most that might be said is that it imposes on any party who is contemplating referring a dispute to arbitration an obligation to invite the other to join in an ad hoc mediation, but the content of even such a limited obligation is so uncertain as to render it impossible of enforcement in the absence of some defined mediation process..."

In this case, the timing as part of the overall process, the clear identification of a process for appointing a mediator and the definition of the process provided by the Mediation Rules will meet the relevant test to make this a condition precedent to the right to refer the dispute to arbitration, unless the provisions of clause 55.1.4 apply.

(b) The Mediation process

Mediation is by its nature a flexible process and the LCIA rules preserve this, allowing the parties maximum flexibility in the way they any case is presented to the mediator (Article 4).

The Mediation Rules provide a process for the nomination of a mediator and an outline procedure, but Article 9 preserves any choices which the parties have made in the context of the dispute which the LCIA will follow. These provisions meet the requirements for the enforceability of this element of the process, as set out in the cases referred to in the previous section.

The balance of the LCIA Mediation Rules address the administrative issues concerning the mediator's appointment and immunity from suit, as well as the administration of the cost elements.

The rules further confirm that the process is and remains confidential, both generally and in the context of the communications to the mediator by each party.

3. Arbitration

It is in the nature of mediation that, whilst support for the process itself can be secured if necessary through court intervention, the parties cannot be forced to agree on any particular outcome. Clause 55 recognises this with the final element of the dispute resolution process being a formal stage leading to a determinative and enforceable finding.

The choice taken in clause 55 is in favour of arbitration. This is a key choice and common in the international commercial community and the oil and gas industry in particular. As compared with proceeding in national courts the key benefits are often seen as

- A potentially more neutral/ international process
- Relevant experience of the tribunal members
- A swifter process than many national court processes

- No appeals
- Confidentiality
- Wider enforceability through the New York Convention in signatory countries

Although there is some variation depending on the chosen place of the arbitration e.g. confidentiality is not a feature of Australian arbitration practice.

(a) Seat of Arbitration - London

Sub clause 55.1.5 provides that any arbitration is to take place in London and to be conducted in accordance with the LCIA arbitration rules in effect on the date of the contract.

These are key provisions, as the place of the seat of arbitration selects the law under which the dispute resolution process is regulated which in this case will be English law. This is notwithstanding that the contract itself is subject to Kuwaiti law.

The current English law position is enshrined in the Arbitration Act 1996, which reinforced a general policy of maintaining a supervisory role of the overall process to ensure that the process is effective and meets the minimum standards the parties expect from a tribunal, whilst leaving the determination of the particular procedure to be followed and the determination of the substantive issues to the tribunal chosen by the parties, subject to any question of appeal (which we address below).

(b) Upholding the arbitration agreement

Current English practice accords to the arbitrators significant power to decide on their own jurisdiction to determine any matter before them, but there is still limited recourse to the court in borderline cases. However, the most recent decisions suggest the opportunity for contesting such matters is now significantly reduced.

(c) Establishing the scope of the Arbitration Clause

The English courts have held at the highest level that the scope of an arbitration clause under English law will be construed liberally. The starting assumption is that any dispute arising out of the contractual relationship will be decided by arbitration. This assumption that any dispute under the relevant LSTK Contract will be the subject of the prescribed dispute resolution process is evident in the structure adopted by Clause 55 as a whole. Issues which in past times depended on the precise words chosen for the arbitration clause are now gone.

The continuing validity of a clause such as clause 55 has also been emphasised even in a case where one party, for whatever reason, seeks to argue the overall agreement is not valid.

Lord Hoffman in *Premium Nafta Products Ltd v Fili Shipping Co Ltd*[335] considered the validity of an arbitration clause at paragraph 35 of the judgment:

"*The appellants' argument was not that there was no contract at all, but that they were entitled to rescind the contract including the arbitration agreement because the contract was induced by bribery. Allegations of that kind, if sound, may affect the validity of the main agreement. But they do not undermine the validity of the arbitration agreement as a distinct agreement."*

In the context of sophisticated projects under the KOC LSTK terms, the validity of the LSTK agreement itself is unlikely to be an issue, but if it is, the benefits of clause 55 will remain available.

[335] [2007] UKHL 40, [2008] 1 Lloyd's Rep 254.

(d) To prevent the arbitration process being undermined by other legal process

The UK is a signatory of the New York Convention under which precedence is given to the parties' selection of arbitration, so that any attempt to bring proceedings in the courts of another Convention party state (like Kuwait for example) in respect of matters within the scope of the arbitration clause can be stayed or stopped on the application of the defending party. Except in extreme cases, the grant of such a stay is almost automatic in the English courts.

Furthermore, an English court is generally more willing to exercise its supervisory role to prevent court applications in other jurisdictions by way of anti-suit injunctions as in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC.*[336]

The position is currently less clear cut where proceedings within the EU are concerned because of the impact of the EU Regulation 44/2000 on jurisdiction. This Regulation potentially shifts the decision as to whether proceedings can be brought to that of the courts of the rival jurisdiction before which the proceedings have been commenced. Such an issue was referred to the European Court of Justice (*Allianz SpA v West Tankers Inc (The Front Comor)*[337] which ruled that it was incompatible for a court of a Member State to make an order restraining a person from issuing proceedings in another Member State where contrary to an arbitration agreement.

(e) The Arbitration process

(i) Tribunal: three man option

[336] [2011] EWCA Civ 647, [2011] 2 Lloyd's Rep 233.
[337] (C-185/07) [2009] 1 AC 1138.

Sub Clause 55.1.6 selects a tribunal of three members with each party making one appointment and the two party appointed arbitrators selecting the third, with the LCIA being given the responsibility of making any default selections.

The three man tribunal has been the most common choice for commercial parties for many years, although a three man tribunal entails a greater cost and greater difficulties over timetabling than a sole arbitrator, experience shows that, for serious disputes, the parties prefer the former. By avoiding the need to secure both parties' agreement at the outset when positions are often more polarised the commencement of the process is facilitated.

The LCIA process is capable of accommodating appointees from both civil and common law backgrounds. Later in the process, when the hearings stage is reached, the mix of views a tribunal constituted in this way can lead to a more balanced result.

The opportunity has been taken in sub clause 55.1.8 to reinforce the current practice of disclosure notices, so as to make express provision for the exclusion of certain categories of arbitrator candidate who may be thought to be potentially biased. In a context where judgments on the degree of any candidate's connection are often difficult, a clear rule in respect of the more straightforward categories provides certainty.

(ii) Tribunal: LCIA Appointments

Sub clauses 55.1.6. and 55.1.7 empower the LCIA to make appointments where there has been default by a party in making an appointment or delay by the party-appointed members in selecting a chairman. This is an important service which the LCIA provides the international business community and avoids the need for the English court to fulfil this role which can introduce unwanted delay, because of the procedural formalities.

Equally the presence of a respected third party appointor has a value for KOC in assisting in enforceability of any award, should that become necessary. The

alternative provision, whereby the default appointment is supplied by the claiming party can often be a ground of objection on enforcement.

Sub clause 55.1.7 also sets out requirements for the qualifications of any appointee by the LCIA, which are generally directed to the nature of the project works likely under the LSTK terms.

There is always a danger that such requirements can, in a particular case, be difficult to fill and the requirement of knowledge and experience in technical matters and experience in implementation may pose difficulties for the LCIA and provide opportunities to a party seeking to delay any arbitration process. The adoption of the various characteristics listed as options in any future revision may limit those opportunities.

(iii) The steps of the Arbitration process

Responsibility for the actual process form the initial claim notices to any hearing is that of the Tribunal operating within the parameters of the Arbitration Rules of the LCIA in effect at the date of the LSTK Contract and the Arbitration Act.

The LCIA is "*one of the longest-established of all the major international arbitration institutions" (Bankers Trust Co v PT Jakarta International Hotels and Development*.[338] In 2011, 224 disputes were referred to it, 16% of those concerned sums over $20 million.[339]

The LCIA arbitration rules have remained the same since January 1998 subject to a new costs schedule introduced on 1 July 2012. New rules from the LCIA governing the arbitration process are expected early next year.[340]

The nature of the rules as they apply to the conduct of the any arbitration is that of a loose framework providing the necessary powers but leaving the precise

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[338] [1999] 1 All ER (Comm) 785, [1999] 1 Lloyd's Rep 910.

[339] LCIA, Director General's Report 2011.

[340] <http://www.lcia.org > accessed 1 September 2012.

structure in any given case to be developed by the Tribunal with the parties involved. In the context of an international arbitration, it is common for there to be cross fertilisation from the practices of other organisations.

The manner in which the parties' cases are presented, disclosure of documents, witnesses and the assistance of experts will all be part of this process, as will be general timetabling and the conduct of any hearing.

The LCIA rules will accord precedence to the parties' specific decisions on any part of the process. Here, sub clause 55.1. 9 makes express provision for the arbitration to be conducted in English. It is common for this to be pre-agreed in the contract terms. Specific provision is also made in respect of the use of evidence which originally is in a language other than English; again this reinforces likely practice.

As outlined at the beginning of this section, the overriding principle of the English arbitration legislation is to minimise interference in the tribunal's work and the court's powers in the LCIA arbitration process, under English law, are limited. This was recognised in *Elektrim SA v Vivendi Universal SA*.[341]

It was argued that the court's power to grant an injunction under section 37 of the Supreme Court Act 1981 could be used to prevent LCIA arbitration from proceeding. At paragraph 63 of the judgment, Aikens J. considers the possible recourse if the LCIA arbitrators had breached their statutory duty to act fairly and impartially.

"First, it was well established under the old regime that the court did not have a general supervisory role over arbitrations at their interlocutory stage beyond that granted by the Arbitration Acts themselves. Therefore there was no scope to invoke the court's jurisdiction to grant injunctions to compel arbitrators to take a particular course in the reference. That rule must remain the case under the 1996 Act. The position is emphasised by the provisions of section 1(c) of the Act,

[341] [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8.

which stipulates that " in matters governed by this Part the court should not intervene except as provided by this Part".

Secondly, the 1996 Act itself provides the remedy for a breach of the section 33 duty [the basic obligations to properly to conduct the proceedings fairly and impartially]. Either before the award is made or after it is made, the party that alleges it is aggrieved can apply to remove the arbitrator or challenge the award, under (respectively) section 24 (1)(d)(i) or 68(2)(b) . The first section permits an application to the court to remove the arbitrator for a refusal or failure properly to conduct the proceedings. The second section permits a challenge to the award on the basis that there has been a serious irregularity because of the tribunal's failure to comply with section 33. In either case there is no need for the court to interfere with the arbitral process by granting an injunction pursuant to the powers in section 37."

This confirms there is no legal basis to compel the tribunal to take a particular course, except where there has been a failure by the tribunal to fulfil its duties under section 24. The court has the power to remove an arbitrator upon application of a party on four grounds, which are:

- impartiality of the arbitrators
- absence of required qualifications
- where the arbitrator is physically or mentally incapable
- refusal or failure by the arbitrators to conduct proceedings properly

(f) The Tribunal's Decision

Sub clause 55.1.10 makes specific provisions for the tribunal's award to contain written reasons which will override any terms of the LCIA Rules.

The clause also makes clear that the Tribunal's duty is to decide the case in accordance with the applicable law of the Contract, which is Kuwaiti Law. This express provision prevents the tribunal from seeking to decide the matter on the basis of what the tribunal might otherwise see as the simple justice of the case based on their own outlook or on the basis of some general international standards of dealing or more general concept of international law. Failure to follow this would be grounds for court intervention on the basis of the tribunal's misconduct.

This term probably also embraces the additional requirement from the governing law clause that the contract wording is to be construed in accordance with the normal usage of the English language as related to works of the type in question. Had English law instead of Kuwait law been the governing law, this may have excluded the latest thinking of the English Supreme Court on issues of interpretation.

Under London arbitration practice, awards in respect of the parties' legal costs are made and this is endorsed expressly by sub clause 55.1.11 which will tie in with article 28.2 of the LCIA arbitration rules,

Irrespective of any award, the LCIA arbitration rules confirm that the parties are jointly and severally liable for the costs of the arbitration service provided by the LCIA and members of the tribunal (article 28.1). The LCIA determines the amounts by reference to the LCIA arbitration schedule of costs. This details the level of the fees, deposits, administrative charges and interest to be charged.

(g) Appeal

Clause 55.1.10 provides that the arbitrators' decisions shall be binding. This is reinforced and extended by the LCIA Arbitration Rules which apply. Article 26.9 of the LCIA Arbitration Rules also waives any right of either party to appeal an award.

English law provides an option to appeal on a question of law under section 69 of the Arbitration Act 1996, but only if not agreed otherwise by the parties. The LCIA arbitration rules were considered in this context by Walker J in *Royal & Sun Alliance Insurance Plc v BAE Systems (Operations) Ltd*[342] who quoted article 26 and stated at paragraph 13 of the judgment:

"It is common ground that in arbitral proceedings governed by the LCIA rules alone the waiver in article 26 would be effective to exclude the right of appeal conferred by s 69 of the 1996 Act: see the opening words of s 69(1)."

The Arbitration Act 1996 does allow a party to the arbitration the possibility of challenging the award, regardless of the LCIA arbitration rules, but only on the grounds that the tribunal does not have substantive jurisdiction (section 67) or if there is a "serious irregularity" affecting the tribunal (section 68).

(h) Additional features consequent of on the arbitration seat being London.

(i) Confidentiality

Arbitration under English law also imports an obligation of confidentiality on all involved. The precise basis of this is a matter of some debate but whether by way of an implied term or as matter of general arbitration law the English jurisdiction is one of the strongest upholders of confidentiality:

"In the last 20 years or so the English courts have had to consider the consequences of the privacy of the arbitral process and the scope of the obligations of confidentiality in several different contexts. It is apparent that the English jurisprudence on this subject (as distinct from the confidentiality of awards, which is much discussed in other countries) is much richer than that of

[342] [2008] EWHC 743 (Comm), [2008] 1 Lloyd's Rep 712.

any other important arbitration centre, and that it constitutes a major contribution to the development of the law of international arbitration."

(Lord Collins, at paragraph 66, of the judgment of *Michael Wilson & Partners Ltd v Emmott*[343])

There are exceptions where the main arbitration documents are needed to support one of the parties legal rights e.g. on enforcement or as a part of an indemnity claim against a third party. Also, the courts will not allow arbitration confidentiality to be used to mislead a foreign court. Collins J at paragraph 111 of *Michael Wilson & Partners Ltd v Emmott*[344] confirm this.

"The factors which lead me to the conclusion that the judge was right on the substance of the case are these…fourth, without being informed of the London arbitration, there was a danger that the NSW court would be misled. These matters lead me to the conclusion that the interests of justice required disclosure. The interests of justice are not confined to the interests of justice in England. The international dimension of the present case demands a broader view."

What the majority in the *Michael Wilson* case left unanswered is whether this is enforced by the tribunal or the court.

(ii) Legal professional privilege and the sanctity of without prejudice communications

Although the application of English law disclosure of documents is a matter for the tribunal to decide, in practice an arbitration in London will be conducted against a background of these rules and the rules of legal professional privilege, which protect a party's communications with its legal advisers (including in house legal teams) and without prejudice communications. Without prejudice communications create a channel of communication between the parties, who are

[343] [2008] EWCA Civ 184, [2008] 1 Lloyd's Rep 616.
[344] ibid.

then each protected from disclosure of these communications to the tribunal, allowing the parties' to develop their cases and promote any possible settlement.

The strict basis for this is not clearly defined but the practice is well recognised and customarily applied (p.243 of *Russell on Arbitration* (23rd edition) Sweet and Maxwell 2007). Arguably section 1 of the Arbitration Act 1996 may provide the source for this.

4. Sub clause 55.1.4 - Leapfrog Provisions

Sub clause 55.1.4. contains a proviso to the otherwise comprehensive dispute resolution process to permit either party (in practice this is likely to be a claiming party) to leapfrog the Friendly Negotiation or Mediation stages to initiate arbitration in three circumstances:

(a) Material adverse effect of delay resulting from performance of the pre-arbitration steps

This is potentially the most material of the provisions. The right arises at any time. There is no reason why this should not mean what it says. An equivalent provision applies in respect of adjudication within the domestic UK constructions industry and is given full effect.

This is an important safety valve to cover situations which arise where urgent action is required and there is sensibly no attempt to limit the situations where this may apply.

Potential examples are any case where injunction style relief (which requires a party to take, or prohibits a party from taking, certain action) is required in response say to a wrongful termination or any attempt by a contractor to gain wrongful advantage at critical stages of the works. This may also be important in respect of ancillary matters such as intellectual property rights.

A general issue may be where a party is faced with the expiry of a key limitation period which is an exception recognised to the English construction courts' own pre-action protocol process, which serves a similar purpose to the friendly negotiations/mediation stages under clause 55.

(b) Failure by a party to fulfil its obligations under clause 55.1

This proviso recognises the obvious unfairness of requiring one party to follow the process where the other party is not participating. At certain stages in the process, this may be more difficult to apply as at certain stage no clear obligations are placed on the defending party e.g. in the first party representative phase.

It is likely that any non performance of a party's representative on the DRB may trigger this proviso, notwithstanding the quasi-judicial role involved.

(c) Expiry of 120 days from Dispute Notice

This requires little explanation.

By inference, this applies a short timeframe for the mediation process which will vary according to the time taken by the prior steps but in general the timings point to the mediation process being initiated after 106 days (45+30+21+10 days).

There is however no procedural objection to the mediation process running in parallel with the first stages of an arbitration or indeed mediation being retried at a later stage of the arbitration process. Experience suggest mediations are more successful either at the outset as provided for by the clause 55.1 process or later in the process, at the stage where the parties' cases have developed in the formal arbitration proceedings shortly before any primary hearing.

5. Conclusion

Overall clause 55.1 establishes a multi-layered framework for the handling of disputes. The clause is clearly directed to taking the parties through a process designed to address disputes at an early stage with a formal arbitration as very much the last resort.

This clause originally formed part of a contract revision understood to have been promoted with a view to attracting contractors to bid for Kuwaiti projects against the background of the contracting market of 2006/7.

But in providing a defined path and opportunities for early resolution of contractor claims clause 55.1 also better meets Company's own strong preference towards solutions negotiated between the parties. In this respect the adoption of a detailed framework established under the supervision of the English jurisdiction, where the value of such procedures are recognised and upheld appears well chosen.

Recommendations

Part II

As seen in previous chapters, we have analyzed and evaluated the style of the most preferable means of dispute resolution in a way that presents the pros and cons of each in an attempt to promote a style that is most efficient.

The recommendations are divided into two parts: the statutory approach that may be promoted by the legislators, and the consensus approach where the agreement is made contractually by the concerned parties.

The Statutory approach

With the exception of arbitration, there is currently no statutory organization for any alternative dispute resolution, such as adjudication. The Kuwaiti law procedure should force, or at least encourage, disputants to participate in an alternative dispute resolution as a pre-procedure to be taken prior to pursuing the final resort of the resolution or during the trial and before issuing the award of such trial.

The procedure must be set to require the parties to approach an alternative dispute resolution as a pre-condition process, otherwise the case may be dismissed by the court.

This step is not entirely new under the Kuwaiti legal system. For instance, according to the Kuwait Labour law, a compulsory pre-action process must be taken in respect of an employment claim before filing a labour case. Otherwise the case would be dismissed on the grounds of breaching public order of procedural law. This approach is as follows:

”An employee before commencing an action in court shall submit an application to the Ministry of Social Affairs and Labour. The Ministry shall call the two parties of the dispute and take the necessary steps to amicably settle their dispute. If an amicable settlement cannot be reached, the Ministry shall inevitably then refer the dispute to the Court of First Instance within two weeks from the date of submission of the application by the employee, and such reference shall be accompanied by a memorandum containing a summary of the dispute, pleas of the two parties, and the Ministry’s comments. The Court’s Records Section shall, within three days from the date on which the application reaches the Court, fix a date for hearing the action, and both disputants shall be notified of this date. The

Court may summon the person who has prepared the memorandum submitted by the Ministry to explain the contents thereof".

The objective of such pre-procedure in not to bind one party unilaterally; it is a reciprocal obligation. It is to compel the parties to put their cards on the table and to honestly and rationally discuss matters[345] .

According to the global practice of adjudication, as well as special experience in the UK, we recommend the following changes to be made to the Kuwaiti law in order to develop its procedure in respect to resolving construction disputes:

"A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

The provisions of this part apply only to the construction contract as it is defined under articles (661 & 689) of the Civil Law Code.

A construction contract must be in writing or evidenced in writing, and any other agreement between the parties as to any matter is effective for the purpose of this part only if in writing. The rules of Law of Evidence apply in this regard.

For this purpose, "dispute" includes any differences in the matters that are permissible to be reached in a way of conciliation in conformity with provisions of Article 554 of the Civil Law Code.

Parties must hold a direct negotiation to settle such dispute(s) amicably. If no settlement is reached between the disputing parties by negotiations, the claimant party may move the tribunal for an adjudication to conclude a claim temporarily or permanently.

This step should not be considered as a tactical or mark time until a second stage is due to be proceeded. Moving to the stage of dispute resolution should not be approached until the applicable proceedings have been exhausted. It is to

[345] *Daejan Investments Ltd v Park West Club Ltd* [2003] EWHC 2872 (TCC).

somewhat strongly encourage parties to settle their dispute amicably before going to the court by imposing such obstructions on their right of access to court or arbitration instantly.

A construction contract must be complied with the following adjudication arrangements:

- Enable a party to give notice at any time of his intention to refer a dispute to adjudication;

- Provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within (7) days of such notice;
- Require the adjudicator to reach a decision within (28) days of referral or such longer period as is agreed by the parties after the dispute has been referred;
- Allow the adjudicator to extend the period of (28) days up to (14) days, with the consent of the party by whom the dispute was referred;
- Impose a duty;
- An adjudicator shall render his decision without compliance with pleading the procedure save the proceedings provided for in this section;
- An adjudicator does not need to render his decision based on the law provisions save those relating to public order.

An adjudicator must be qualified to act as an arbitrator in accordance with Kuwaiti Arbitration Law as both of them perform the same action and have a similar mission to resolve disputes in an informal process.

The most distinguishable feature of the adjudication is the nature of its decision. An adjudication decision is an interim and subject to be revisited by the final resort of dispute resolution, therefore, for the sake of quick resolution and to

maintain the momentum of the project, an application to recuse of an adjudicator shall not be accepted as long as his decision is provisional and may be resisted before a competent final resort tribunal.

An adjudicator shall act impartially and fairly and give each party full opportunity to defend his case to maximum extent but not to be typical to a judge in a litigation system.

Once a referral notice has been made by a referral party, a copy of such notice along with all related and submitted documents must be passed simultaneously to the other party. There should be no specific way to exchange such document, but to be left to the concerned parties to agree a most appropriate and convenient way to pursue to such a procedure. Adjudication should be flexible and informal, and the parties or the adjudicator have a right to tailor their most convenient procedure with no strict requirements to be complied with the litigation procedure. Moreover, an adjudicator should have maximum authority to set a procedure and the discretion to take the initiative in ascertaining the facts and law as well as the power to decide on his own jurisdiction to look into the case. This is one of the main features that distinguish adjudication from other alternative dispute resolutions.

The contractually approach

According to Kuwaiti law and to the practice of the government's department, it seems very substantial to include both an administrative and commercial contract provision that confers both parties the right to proceed an amicable settlement before or during the trial and up to when the dispute ended in the final resort of litigation or arbitration.

This concern was detected by many commentators such as raised by the FIDIC in its guidance to the old Red Book which stated the following: "in some countries it has been maintained that if there is no reference to amicable settlement in the

Contract, then the individual responsible for administrating the Contract may have no right to enter into negotiation for an amicable settlement".[346]

Furthermore, it has been noticed that the best moment to agree on the compulsory use of an amicable means of dispute resolution and application to its process, is at the time of drafting and forming the agreement itself in order to avoid such obstacles as well as to keep the parties confident that the approaching of any amicable settlement would not give an indication of a party's weakness, as such action was merely an exercising of contract provisions.[347] It is a good initiative of being a reason for either party who would prefer to move into a negotiation or amicable settlement with no fear of being criticized, especially in the case of representing public authorities. According to my experience, there were many cases where a public department was reluctant to enter into a negotiation or use an amicable settlement if there was no supported provision included in the related contract regarding the reason that may criticized by the state auditor for such disrespect towards their justification. Therefore, in such an event the public department would prefer to go directly to the final resort of the dispute resolution to keep itself away from being commented on. In essence, it does not matter for some of the public department leaders to proceed to litigation or arbitration instantly if they would protect themselves rather than to look for another valuable ways or means. There is no doubt that the leaders who have a mentality of thinking commercially would prefer to choose the most beneficial mechanism for their enterprise regardless of the amount of criticism that would occurred due to their decision. As a result, the best way that may encourage such enterprises to use an amicable settlement is to include a provision of amicable settlement in its contract from the outset of the relationship between parties.

- For instance, a few years ago major project markets were attacked by the dramatic increase of steel prices as well as the fluctuation of currency. This led to

[346] Guide to the Use of FIDIC Conditions of Contract for Works of Civil Engineering Construction.
[347] Nael Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing 2005) 440.

hurdle managing and handling massive projects in the gulf region for both parties. Contractors had struggled to manage a massive exceeding of the project budget, and owners in turn found it very difficult to deal with claims of compensation for such a crisis or they would face a suspension of very vital projects. KOC, for example, had tried to look for a best solution that may strike a balance between the contractors' loss and remaining projects carrying on its schedule without any delay which may affect its operations and ultimately lead to lose much more than what it would save. However, because such problems had not been contractually arranged, KOC as a state-owned company found it difficult to stand on any legal, contractual or commercial basis where the reasoning of any decision may be taken. Hence, KOC, according to the study that has been made to look for the best solution, decided to include its lump sum turnkey provision to set a certain procedure that may be taken by both parties in case of the future similar events which was drafted as following:"

- **Currency Fluctuations**

The Contract Price shall be adjusted at the times and in the manner prescribed in Appendix??? (Contract Price and Payment) by means of an Adjustment Order issued pursuant to Clause (-)of the General Conditions of Contract, to reflect currency fluctuations after the Date of Tender in the currencies stated in the Form of Tender (hereinafter called "Contract Currencies") used by the Contractor in the compilation of the Contract Price.

- **Commodity Price Fluctuations**

The Contract Price shall be adjusted at the times and in the manner prescribed in Appendix??? (Contract Price and Payment) by means of an Adjustment Order issued pursuant to Clause??? of the General Conditions of Contract, to reflect currency fluctuations in the cost of certain key materials forming part of the Facilities and described in Appendix??? (Contract Price Payment).

Consequently, we suggest the following clause to be adopted under the provision of dispute resolution in the major projects that would be entered into with an international contractor:

"In the event of the parties having a matter in dispute, they shall expeditiously meet to discuss and if possible resolve such issues as soon as practical (parties meet set a certain period if the preferred to stick with time). In the event that the dispute cannot be resolved at such meeting, it shall be documented in writing and escalated to the representatives of both parties who shall use their reasonable endeavours to resolve expeditiously the documented dispute, by meeting if necessary. If such dispute cannot be resolved by them within (28) days of being escalated, the matter in dispute shall be referred to the senior management of both parties for expeditious resolution. If the senior management of both parties cannot resolve such matter within (28) days the matter shall be finally settled either by arbitration in accordance with sub-clause () or by a third party expert in accordance with sub-clause (), whichever is applicable".

As set out in Clause (), any dispute (including disputes related to the existence, validity, enforceability, effectiveness, interpretation, breach and remedies in breach of this agreement) in respect of which clause () has been fulfilled without such dispute having been resolved shall be resolved by reference to arbitration under the LCIA Rules.

The language of the arbitration shall be English and there shall be three (3) arbitrators. Each party shall be entitled to appoint an arbitrator and the two arbitrators so appointed shall appoint a third arbitrator of their choice, who shall be the chairman. If the two arbitrators cannot settle on the mutual appointee of the third arbitrator within fourteen (14) days of referral of the dispute to arbitration, the chairman of the LCIA shall appoint the third arbitrator as soon as is practicable.

The award of arbitrators shall be final and binding.

The seat of arbitration shall be London.

Each party shall pay its own legal fees, unless otherwise ordered by the tribunal.

Dispute settled by third party expert

Either party may refer a technical dispute (matters that are to be specified for each contract individually according to its nature) which cannot be resolved in accordance with sub-clause () to a third party expert for determination in accordance with the clause.

Such referral shall be initiated by the party seeking to make such a reference notifying the other party of such intention.

The parties shall thereupon agree on the identity of the third party expert who shall determine the technical dispute. in the event that the parties cannot decide upon a mutually agreed third party expert within ten (10) days of notice being given under sub-clause () or if the agreed third party expert refuses to accept such a referral then upon the request of the parties the LCIA shall appoint such third party expert.

A party wishing to refer a technical dispute to a third party expert shall deliver to such third party expert all the related documents that help to conclude the issue.

The referring party shall send copies of such documents, so as delivered, to the other party at the time of referral to the third party expert.

Such third party expert will not be an arbitrator of the technical dispute and shall not be deemed to be acting in an arbitral capacity.

The third party expert, once appointed, shall have no ex parte communications with either of the parties concerning the expert determination or the underlying technical dispute.

The parties agree to cooperate fully in the expeditious conduct of such expert determination and to provide the third party expert with reasonable access to all

facilities, books, records, documents, information and personnel necessary to make a fully informed decision in an expeditious manner.

Before issuing his decision, the third party expert shall issue a draft report and allow parties to comment on it.

The third party expert shall endeavor to resolve the technical dispute within (28) days but not later than (56) days after his appointment, taking into account the circumstances requiring an expeditious resolution of the matter in dispute.

In the event that there is a dispute as to whether a dispute should be referred to arbitration or a third party expert, the manner shall be referred to arbitrators in accordance with sub-clause (), who shall determine the matter should be referred to a third party expert.

It goes without saying that an alternative dispute resolution does not ensure a panacea and may face some obstacles that hurdle its movement. However, it is an attempt to customize the way of resolving conflicts between contracting parties to the maximum extent.

The recommended procedure was designed to assist parties in not wasting their time and cost in every single technical matter but to refer it to their technical representative or an agreed trusted expert whom is specialized in the area of the disputed matter that in particular focuses on the technical and factual issues rather than contractual or law matters. Nevertheless, such a procedure does not prevent either party from pursuing a court or arbitration process if he is not sure about the nature of the issue or if he would prefer to do so in case of the importance of the matter.

Expert determination is not a new approach to resolve a technical matter. Under Kuwaiti law, expert determination is almost like arbitration but it is neither a real arbitration nor is the rules of arbitration instantly applicable. It is a sort of alternative dispute resolution which is not yet organized by Kuwaiti law. It is a contractual procedure that is subject to the parties' agreement, therefore, a

framework, scope and the details that will govern the expert procedure must be addressed and agreed by parties. It may be agreed by the parties to refer and apply institutional rules of procedure such as ICC or UNCITRAL or even leave for the appointed expert to form his own procedure.

The proposed clause requires that the expert decision must be made within about 3 months. However, it is not often that the time limit is met; therefore, an expert with parties' agreement may extend the time limitation for any further reasonable duration.

As a result, in order to adopt an expert determination approach to resolving disputes, parties should essentially agree on advance specific items. Parties should specify technical matters that may be referred to and resolved by an expert. A legal or contractual matter should not be referred to the expert as it may be beyond his jurisdiction or area of expertise. It should be clearly stated that a designated expert will act and conduct his rules as an expert, and not as an arbitrator. To distinguish an expert determination from any other forms of alternative dispute resolution such as mediation or conciliation, an expert decision must be final and binding.

With respect to the international projects, the enforceability of the expert determination may face some obstacles. An expert determination is not treated consistently in all countries that ratified the New York Convention. Therefore, the rules and process of enforcing an international arbitration award may not be applicable to the expert decision in some ratifying countries if these countries consider the expert determination another way of dispute resolution different from the arbitration. Such cases may require further proceedings to enforce the expert determination which prolongs the resolving of the issue. In essence, under Kuwaiti law, this issue has not been examined by the court, so, it is still possible to enforce the expert decision in the same manner that is applicable to the arbitration award, unless the expert determination process has been made in a country that clearly does not consider it similar to the arbitration.

Conclusion

Coming to the final destination of this thesis journey, it is now the time to brief up the story of this long term mission.

The thesis has described and examined the most common means of dispute resolution in the construction industry as it is internationally practiced and under the State of Kuwait as well.

In chapter one, the journey began with the definition of construction contract, and then it has been followed by describing the process of forming major construction projects agreement in chapter two.

Next, the common selected methods of dispute resolution have been analyzed individually in the following parts of the thesis, i.e. Chapter Three: Arbitration, Chapter Four: Adjudication, Chapter Five: Expert Determination and Chapter Six: Mediation.

The study has found that there are some new techniques of dispute resolution have been adopted in the UK and some other common law countries approved to some extent its successes. Such methods are not widely recognized in the area of construction in the State of Kuwait.

As a consequence, these techniques have been recommended to be taken in the construction industry in the State of Kuwait of Kuwaiti in the second part of Chapter Seven while in the first part of this chapter, we were describing and examining the practice of Kuwait Oil Company as a case study.

Finally, the purport of the search under this thesis hopefully shall help to reach balanced provisions that lead to a win-win transaction between parties to a contract with the aim of contributing to the country national economy. Narration on untraditional methods of dispute resolution which unfortunately do not enjoy good reputation in most of the third world countries and of course Kuwait is not an exception of this.

Demonstrating the advantages of these means of the alternative dispute resolution and the added value of the right management of the cases which brings about positive results to both parties, may refine the gloomy image of these increasingly important methods of dispute resolution.

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