

Amendments to the Commercial Companies Law: Positive Steps Towards Bahrain's 2030 Economic Vision

by Aysha Sanad - a.sanad@tamimi.com -

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Over the past forty years, the Kingdom of Bahrain ("Bahrain") has been able to establish a reputable business infrastructure suited to the needs of both local and foreign investments.

In line with the legal and regulatory reforms introduced to the corporate environment in Bahrain by the issuance of Legislative Decree No. 21 promulgating the Commercial Companies Law ("Commercial Companies Law") and through its 2030 Economic Vision, Bahrain has actively sought to promote itself as a business friendly environment, specifically targeting direct foreign investment. The recently issued Legislative Decree No. 50 of 2014 amending the Commercial Companies Law ("New Law") introduced further reform to Bahrain's corporate environment. Whilst the New Law has introduced many changes, this article explores some of the more significant changes which appear to be guided by the principles of the 2030 Economic Vision: competitiveness, sustainability and fairness.

Swifter Procedures

Article 3 of the New Law provides that all reference to "sixty days" in the Commercial Companies Law shall now be replaced by "fifteen days". As such, all procedures can now be completed within a quarter of the time previously required under the Commercial Companies Law. This change reflects a clear recognition that swifter procedures are required by the fast paced corporate world.

Minimum Capital Requirements

The New Law adds a new Article 21 (bis) to the Commercial Companies Law which allows the Minister of Industry and Commerce ("Minister") to issue resolutions dictating the minimum capital requirements for some forms of companies, and for companies working in specific sectors or undertaking specific economic activities. Although the New Law does not remove the existing right of the company's founders to determine the company's capital, changes were made to Articles 109, 228, 249(e), 264 and 293 so that said rights are now made subject to the provision of Article 21 (bis) introduced by the New Law. Practically, this change reinforces the requirement of strict correlation between a company's activity and its capital. The amendment is intended to strike an even balance between shareholders and other stakeholders in the market, by allowing the Minister to make determinations in relation to minimum capital in certain circumstances.

Encouragement of Foreign Direct Investment and Presence

Removal of Nationality and Foreign Capital Trading Restrictions for Joint Stock Companies

The New Law introduces changes that are favourable to foreign investors. For example, Article 64 of the Commercial Companies Law, which required that all shareholders in a public joint stock company shall be of Bahraini nationality, no longer exists.

Article 65 of the Commercial Companies Law now generally allows the incorporation of public joint

stock companies with the participation of foreign capital and expertise, whilst giving the Minister the power to impose foreign ownership restrictions within certain economic sectors or when undertaking certain commercial activities.

In addition, Article 65 of the Commercial Companies Law previously restricted trading in stocks and shares representing foreign capital in a public joint-stock company until a three-year period from incorporation had lapsed. The New Law amends Article 65 by removing this restriction. In line with the efforts to encourage direct foreign investment in Bahrain, the removal of this restriction reinforces Bahrain's position as an open and competitive economy.

Presence of Foreign Branches

The New Law amends Article 347 of the Commercial Companies Law so that branches of foreign entities no longer require a Bahraini sponsor to set up in Bahrain. Further, previously Article 348 of the Commercial Companies Law stipulated that the requirement of a guarantee for branches of foreign companies may be provided either in the form of sponsorship from the head office, or the Bahraini sponsor or in form of a bank guarantee. The New Law has now relaxed this requirement by allowing foreign branches to provide a guarantee by way of a letter from the foreign company's head office, and removing reference to the guarantees provided by banks or the Bahraini sponsor. As an attempt to strike the correct balance, the New Law has amended Article 348 so that it now requires the foreign branch to provide a copy of the foreign parent company's constitutional documents and audited financial statements. In addition, the Minister retains the discretion to require additional guarantees on a case-by-case basis.

Changes to Bahrain Joint Stock Company Requirements

Minimum Number of Founders

With the exception of companies exclusively incorporated by the government, the New Law amends Article 75(d) so that the minimum number of founders for a joint-stock company in Bahrain has been reduced to two instead of the previous requirement of a minimum of seven founders. This allows for easier incorporation of joint stock companies

Minimum Subscription to Capital By Founders

Article 84 of the Commercial Companies Law as amended by the New Law removes the 40% maximum limit on founders' subscription to the capital of a public joint stock company in Bahrain. As such, founders of a public joint stock company in Bahrain are now able to tap into this form of equity financing without the need to settle for a 40% stake in the company. Further, founders' subscriptions are now subject to the provisions of the Central Bank of Bahrain ("CBB") and Financial Institutions Law promulgated by Law No. 64 of 2006 ("CBB Law") and its executive regulations.

Board Members' Eligibility Requirements

The New Law amends Article 173(1)(c) of the Commercial Companies Law by removing the previous requirement that directors need to either personally own shares amounting to BD10,000 or represent the owner of shares amounting to 1% of the company's capital, whichever is greater. In addition to the requirements under Articles 173(1)(a-b) of the Commercial Companies Law, Article 173(1)(c) currently includes a generic requirement that a board member should fulfil any other conditions stipulated in the company's constitutional documents. This change is significant in that it empowers shareholders to appoint board members to manage their company based on criteria that they deem to be relevant to the appointment.

Leniency in Relation to Administrative Rules

i. Proxies at the General Assembly Meeting

The New Law has relaxed a previous administrative burden imposed by Article 203 of the Commercial Companies Law. In the context of general assembly meetings, Article 203 provided that where proxies are used in General Assembly meetings, a single representative may not represent a number of votes exceeding 5% of the company's issued share capital. The New Law has removed this restriction and added flexibility in this regard.

Empowerment of Shareholders

i. Standing To Bring A Claim Against Directors

Article 187(a) of the Commercial Companies Law has been amended by the New Law to introduce the right of a shareholder to file a claim against the board of directors for damages he may have incurred. A shareholder is entitled to initiate such a case where the company has failed to sue a director. This change has the effect of both empowering shareholders, who are the ultimate investors and owners of the company's capital. Moreover, this change also ensures minority shareholders have recourse to justice in situations where their rights may be prejudiced by their inability to pass resolutions through the General Assembly.

ii. Dissolution of the Board Management

In cases where the Minister passes a resolution mandating the dissolution of a company's board of directors, Article 197 provided that the company shall be managed by an interim committee for a period of six months, which may be renewable for a similar period if the General Assembly did not vote for a new board by the end of the first six months.

The New Law has amended Article 197 so that the interim committee shall only be appointed for three months. Further, the Minister is required to set the date on which the General Assembly will be held and voting on the new board appointments will take place. This eliminates any possibility for extending the three months of interim committee's management and ensures that management will be restored to a board of directors elected by the shareholders. This change clearly highlights the preferred approach of minimum state intervention taken by the government in Bahrain towards corporate bodies and private capital.

Virtual Meetings

With the exception of the meetings of the General Assembly of public joint-stock companies, and the voting process which may take place, the New Law introduces a new Article 23 (bis) whereby the constitutional documents of the company may provide for the possibility of holding all company meetings via any means of telephone or electronic communication provided that:

- the identity of the participant in such meeting and the validity of any power of attorney under which any proxy participates is verified;
- the shareholder is able to fully participate in the meeting as if he/she is present at the meeting. This requires that the shareholder is fully aware of the discussions of the meeting and is able to express opinions and participate in the discussions; and
- any statement or vote properly made by participants should be recorded.

Relieving companies from the requirement of shareholders being physically present in meetings ensures that corporate affairs are not held up in circumstance where shareholders cannot physically be in the same location. Such requirement is becoming increasingly obsolete especially in light of the continuous development of advanced information and communications technologies available globally. Again, this reflects Bahrain's sensitivity to corporate needs and both a desire and ability to adapt to global advancements.

Strengthening Corporate Governance

Corporate Management and Governance Charter

While the Commercial Companies Law already had various corporate governance requirements applicable to most corporate structures, previously only public joint-stock companies were subject to Bahrain's Corporate Governance Code. The New Law introduces Article 358 (bis 1) which provides that the charter relating to Corporate Management and the Governance Charter shall apply to all commercial companies subject to the provisions of the Commercial Companies Law, with the exception of joint-stock companies, which continue to be under an obligation to apply the corporate governance principles mandated by the CBB.

Accountability

The New Law introduces a new Article 18 (bis) to the Commercial Companies Law, holding shareholders and directors of all types of companies personally and jointly accountable to each other and third parties (up to the company's entire capital), for any damages affecting the company, in certain circumstances as follows:

- submission of incorrect data or information about the company's capital in the company's constitutional documents, in transactions with third parties, or in any documents that are likely to influence the financial confidence in the company;
- using the company for fraudulent purposes or illegal acts;
- personal dealing with the company's funds;
- where personal interests and the interests of the company are not separated;
- where the company is encumbered with further obligations, despite being certain or presumably knowing that the company will not be able to perform such obligations as they fall due or that encumbering the company with such further obligations was a result of negligence or a grave mistake;
- where such person causes the company's inability to pay accrued taxes and fees to the government, authorities, or public organizations departments or public institutions, despite the supposed certainty or knowledge of the same, or if the company fails to pay those taxes due to the gross negligence or wrongdoings thereof; and
- violation of the Commercial Companies Law or the company's constitutional documents.

Significantly, the New Law does not relieve individuals from accountability on the basis of their absence from relevant company meetings. Therefore, for example, a board member cannot evade liability on the basis that the violation occurred as a result of a resolution taken at a meeting at which he was absent, unless he has objected to the resolution and recorded his objection in the minutes.

Conclusion

The highlighted changes in the New Law underlie the government's real attempt to balance its strategy in relation to implementing its 2030 Economic Vision: to increase investor confidence in the Kingdom's economy and create a business friendly environment. This strategy is coupled with the necessary mitigating factors to combat the increased risks of fraud, civil and criminal liability. By incorporating more relaxed rules in relation to administrative matters and foreign investments, whilst at the same time strengthening the corporate governance requirements, the New Law reinforces the principles of an open market coupled with accountability and fairness within Bahrain's corporate environment. This should lead to increased investor confidence and long-term sustainability in growth and operations.