

# THE LEGALITY AND EQUITY OF PRE-DISPUTE MANDATORY ARBITRATION CLAUSES IN THE CREDIT CARD CONTRACTS UNDER THE CURRENT KUWAITI ARBITRATION LAW: A COMPARATIVE ANALYTICAL STUDY

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**Abstract:** While the enforceability of arbitration clauses in consumer contracts, notably credit card contracts, has been well developed in some jurisdictions like the United States and the Czech Republic, the issue has not yet arisen in Kuwait, largely because the development of the credit card sector is relatively new, but, more importantly, because the arbitration system has generally been limited in practice to specific contexts that have not yet included consumer disputes in relation to credit cards. This article examines both the likelihood that Kuwaiti financial institutions will adopt pre-dispute mandatory arbitration clauses in credit card agreements in the near future, and the likelihood that those clauses, often significantly unfair to consumers, will be enforced under current Kuwaiti laws. It proposes amendments to relevant Kuwaiti legislation to mitigate the harshness of the enforcement of these clauses in the consumer credit card context and to provide greater balance between the interests of card issuers and cardholders.

**Keywords:** Alternative Dispute Resolution, Arbitration, Arbitration Clause, Mandatory Arbitration, Pre-dispute Clause, Consumer, Credit Card

## I. INTRODUCTION & BACKGROUND

A study conducted in 2019 by the Central Bank of Kuwait (Hereinafter: CBK)<sup>1</sup> shows that credit card usage in the State of Kuwait (Hereinafter: Kuwait)<sup>2</sup> witnessed a remarkable

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<sup>1</sup> The CBK was established by virtue of the Law No. 32 of 1968 concerning Currency and the Central Bank of Kuwait and the Organization of Banking Business. CBK replaced the Kuwaiti Currency Board, which, established by virtue of the Amiri Decree No. 41 of 1960. CBK commenced operation on April 1, 1969, in fulfillment of the following core objectives stated in Article 15 of its Law No. 32 of 1968: 1) Issue the national currency on behalf of the State; 2) Maintain the relative stability of the Kuwaiti Dinar, and secure its free convertibility into foreign currencies; 3) To direct the credit policy with the aim to contribute to the social and economic progress and enhance the national income; 4) To supervise the State's banking system; 5) To serve as a banker to the government; and 6) To serve as a financial adviser to the government. In: *Central Bank of Kuwait* [online]. [2020-10-02]. Available at: <<https://www.cbk.gov.kw/en>>.

<sup>2</sup> The State of Kuwait is the formal name of a country located in the northern edge of Eastern Arabia at the tip of the Arabian Gulf, it shares borders with Iraq and Saudi Arabia. As of 2014, Kuwait has a population of 4.6 million people; 1.4 million are Kuwaitis and 3.2 million are expatriates. Kuwait's legal system is based on Latin Civil Law, which is mainly derived from French Law. Kuwaiti laws are mostly secular. However, only in family law for Muslim residents, the Islamic Law "Sharia" is used. For more information about Kuwait. For more information about Kuwait see, e.g., IBP, Inc. *Kuwait Export-Import Trade and Business Directory Volume 1 Strategic Information and Contacts*. 6<sup>th</sup> revised edition. USA: International Business Publications, 2018, pp. 13–20. The Kuwait Public Authority for Civil Information (Hereinafter: PACI). In: *PACI* [online]. [2020-10-02]. Available at: <<https://www.paci.gov.kw/stat/Default.aspx>>.

growth during the last five years.<sup>3</sup> This growth has begun a transition in Kuwaiti society to one that uses plastic money<sup>4</sup> as an alternative to traditional money accepted as a payment system.<sup>5</sup>

Moreover, the CBK's quarterly bulletin indicates that the number of valid credit cards issued for use during the third quarter of 2014 in Kuwait amounted to about 2.8 Million; and cardholders used their credit cards both inside and outside Kuwait<sup>6</sup> for a value of more than 3 Billion Kuwaiti Dinars (Hereinafter: KWD).<sup>7</sup>

Furthermore, the general manager of Visa<sup>8</sup> in Kuwait, Mr. Amit Vij, said that the company achieved growth in the volume of spending with Visa cards by more than 25 % in 2014, as compared with 2013. He also emphasized that according to Visa's institutional clients (institutional clients refers to both issuer banks and financial institutions that certified to issue Visa credit cards) in the Middle East, Visa Kuwait has witnessed a significant shift toward electronic payments, and it is today in third place among other Middle Eastern and North African clients in terms of public spending on Visa credit cards.<sup>9</sup>

As a result of these enormous numbers of transactions in Kuwait using credit cards as a payment method, disputes between cardholders (consumers), merchants, and the issuer banks, or any combination of the three, are inevitable.

<sup>3</sup> For more information about the Numbers of Plastic Credit Cards, and their Transactions and Payment Devices Used Inside Kuwait, see an official statistic report conducted by the CBK available at its official website at. In: *Central Bank of Kuwait* [online]. [2020-10-02]. Available at: <<https://www.cbk.gov.kw/ar/statistics-and-publication/dynamic-statistical-releases/quarterly>>.

<sup>4</sup> Plastic money refers to credit cards, debit cards, or other alternatives that people use to make purchases without cash; see PATIL, S. Impact of Plastic Money on Banking Trend in India. *International Journal of Management Research & Business Strategy*. 2014, Vol. 3, No. 1, pp. 224–225.

<sup>5</sup> See, e.g., FATHI, A. 1.6 Billion Dinars, the Growth of Credit Card Transactions in 2014. In: *Aljarida* [online]. 22. 2. 2015 [2020-10-02]. Available at: <<https://www.aljarida.com/articles/1462456731908587900/>>; FATHI, A. 9.3% The Growth in Credit Card Transactions in Kuwait. In: *Aljarida* [online]. 1. 12. 2015 [2020-10-02]. Available at: <<https://www.aljarida.com/articles/1468263159536658100/>>; FATHI, A. 10.4 Billion Dinars Credit Card Transactions in 6 Months in Kuwait. In: *Aljarida* [online]. 18. 9. 2016 [2020-10-02]. Available at: <<https://www.aljarida.com/articles/1474134369798158700/>>; FATHI, A. 4.3% The Growth in Credit Card Transactions in Kuwait. In: *Aljarida* [online]. 22. 11. 2016 [2020-10-02]. Available at: <<https://www.aljarida.com/articles/1479748595568295000/>>; FATHI, A. 20.66 Billion Dinars the Value of Credit Cards Transactions at The End of 2016. In: *Aljarida* [online]. 26. 2. 2017 [2020-10-02]. Available at: <<https://www.aljarida.com/articles/1488032535451458500/>>.

VERDICT, S. Cash remains king in Kuwait, but card growth picking up. In: *Cards International* [online]. 21. 11. 2016 [2020-10-02]. Available at: <<https://www.cardsinternational.com/country-surveys/cash-remains-king-in-kuwait-but-card-growth-picking-up-5674705/>>.

<sup>6</sup> ALMEZAL, S. 2.8 Million Credit Cards in Kuwait and in Just Three Month the Credit Cardholders spent over 3 Million Dinars. In: *Annahar* [online]. 21. 2. 2015 [2020-10-02]. Available at: <<http://www.annaharkw.com/Annahar/Article.aspx?id=42479>>.

<sup>7</sup> The KWD is the official currency of Kuwait, 1 Kuwaiti Dinar equals 3.2651 United States Dollar (Hereinafter: USD) as in 1. 10. 2020. In: *The Money converter* [online]. [2020-10-02]. Available at: <<https://themoneyconverter.com/KWD/USD>>.

<sup>8</sup> Visa refers to Visa International Service Association. Visa is an American multinational financial services corporation headquartered in Foster City, California, United States, Visa has operations across India, Australia, Oceania, Asia-Pacific, North America, Central and South America, the Caribbean, Western Europe, Central and Eastern Europe, Africa and Middle East. Kuwait Visa operated through Visa Middle East. In: *Visa Middle East* [online]. [2020-10-02]. Available at: <[https://ae.visamiddleeast.com/ar\\_AE](https://ae.visamiddleeast.com/ar_AE)>.

<sup>9</sup> ALDEGHAIMI, M., Amit, V. More than 25% the size Growth in Spending using Visa Cards in Kuwait. In: *Alanba* [online]. 5. 2. 2015 [2020-10-02]. Available at: <<https://alanba.com.kw/534694>>.

Until now, these types of disputes in Kuwait have been resolved only through conventional litigation proceedings by filing a lawsuit in the courts,<sup>10</sup> which is the most traditional dispute resolution process in Kuwait.<sup>11</sup>

However, many other options are available to resolve these kinds of disputes. These options or methods are called Alternative Dispute Resolution (Hereinafter: ADR).<sup>12</sup> ADR refers to a variety of processes that help litigants to resolve their disputes outside the courtroom.<sup>13</sup> ADR includes negotiation, mediation, arbitration, and other forms,<sup>14</sup> such as early neutral evaluation, summary jury trial, and mini-trial.<sup>15</sup> Thus, ADR can be defined as encompassing all legally permitted processes of dispute resolution other than conventional litigation.

As of today,<sup>16</sup> Kuwait's legal system only recognizes arbitration<sup>17</sup> as an ADR method, and does not yet recognize any other forms of ADR. However, in the United States of America (Hereinafter: U.S.), the legal system recognizes all of these methods.<sup>18</sup>

Arbitration is a dispute resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.<sup>19</sup> The legal frameworks that govern arbitration in Kuwait are both the Kuwaiti Code of Civil and Commercial Procedure (Hereinafter: KCCCP)<sup>20</sup> and the Judicial Arbitration Act (Hereinafter: JAA).<sup>21</sup> According to article 173 of the KCCCP,<sup>22</sup> the arbitration agreement is the cornerstone of the entire arbitration process,<sup>23</sup> because the authority of the arbitration tribunals (arbitrators) rests on an agreement between the parties executed in accordance with the contract.<sup>24</sup> Hence, parties to the dispute may select the third party “the arbitrator-s”

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<sup>10</sup> The Kuwaiti Court of Appeal Decision. Issued by the Fifteenth Commercial Circuit. Appeal No. 3160 and 3201/2005. Date of Judgment: 28. 10. 2015. This case was about the unfair fees and interest in a credit card agreement; there was not an arbitration clause between the credit cardholder and the issuer bank in the lawsuit. Therefore, the court exercised its jurisdiction over the case.

<sup>11</sup> ATTIA, A. *The Kuwaiti Law of Civil and Commercial Procedure: The First Volume*. 3<sup>rd</sup> revised edition. Kuwait: The House of Books Foundation, 2015, pp. 465–466.

<sup>12</sup> ATTIA, A. *The Kuwaiti Arbitration Law: A Study of The National Arbitration Rules*. 2<sup>nd</sup> revised edition. Kuwait: The House of Books Foundation, 2012, pp. 22–32.

<sup>13</sup> WARE, J. S. *Alternative Dispute Resolution*. USA: West Group, 2001, pp. 1–14.

<sup>14</sup> Kuwait cannot incorporate these other forms of ADR into its legal system because it has a civil legal system and does not recognize the jury trial system in its Code of Civil and Commercial Procedure; for more information see generally: the Kuwaiti Code of Civil and Commercial Procedure. Law No. 38 of 1980 issued the Kuwaiti Code of Civil and Commercial Procedure. *The Official Gazette of Kuwait*. 25 June 1980 (Kuwait) (Hereinafter: KCCCP).

<sup>15</sup> ATLAS, F. N., HUBER, K. S., TRACHTE-HUBER, E. W. *Alternative Dispute Resolution: The Litigator's Handbook*. USA: American Bar Association. Section of Litigation, 2000, p. 2.

<sup>16</sup> This paper finished on July 18, 2020.

<sup>17</sup> See, e.g., Article 173-188 of the KCCCP; and Law No. 11 of 1995 Regarding in Judicial Arbitration Act with Respect to Civil and Commercial Matters (Hereinafter: JAA). *The Official Gazette of Kuwait*. February 19, 1995 (Kuwait).

<sup>18</sup> LEESON, S., JOHNSTON, M., BRYAN, M. *Ending It: Dispute Resolution In America: Descriptions, Examples, Cases, and Questions*. USA: Anderson Publishing Co., 1988, pp. 1–4.

<sup>19</sup> BLACK'S LAW DICTIONARY 125 (10<sup>th</sup> Edition 2014).

<sup>20</sup> Article 173-188 of the KCCCP.

<sup>21</sup> Law No. 11 of 1995, the Judicial Arbitration Act (Hereinafter: JAA) (Kuwait).

<sup>22</sup> The KCCCP governs private arbitration in Kuwait, which is the subject of this study.

<sup>23</sup> RAGIB, W. Is Arbitration a Type of Litigation? *Kuwait University Law Journal*. 1993, Vol. 17, No. 1, pp. 33–35.

<sup>24</sup> MELEJE, A. *The Rules of Arbitration in Kuwaiti Law*. Kuwait: The House of Books Foundation, 1996, pp. 47–52.

directly by mutual agreement (*an ad hoc arbitration*)<sup>25</sup> to decide their dispute, or indirectly by agreeing to have the arbitration institution govern the arbitration process.<sup>26</sup> Under the latter approach, the institution will select the arbitrators based on its own rules.<sup>27</sup> Moreover, if the parties, who agree to arbitrate fail to agree on an arbitrator selection, or a conflict arises about the nomination of arbitrators, the court should appoint an arbitrator, and its ruling here is unappealable.<sup>28</sup>

Furthermore, article 173 § (1) of the KCCCP states that the arbitration agreement is an agreement by which the parties consent to resolve one or more disputes by arbitration, and this agreement can consist of a clause in an original contract or a stand-alone agreement before a dispute, and can be entered into either before a dispute arises between the parties or after a dispute has arisen between the parties.<sup>29</sup> Also, article 173 § (2) and (3) of the KCCCP states that consent to arbitrate must be documented in writing,<sup>30</sup> and if it follows this form, Kuwaiti courts shall have no jurisdiction to hear disputes in which the parties have agreed to arbitrate.<sup>31</sup>

Thus, under Kuwaiti law, an arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties. For example, the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.<sup>32</sup>

During the last few decades, arbitration has become the most common dispute resolution method to resolve business disputes in both Kuwait<sup>33</sup> and the U.S. because of its advantages for business people's needs.<sup>34</sup> However, arbitration today expands to other categories of disputes, and, since the U.S. Supreme Court's 1984 landmark decision in *Southland Corp. v. Keating*,<sup>35</sup> arbitration has become a common feature in consumer transactions.<sup>36</sup>

<sup>25</sup> An ad hoc arbitration is one which is not administered by an institution. See, e.g. SCHWEBEL, S. M. *Ad Hoc Chambers of the International Court of Justice*. *American Journal of International Law*. 1987, Vol. 81, No. 4, p. 831.

<sup>26</sup> ALAAMERA, K. *Institutional Arbitration: A Comparative Study Between the International Institutional Arbitration and The National Institutional Arbitration*. Kuwait: Arab Renaissance House for Publishing and Distribution, 2013, pp. 66–67.

<sup>27</sup> *Ibid.*

<sup>28</sup> Article 175 of the KCCCP.

<sup>29</sup> Article 173 § (1) of the KCCCP.

<sup>30</sup> Article 173 § (2) of the KCCCP.

<sup>31</sup> Article 173 § (5) of the KCCCP.

<sup>32</sup> ALYAKOT, K., RIZQ, T. *The Rules and Principles of the Kuwaiti Arbitration According to the Kuwaiti Code of Civil and Commercial Procedure and its Amendments*. Kuwait: Arab Renaissance House for Publishing and Distribution, 2007, pp. 61–65.

<sup>33</sup> ALAAMERA, K. *Principles of the Kuwaiti Arbitration Act: A Comparative Study with the Egyptian Arbitration Act and the French Arbitration Act*. Kuwait: The House of Books Foundation, 2016, pp. 11–12.

<sup>34</sup> MOFFITT, M. L., SCHNEIDER, A. *Dispute Resolution: Examples & Explanations*. 3<sup>rd</sup> revised edition. USA: Wolters Kluwer, 2014, pp. 172–173.

<sup>35</sup> *Southland Corp. v. Keating*, 465 U.S. 1, (1984); the court emphasized in this decision that: "In enacting § 2 of the Federal Arbitration Act (Hereinafter: FAA), Congress declared a national policy favoring arbitration and withdrew the power to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration".

<sup>36</sup> See, e.g. HABUSH, H., ROTTIER, S. C. *The Privatization of Justice? Mandatory Arbitration and the State Courts: Report of the 2003 Forum for State Appellate Court Judges*. USA: Pound Civil Justice Institute, 2006, pp. 5–15; BLAND Jr., PAUL, F. QUIRK, M. J., GORDON, K., SHELDON, J. *Consumer Arbitration Agreements: Enforceability and Other Topics*. USA: National Consumer Law Center, 2004, p. 137.

In the U.S. in recent years, it has become increasingly difficult to apply for a credit card without agreeing to private arbitration<sup>37</sup> because there is a recent trend in the credit card industry to include in credit card agreements a mandatory arbitration clause to prevent the cardholders from relying on their fundamental right to choose conventional court litigation.<sup>38</sup>

In Kuwait, there are eleven Kuwaiti banks<sup>39</sup> and twelve foreign banks<sup>40</sup> that issue credit cards such as Visa and MasterCard; there is also an American Express branch in Kuwait<sup>41</sup> that issues its own credit cards. This causes important questions to arise in Kuwait, such as: Whether under the current Kuwaiti law, the issuer banks could insert pre-dispute mandatory arbitration clauses into credit card agreements with cardholders? What is the potential attitude toward such clauses by the Kuwaiti courts? Whether these clauses are fair or not? And how can Kuwait avoid these clauses in its credit card industry?

This paper attempts to answer these questions. In doing so, the paper will be in four sections. In the first section, the paper demonstrates the legal and judicial approaches regarding mandatory arbitration clauses in credit card contracts as a consumer transaction between the issuer banks and cardholders by using a comparative method in Kuwait, the U.S., and the Czech Republic. Second, the paper considers the possibility of inserting pre-dispute mandatory arbitration clauses in credit card agreements in Kuwait. Third, the paper identifies criticisms of both pre-dispute mandatory arbitration clauses and courts' decisions regarding consumers' protection in relation to these adhesion clauses. Finally, the paper demonstrates ways in which Kuwait can effectively and fairly protect consumers from these pre-dispute mandatory arbitration clauses in the credit card industry.

## II. COMPARATIVE LEGAL & JUDICIAL APPROACHES REGARDING MANDATORY ARBITRATION CLAUSES IN CREDIT CARD CONTRACTS AS A CONSUMER TRANSACTION

Are mandatory pre-dispute arbitration clauses in credit card contracts between issuer banks and cardholders valid and enforceable, or not?

Before answering this question, we should emphasize that Kuwait's courts have not directly faced this type of question, as of yet. However, Kuwait's courts have dealt with the

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<sup>37</sup> SILVER-GREENBERG, J., GEBELOFF R. Arbitration Everywhere, Stacking the Deck of Justice: Beware the Fine Print: Part I. *The New York Times*. 2015 [2020-10-02]. Available at: <[https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0)>.

<sup>38</sup> HARRINGTON, J. To Litigate or Arbitrate? No Matter- The Credit Card Industry Is Deciding for You. *Journal of Dispute Resolution*. 2001, Vol. 2001, No. 1, pp. 102–106.

<sup>39</sup> Kuwait Banking Association (Hereinafter: KBA) founded in 2001. In: *Kuwait Banking Association* [online]. [2020-10-02]. Available at: <<http://www.kba.com.kw>>.

<sup>40</sup> See foreign banks licensed to operate in Kuwait by the Central Bank of Kuwait at their official website. In: *Central Bank of Kuwait* [online]. [2020-10-02]. Available at: <<https://www.cbk.gov.kw/ar/supervision/financial-units/foreign-banks>>.

<sup>41</sup> In: *CNN Business* [online]. [2022-05-02]. Available at: <<http://money.cnn.com>>. The American Express is an American multinational financial services corporation headquartered in Manhattan's Three World Financial Center in New York City, United States. In: *American Express* [online]. [2020-10-02]. Available at: <<https://secure.americanexpress.com/bh/wps/portal/kuwait?location=globalsplash>>.

validity of arbitration agreements on many occasions. On the other hand, the U.S. courts have answered this question many times. This experience in the U.S. helps us to build assumptions about how to answer this question if it is presented in the future to the Kuwaiti courts.

Also, the paper compares the Czech legal system in this regard as a European model to be aware of the Czech legal approach regarding mandatory pre-dispute arbitration clauses in credit card contracts as a consumer transaction between the issuer banks and cardholders under the Czech Arbitration Act.

## A. Kuwaiti Courts' Approaches

In Kuwait, judiciary structures that are competent with regard to civil and commercial matters and have jurisdiction over these disputes are as follows: 1) Summary Courts (*Al-Mahakim Al-Juz'iyah*);<sup>42</sup> 2) The Court of First Instance (*Al-Mahkamah Al-Kulliyya*);<sup>43</sup> 3) The Court of Appeals (*Mahkamat Al-Isti'ana*);<sup>44</sup> and 4) The Court of Cassation (*Mahkamat Al-Tamyeez*).<sup>45</sup>

Hereinafter, this subheading analyzes decisions that were rendered by both the Court of Appeals (*Mahkamat Al-Isti'ana*) and the Court of Cassation (*Mahkamat Al-Tamyeez*) because of their values and authority in Kuwait's legal system.<sup>46</sup> In many cases regarding disputes arising between parties upon the validity and enforceability of arbitration agreements in Kuwait, courts (whether the Appellate or Cassation courts) have upheld written arbitration agreements under the theory of contract and the statutory language of KCCCP.<sup>47</sup>

For example, the Kuwaiti Court of Appeals held that while there is a written agreement between the parties to refer any dispute arising from their contract to arbitration as a dispute resolution process, the court shall not interfere or decide whether that agreement is fair or not.<sup>48</sup> Moreover, the same court held that an arbitration agreement is proper and valid in matters where a settlement could be reached between parties; and the court emphasized in its judgment that if the court wants to nullify the agreement, it must be based on the law, and mere insistence from the plaintiff that the contract in

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<sup>42</sup> *Al-Mahakim Al-Juz'iyah* deals with small value claims and rent disputes. See Article 29-30 of the KCCCP.

<sup>43</sup> *Al-Mahkamah Al-Kulliyya* is the first-degree court that exerts a comprehensive jurisdiction with regard to claims exceeding 5000 KWD in value. See Article 34-36 of the KCCCP.

<sup>44</sup> *Mahkamat Al-Isti'ana* is an Appellate Court in the Kuwaiti legal system. So, After the Court of First Instance has rendered its award, the unsatisfied party may seek an appellate review within 30 days from the date in which the Court of First Instance has rendered its award, unless the law provides to the contrary. See Article 137-147 of the KCCCP.

<sup>45</sup> *Mahkamat Al-Tamyeez* is the Court of Cassation (the Supreme Court) in Kuwait stands at the apex of the country's court system. See, Article 152-157 of the KCCCP.

<sup>46</sup> In theory, decisions rendered by the Court of Cassation are not binding for inferior courts in future cases, but are highly respected as precedents of the Supreme Court. Nevertheless, reality reveals that lower courts closely follow them when deciding on similar disputes and these decisions are therefore rarely contradicted.

<sup>47</sup> ALROMH, A. *The Arbitral Awards: According to The Kuwaiti Code of Civil and Commercial Procedure*. Kuwait: Arab Renaissance House for Publishing and Distribution, 2009, p. 132.

<sup>48</sup> The Kuwaiti Court of Appeal Decision. Issued by the Fourteenth Commercial Circuit. Appeal No. 511/2004. Date of Judgment: 13. 2. 2007.



dispute was lacking in equal bargaining power does not give the court the power to do anything because the agreement to arbitrate is valid in accordance with the requirements of the KCCCP.<sup>49</sup>

Moreover, the Kuwaiti Court of Cassation held that the court should enforce an arbitration agreement according to its written terms; and the court emphasized in its judgment that commercial arbitration agreements are like other contracts and agreements; they are enforced according to their terms.<sup>50</sup> Additionally, the same court held that § (2) of article 173 of the KCCCP requires that an arbitration agreement be in writing; the court emphasized in its judgment that this is not merely a requirement that there will be written evidence; Rather, it means that the agreement itself must be in writing.<sup>51</sup>

## B. U.S. Courts' Approaches

In the United States, pre-dispute mandatory arbitration clauses in consumer transactions generally are enforceable, even if they provide for binding arbitration awards.<sup>52</sup> The Federal Arbitration Act (Hereinafter: FAA) overturned the common law hostility toward arbitration by making pre-dispute arbitration agreements “valid, irrevocable, and enforceable,” without distinguishing between business contracts and consumer contracts.<sup>53</sup> Moreover, federal statutory claims brought by consumers are resolved in binding arbitration, to the exclusion of a court trial. For instance, a number of U.S. Supreme Court cases have rejected challenges to pre-dispute arbitration clauses in consumer contracts.<sup>54</sup>

Thus, unlike Kuwaiti courts, American courts have dealt directly with the validity and enforceability of pre-dispute mandatory arbitration clauses in consumer contracts on many occasions.<sup>55</sup> In most of these decisions, courts uphold that written pre-dispute arbitration agreements in consumer transactions are enforceable and irrevocable. The U.S. courts stated in these decisions that: “The principal purpose of the Federal Arbitration Act (FAA) is to ensure that private arbitration agreements are enforced according to their

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<sup>49</sup> The Kuwaiti Court of Appeal Decision. Issued by the First Commercial Circuit. Appeal No. 13/2008. Date of Judgment: 24. 1. 2007. (In this case the court emphasizes “the current law does not give the courts this power because in article 173 § (5) of the KCCCP it states that courts shall have no jurisdiction over hearing disputes when there is a previous written arbitration agreement”).

<sup>50</sup> The Kuwaiti Court of Appeal Decision. Issued by the Second Commercial Circuit. Appeal No. 151/1995. Date of Judgment: 18. 3. 1996.

<sup>51</sup> See The Kuwaiti Court of Cassation Decision. Appeal No. 449/2001. Date of Judgment: 2. 4. 2002. See also The Kuwaiti Court of Cassation Decision. Appeal No. 157/2001. Date of Judgment: 1. 4. 2002; The Kuwaiti Court of Cassation Decision. Appeal No. 668/2001. Date of Judgment: 11. 5. 2002; The Kuwaiti Court of Cassation Decision. Appeal No. 1196/2007. Date of Judgment: 5. 11. 2008.

<sup>52</sup> DRAHOZAL, C. R., FRIEL, R. J. Consumer Arbitration in the European Union and the United States. *North Carolina Journal of International Law and Commercial Regulation*. 2002, Vol. 28, No. 2, p. 374.

<sup>53</sup> 9 U.S.C. § 2 (2000).

<sup>54</sup> See, e.g. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (consumer credit dispute); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (pest control dispute); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (securities dispute); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (securities dispute); see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (employment dispute); & *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (employment dispute).

<sup>55</sup> See, e.g. *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

terms. This purpose is readily apparent from the FAA's text. 9 U.S.C.S. § 2 makes arbitration agreements valid, irrevocable, and enforceable as written".<sup>56</sup>

Likewise, the U.S. Supreme Court's decisions support upholding pre-dispute mandatory arbitration clauses in consumer transactions. For example, in an 8-1 decision on January 12, 2012 before the U.S. Supreme Court in *CompuCredit Corp. v. Greenwood*, the court upheld mandatory pre-dispute arbitration clauses in consumer credit card contracts covered by the Credit Repair Organizations Act (Hereinafter: CROA).<sup>57</sup> The Supreme Court rejected the consumers' claim which allege mandatory arbitration clauses violations of CROA, because the CROA was silent on whether claims under the CROA could be resolved by arbitration, and the Federal Arbitration Act required that the arbitration agreements the consumers signed be enforced according to their terms. The Court rejected the consumers' claim that because 15 U.S.C.S. § 1679(c) gave consumers the "right to sue" and 15 U.S.C.S. § 1679 (f) prohibited the waiver of any right consumers had under the CROA the arbitration agreements in question were not enforceable. Section 1679 (c) did not give consumers the right to bring an action in a court of law.<sup>58</sup> In sum, the U.S. Supreme Court held that the Federal Arbitration Act of 1925 (Hereinafter: FAA)<sup>59</sup> required arbitration agreements in credit card applications be enforced according to their terms.

Moreover, in *American Express Company v. Italian Colors Restaurant*, another U.S. Supreme Court case, merchants filed a class action antitrust suit against a charge-card issuer (American Express). In this case, the respondents (cardholders) claimed that a class-action waiver provision contained in a mandatory pre-dispute arbitration clause in a card acceptance agreement was unenforceable. However, The Supreme Court held that the appellate court overrode the overarching principles that were reflected in the text of the FAA and upheld arbitration agreements in the credit card industry on two grounds.<sup>60</sup> First, the text of the FAA<sup>61</sup> reflects the central principle that arbitration is a matter of contract, and consistent with that text, courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted.<sup>62</sup> Second, there were some judge try to make exceptions to the FAA's enforcement of arbitration agreements, and if the court upheld, such exceptions would allow courts to invalidate arbitration agreements that were not even intend in the FAA statutory language.<sup>63</sup>

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<sup>56</sup> *Ibid.*

<sup>57</sup> *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012).

<sup>58</sup> *Ibid.* at 673.

<sup>59</sup> 9 U.S.C. §§ 1-16 (2015).

<sup>60</sup> *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 133 S. Ct. 2304 (2013).

<sup>61</sup> 9 U.S.C.A. § 2 provides "A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".

<sup>62</sup> *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 133 S. Ct. 2304 (2013).

<sup>63</sup> *Ibid.*, see also: 9 U.S.C.A. § 2 (2015) statutory language, which is as follows: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".



### C. The Czech legal approach regarding pre-dispute mandatory arbitration clauses in consumer transactions

The Czech Republic has a very long and deep-rooted practice of arbitration as an ADR method. Going back as far as the years before 1989, the Permanent Court of Arbitration, connected to the Czechoslovak Chamber of Commerce and Industry in Prague, was the most important arbitral institution in Czechoslovakia. During that time, especially before the dissolution of the Soviet Union, the Permanent Court of Arbitration in Prague routinely was selected for resolving international commercial disputes between the East and the West.<sup>64</sup> But after the year 1989 and the dissolution of the unstable Czech and Slovak states, Czechoslovakia was dissolved in 1993, when two new independent states the Czech Republic and the Slovak Republic were founded.<sup>65</sup>

After the establishment of the Czech Republic, the enactment of the new Czech Act No.216/1994 on Arbitral Proceedings and Enforcement of Arbitral Awards (Hereinafter: the Czech Arbitration Act)<sup>66</sup> started a productive period for the conduct of arbitration in the Czech Republic.<sup>67</sup> In the Czech Republic, both international and domestic arbitration are governed by the Czech Arbitration Act if the arbitral tribunal is seated in the Czech Republic territory.<sup>68</sup>

The Czech Arbitration Act is not based on the UNCITRAL Model Law, some provisions are similar but there are many differences as well (among others, arbitrators cannot issue interim measures, the number of arbitrators must be odd, etc.).<sup>69</sup> The Czech Arbitration Act entered into force in 1995 according to section 50.<sup>70</sup> Under Section 30 of the Czech Arbitration Act,<sup>71</sup> the Czech Rules of Civil Procedure (Act No. 99/1963 Coll., as amended) are to be used as a subsidiary law.<sup>72</sup>

As a result of the EU legislations, Arbitration as an ADR tool in consumer disputes in the Czech grown over the last 10 years.<sup>73</sup>

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<sup>64</sup> BĚLOHLÁVEK, A. J. *Arbitration Law and Practice in the Czech Republic with Regard to the Arbitration Law in Slovakia*. Praha: Linde, 2009, p. 23.

<sup>65</sup> MAHONEY, W. M. *The History of the Czech Republic and Slovakia (The Greenwood Histories of the Modern Nations)*. Santa Barbara, California: Greenwood, 2011, pp. 6–7.

<sup>66</sup> ACT of the Czech Republic No. 216/1994 Sb. on Arbitration Proceedings and on Enforcement of Arbitration Awards. In: *is.muni.cz* [online]. [2022-04-29]. Available at: <[https://is.muni.cz/el/1422/jaro2008/SOC026/um/216-1994\\_EN.pdf](https://is.muni.cz/el/1422/jaro2008/SOC026/um/216-1994_EN.pdf)>.

<sup>67</sup> CHOVANCOVÁ, K. Consumer Arbitration and Subtle Variances in its Effectiveness in Selected EU Member States (Czech Republic, Slovakia, Austria, Germany). *Review of Central and East European Law*. 2018, Vol. 43, No. 2, p. 203.

<sup>68</sup> HRODEK, M., ZÁVODNÁ, M. *The Baker McKenzie International Arbitration Yearbook 2016 - 2017 10<sup>th</sup> Anniversary Edition*. New York: Juris Publishing LLC, March 2017, p. 141.

<sup>69</sup> KUDRNA, J. *Arbitration Guide IBA Arbitration Committee Czech Republic*. London: International Bar Association, 2018, p. 4.

<sup>70</sup> Section 30 of the Czech Arbitration Act states that: “This Act shall become effective on January 1, 1995”.

<sup>71</sup> Section 30 of the Czech Arbitration Act states that: “Unless the law stipulates otherwise, the provisions of Civil Procedure Code shall apply to the arbitration proceedings adequately”.

<sup>72</sup> ACT of the Czech Republic No. 99/1963 Sb. Civil Procedure Code. In: *is.muni.cz* [online]. [2022-04-29]. Available at: <[https://is.muni.cz/el/1422/jaro2008/SOC026/um/99-1963\\_EN.pdf](https://is.muni.cz/el/1422/jaro2008/SOC026/um/99-1963_EN.pdf)>.

<sup>73</sup> See Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

Nevertheless, it is very clear from Czech court jurisprudence over the past 20 years<sup>74</sup> that pre-dispute mandatory arbitration clauses in consumer transactions have not been without trouble,<sup>75</sup> and, since the Constitutional Court of the Czech Republic landmark decision in 2008 that held that pre-dispute mandatory arbitration clauses *per se* do not violate the Constitution of the Czech Republic in terms of banning the consumer party of his or her legal right of standing in front a judge or the right of access to the judiciary.<sup>76</sup>

And since the Constitutional Court of the Czech Republic landmark decision, the issue of the legality and equity of pre-dispute mandatory arbitration clauses in consumers' transaction become under the public's criticism. The public in Czech often considered mandatory arbitration as the only consumers dispute resolution tool with companies to be unfair because of these reasons: 1) pre-dispute mandatory arbitration clauses were drafted in favor of companies and, 2) the unofficial arbitration centers were viewed as companies' private courts and they were not considered independent and impartial.<sup>77</sup> Also, according to statistics from the Czech Ministry of Justice, the mandatory arbitration practice has become a common feature in consumer transactions, and most of the 150,000 disputes each year are decided in *ad hoc* arbitrations concerned consumer agreements.<sup>78</sup>

Under the Czech Arbitration, consumer disputes were not excluded from the jurisdiction of arbitral tribunals on the basis of the lack of arbitrability. The validity of pre-dispute mandatory arbitration clauses in consumer contracts in Czech used to be examined mainly on the basis of substantive consumer law,<sup>79</sup> in particular the protection of consumers against unfair contractual terms.<sup>80</sup>

Therefore, the need to amend the Czech Arbitration Act to protect consumers from these pre-dispute mandatory arbitration clauses in consumer transactions becomes necessary. And in order to do so, the Czech Arbitration Act has been amended two times.

In the following, the section will articulate the main two amendments to the Czech Arbitration Act regarding Arbitration clauses in consumers' contracts.

The first amendment to the Czech Arbitration Act happened in 2012 by Act No. 313/2012 Sb. (Hereinafter: the 2012 Amendment). The 2012 Amendment had a significant impact on the arbitration arising from consumer contracts.<sup>81</sup> Under the 2012 Amendment, the conditions for the conclusion of the arbitration agreement, the conditions for arbitral

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<sup>74</sup> CHOVANCOVÁ, K. *Consumer Arbitration and Subtle Variances in its Effectiveness in Selected EU Member States (Czech Republic, Slovakia, Austria, Germany)*. pp. 204–209.

<sup>75</sup> MICKLITZ, H.-W., SAUMIER, G. *Enforcement and Effectiveness of Consumer Law*. Cham: Springer, 2018, p. 243.

<sup>76</sup> PAUKNEROVÁ, M., SKALSKÁ, H. *Enforcement and Effectiveness of Consumer Law in the Czech Republic. The Lawyer Quarterly*. 2017, Vol. 7, No. 4, p. 247.

<sup>77</sup> *Ibid.*, p. 247.

<sup>78</sup> CHOVANCOVÁ, K. *Consumer Arbitration and Subtle Variances in its Effectiveness in Selected EU Member States (Czech Republic, Slovakia, Austria, Germany)*. pp. 204–205.

<sup>79</sup> See Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, and of the Council and earlier Council Directive 93/13/EEC (Directive on Unfair Terms in Consumer Contracts).

<sup>80</sup> PAUKNEROVÁ, M., SKALSKÁ, H. *Enforcement and Effectiveness of Consumer Law in the Czech Republic*. pp. 247–248.

<sup>81</sup> HRODEK, M., ZÁVODNÁ, M. *The Baker McKenzie International Arbitration Yearbook 2016–2017 10<sup>th</sup> Anniversary Edition*. p. 141.

awards, and the conditions for arbitrators were set stricter in consumers' disputes.<sup>82</sup> Moreover, the 2012 Amendment also introduced an exception regarding the review of arbitral awards, when under s. 31 (g) of the Arbitration Act a court shall set aside an arbitral award if arbitrators or a permanent arbitration court decided a dispute arising from a consumer contract in conflict with the consumer laws or manifestly contrary to good morals or public order. However, under the 2012 Amendment, a complete review of arbitral awards relating to the merits of consumer disputes was not accepted.<sup>83</sup>

The second amendment to the Czech Arbitration Act regarding arbitration in consumer contracts happened in 2016, and entered into force on 1 December 2016 (Hereinafter: the 2016 Amendment).<sup>84</sup> Despite the 2012 Amendment, under the 2016 Amendment of the Czech Arbitration Act, all consumer disputes are entirely excluded from arbitration by the 2016 amendment with effectiveness from December 1, 2016. Thus, pre-dispute mandatory arbitration clauses concluded with consumers in Czech are nowadays invalid due to the lack of arbitrability.<sup>85</sup>

### III. POSSIBILITY OF INSERTING MANDATORY ARBITRATION CLAUSES IN THE CREDIT CARD INDUSTRY IN KUWAIT

To my knowledge, no issuer banks in Kuwait inserted pre-dispute mandatory arbitration clauses in credit card agreements with their consumers (cardholders) as of yet.<sup>86</sup> However, according to the KCCCP's statutory language, judicial approaches, and jurisprudence on both the validity and enforceability of arbitration agreements these clauses are valid and enforceable according to their written terms. Moreover, in the case of the existence of a clear and written contract containing an arbitration clause, courts cannot interfere in the parties' agreement to arbitrate their dispute under one party's claim that the he or she did not freely agree to arbitrate the dispute.

Therefore, issuer banks could insert pre-dispute mandatory arbitration clauses into their written contracts with cardholders in Kuwait to avoid litigation in public courts.

*But how could that happen in reality?*

The banking business is an international professional practice. Therefore, wherever there is a new trend from leading financial institutions such as the U.S. big banks, the

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<sup>82</sup> In particular, the amendment provided that disputes arising from consumer contracts can only be decided by specialized arbitrators who are qualified lawyers and are registered in a list maintained by the Ministry of Justice; entering into a consumer contract cannot be made conditional on entering into an arbitration agreement; the consumer should be advised of the consequences before entering into an arbitration agreement; rules on consumer protection cannot be waived in an arbitration. New grounds were also introduced in the Arbitration Act for setting aside a domestic award due to non-compliance with the abovementioned regulations. See, PAUKNEROVÁ, M., SKALSKÁ, H. *Enforcement and Effectiveness of Consumer Law in the Czech Republic*. p. 248.

<sup>83</sup> *Ibid.*, p. 248.

<sup>84</sup> HRODEK, M., ZÁVODNÁ, M. *The Baker McKenzie International Arbitration Yearbook 2016–2017 10<sup>th</sup> Anniversary Edition*. p. 142.

<sup>85</sup> PAUKNEROVÁ, M., SKALSKÁ, H. *Enforcement and Effectiveness of Consumer Law in the Czech Republic*. p. 248.

<sup>86</sup> Case No. 3160 & 3201/2005/ Court of Appeals, The Fifteenth Commercial Circuit, Kuwait, Oct. 28, 2015.

trend will spread among other financial institutions on both the domestic and international level.<sup>87</sup>

Consequently, I believe that many issuer banks in Kuwait will move toward inserting mandatory arbitration clauses into their written contracts with cardholders to prevent them from exercising their fundamental right to litigate in public courts.

For example, in actual practice the issue will be as follows: the consumer applies to any issuer bank inside the branch to get a credit card such as a Visa, MasterCard, or American Express, and the banker will tell the consumer (*please read the contract and sign it*); or if the consumer applies online, the website will order him or her to press (*I agree to all terms and conditions after having read them*).<sup>88</sup> Thus, Kuwaiti issuer banks can insert a mandatory arbitration clause in their credit card agreements with their cardholders in small print, hidden among the 50 pages contracts, and it will be valid and enforceable. In doing so, this kind of clause shall contain the following language:

**“Any claims, disputes, or controversy claims arising out of or relating in any way to this Credit Card agreement, shall be finally and exclusively resolved by a binding individual arbitration conducted by this arbitration institution.<sup>89</sup> This arbitration agreement is made pursuant to a commercial transaction, and shall be governed by the KCCCP, which governs the domestic arbitration procedures”.**

In reality, consumers usually do not read these kinds of 50 pages contracts, because either they would not understand the legal language or they do not care to spend a lot of time trying to read the online terms and conditions. Moreover, even if consumers read these mandatory arbitration clauses and understand the language, they still do not have the ability to change the terms or negotiate with issuer banks, because these kinds of contracts simply tell consumers to (take it or leave it). Thus, if consumers want to hold a credit card for their daily needs, and all credit card agreements contain these pre-dispute mandatory arbitration clauses, consumers will give up their fundamental right to seek relief from the public courts through litigation.

#### IV. CRITICISM OF PRE-DISPUTE MANDATORY ARBITRATION CLAUSES IN CONSUMER CONTRACTS

Corporations such as issuer banks believe that courts should continue the trend of upholding these mandatory pre-dispute arbitration agreements as binding and enforceable.

<sup>87</sup> HOFFMAN, L., DEMOS, T. How U.S. Banks Took Over the World. In: *The Wall Street Journal* [online]. 4. 9. 2019 [2020-10-02]. Available at: <<https://www.wsj.com/articles/how-u-s-banks-took-over-the-world-11567589403>>.

<sup>88</sup> LAZARUS, D. Credit card issuers shouldn't bully customers into arbitration clauses. In: *Los Angeles Times* [online]. [2020-10-02]. Available at: <<http://www.latimes.com/business/la-fi-lazarus-20150324-column.html>>.

<sup>89</sup> In a discussion sponsored by professors Wilbur C. Leatherberry & Spencer Neth at the Public Affairs Discussion Group, Center For policy studies, The Use and Abuse of Arbitration Clauses in Contracts, Friday January 22, 2016, 12:30-1:30 p.m., Dampeer Room, Kelvin Smith Library, Case Western Reserve University. A lot of speakers said that in practice, there is a believe among consumers that those arbitration institutions which had been handled the bank's cases regarding to its Credit Cards agreements with consumers will not held an award against banks if they want to be continuous in their business with corporations. See also SILVER-GREENBERG, J., CORKERY, M. In Arbitration, a 'Privatization of the Justice System': Beware the Fine Print: Part II. *The New York Times*. 2015 [2020-10-02]. Available at: <[http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?\\_r=0](http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0)>.

They would rely on the nature of both the KCCCP article 173 and the FAA § 2 statutory language, which obviously makes challenging these mandatory written clauses unlikely to succeed and extremely difficult in practice.

Moreover, banks would insist on arguments relating to the enormous number of credit cards being issued every day, and that issuer banks need arbitration as a fair and quick ADR process to control the risks in disputes that may arise with cardholders. It is thus fair to give the issuer banks the right to insert pre-dispute mandatory arbitration clauses in their contracts with credit cardholders,<sup>90</sup> because arbitration is more flexible,<sup>91</sup> less time-consuming, more efficient, has fewer procedural steps, fewer costs, and less discovery processes<sup>92</sup> than conventional court litigation.<sup>93</sup>

Notwithstanding the foregoing reasons supporting pre-dispute mandatory arbitration clauses in credit card agreements, there is still no solution in relation to the main point, which is how to protect the credit cardholders from these mandatory arbitration clauses in their contracts, which prevent them from going to court and litigating their dispute with the issuer banks. Because of this, I believe that both courts' decisions<sup>94</sup> and the KCCCP statutory language, which upholds pre-dispute mandatory arbitration clauses in consumer contracts when they are in writing, deserve to be looked at again, with a critical eye.

First and most important, the original intent behind Section XII of the KCCCP<sup>95</sup> as well as the FAA<sup>96</sup> was to put an end to the judicial hostility toward arbitration agreements between businesspeople. The intent was to make arbitration agreements binding and enforceable without any intervention from courts when these agreements are in written documents,<sup>97</sup> and was not meant to facilitate the arbitration of disputes between corporations and consumers.<sup>98</sup>

Second, when courts stand in favor of these pre-dispute mandatory arbitration clauses in credit card contracts at the expense of the consumer, the result will be a small travesty in the judicial branch, which leads poor consumers to be dragged down by gluttonous and greedy corporations in the absence of any protection by the judiciary.<sup>99</sup>

Third, under these pre-dispute mandatory arbitration clauses, cardholders are forced to get into an arbitration process to resolve their conflicts, which is essentially based on

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<sup>90</sup> BENNETT, S. C. *Arbitration: Essential Concepts*. USA: ALM Publishing, 2002, pp. 161–162.

<sup>91</sup> WARE, J. *Alternative Dispute Resolution*. p. 20.

<sup>92</sup> *Ibid.*, p. 21.

<sup>93</sup> ROTH, B. J., WULFE, R. W., COOPER, C. A. *The Alternative Dispute Resolution: Practice Guide*. USA: Thomson West Business, 2014, pp. 6–12.

<sup>94</sup> Kuwait's courts did not face these kinds of questions. However, according to the KCCCP statutory language, Kuwait courts' decisions will be like the U.S. courts' approaches in this matter; and see supra III. JUDICIAL APPROACHES REGARDING TO MANDATORY ARBITRATION CLAUSES IN CREDIT CARDS CONTRACT, at pp. 7–8.

<sup>95</sup> ATTIA, A. *The Kuwaiti Arbitration Law: A Study of The National Arbitration Rules*. p.11.

<sup>96</sup> SZALAI, I. S. Correcting a Flaw in the Arbitration Fairness Act. *Journal of Dispute Resolution*. 2013, Vol. 2013, No. 2, pp. 272–273.

<sup>97</sup> ATTIA, A. *The Kuwaiti Arbitration Law: A Study of The National Arbitration Rules*. p. 12.

<sup>98</sup> SZALAI, I. S. *Correcting a Flaw in the Arbitration Fairness Act*. p. 274.

<sup>99</sup> KOENIG, C. If It Only Had a Heart: Supreme Court Eschews Compassion for Cash-Strapped Consumers in Upholding the Validity of Arbitration Clauses in Credit Repair Contracts. *Journal of Dispute Resolution*. 2012, Vol. 2012, No. 2, p. 643.

an offer and acceptance between the consumer and the card issuer;<sup>100</sup> however, in real life the consumer cannot avoid these mandatory arbitration agreements altogether.<sup>101</sup>

Fourth, typically, the issuer banks in those credit card contracts would hire the arbitration institution most favorable to their own interests to oversee the arbitration process, and bind the consumers to the banks' choice of institution.<sup>102</sup>

Fifth, one of the most significant complaints regarding arbitration of consumer disputes is that arbitral proceedings lack many of the crucial due process protections of the official justice system.<sup>103</sup> Generally, arbitration proceedings are confidential and there is no appeals process.<sup>104</sup>

Last, but not least, credit card agreements are merely adhesion and unconscionable contracts, which mean that these contracts are simply prepared to effectively give consumers no choice; and say in their terms to consumers you can "take it or leave it" Additionally, issues of unequal bargaining power exist, because if consumers do not agree to the bank's terms in the contract, they cannot acquire the credit card services they require. Consumers do not have any opportunity for negotiation regarding any terms in the credit card agreements, including mandatory arbitration clauses or others.<sup>105</sup>

Therefore, I believe that these kinds of mandatory pre-dispute arbitration clauses in credit card agreements between the issuer banks and credit cardholders (consumers) are unfair clauses.

## V. HOW KUWAIT CAN PROTECT CONSUMERS FROM THESE MANDATORY PRE-DISPUTE ARBITRATION CLAUSES IN CREDIT CARD AGREEMENTS

In 2002, seven million customers in just the state of California were subject to these unfair mandatory arbitration clauses in their contracts. Imagine that a single corporation stripped millions of consumers of their various fundamental rights and forced them to pay costly arbitration fees; and the unfortunate result was that U.S. courts did not protect consumers from this company from which they sought relief.<sup>106</sup>

Nevertheless, arbitration is not a bad method through which to resolve disputes. It is a tool to overcome the disadvantages of litigation proceedings. However, arguing that the

<sup>100</sup> HARDEKOPE, B. CFPB May Reform Mandatory Arbitration Clauses in Credit Card Agreements. In: *LowCards.com*. 2015 [2020-10-02]. Available at: <<http://www.lowcards.com/cfpb-reform-mandatory-arbitration-clauses-credit-card-agreements-31323>>.

<sup>101</sup> GRANT, K. B. Got a credit card? What right you're signing away. In: *CNBC U.S.* [online]. 2015 [2020-10-02]. Available at: <<http://www.cnbc.com/id/102492740>>.

<sup>102</sup> PUBLICCITIZEN PRESS, The Arbitration Trap: How Credit Card Companies Ensnare Consumers. In: *Public Citizen* [online] 10. 11. 2016 [2020-10-02]. Available at: <<https://www.citizen.org/article/the-arbitration-trap-how-credit-card-companies-ensnare-consumers-2/>>.

<sup>103</sup> BLAND Jr., F. P. Resisting Corporate Efforts to Impose Mandatory Arbitration on Consumers. *Journal of Texas Consumer Law*. 1999, Vol. 50, No. 2, p. 95.

<sup>104</sup> Article 182-186 of the KCCCP.

<sup>105</sup> MERZER, M. More credit card issuers ditch mandatory binding arbitration: Legal pressure ramps up on oft-criticized way to resolve disputes. In: *CreditCards.com* [online]. 2009 [2020-10-02]. Available at: <<http://www.creditcards.com/credit-card-news/credit-card-binding-arbitration-going-away-1282.php>>.

<sup>106</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).



litigation process is time-consuming does not justify these mandatory clauses, because speedy justice is up to the judicial branch, not the consumers. Therefore, I believe that Kuwait should consider the current language of the KCCCP to preclude credit cards issuers from inserting these unfair clauses in credit cards agreements, because issuer banks certainly will take steps to prevent consumers from exercising their fundamental right to seek relief from the Kuwaiti public courts.

In order to protect consumers effectively, section XII of the KCCCP should be amended. However, any future amendments should consider create a middle ground between business needs and the need to protect consumers. Therefore, I propose that in any dispute between a consumer and a corporation where the amount in controversy exceeds the sum or vale (the contract here) of 5,000 KWD, the following proposed amendments should be apply.

First, the statute should state that any pre-dispute arbitration agreements shall not be valid or enforceable if they require arbitration of consumer disputes.<sup>107</sup> Second, the statute should declare that courts shall have the power to determine the validity and enforceability of arbitration agreements if they are involved with consumer transactions and the arbitration agreement seems to be the result of unequal bargaining power between the parties.<sup>108</sup> Third, by corporates and business entities and business people shall the ability to refer their consumer disputes to arbitration only, if the arbitration agreement was in a separate document, and only if the consumer's consent to the arbitration was voluntary.

## VI. CONCLUSION

In sum, as a result of the remarkable growth of the credit card industry in Kuwait over the last five years, it is likely that Kuwait will soon face questions similar to those that have arisen in the United States involving disputes between consumers and issuers about the validity of pre-dispute mandatory arbitration clauses. In particular, issues will arise as to the fairness to consumers of these mandatory arbitration clauses. Therefore, the legislature should pre-empt this situation by amending section XII of the KCCCP to provide more protection to credit card holders from these potential mandatory arbitration clauses in their contracts with the issuer banks. Merely arguing that the conventional litigation process is time-consuming does not justify these mandatory clauses, because speedy justice is up to the judicial branch, not the consumers, and many mandatory arbitration clauses will operate to the detriment of consumer interests.

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<sup>107</sup> S. 878, 113<sup>th</sup> Cong 1<sup>st</sup> Session: Arbitration Fairness Act of 2013 (2013).

<sup>108</sup> There were members of U.S. Congress introduced bills to amend Federal Arbitration Act of 1925 and this bill was called Arbitration Fairness Act of 2013 [Hereinafter: AFA]. It introduced in Senate in 5. 7. 2013, but unfortunately it died in a previous Congress. To see more about this bill, visit the Congress official site. In: *govtrack.us* [online]. 7. 5. 2013 [2020-10-02]. Available at: <<https://www.govtrack.us/congress/bills/113/s878>>.