

Kuwait: Legal Overview

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Introduction

The Vision of Emir Sheikh Sabah Al Ahmad Al Jaber Al Sabah to modernise Kuwait into a preeminent centre for commerce and finance by the year 2035 is being achieved through a vast range of commercial and government sector developments. These developments are also supported by the promulgation of legal reforms that essentially reflect Kuwait's ultimate objective in moving toward an investor friendly economy. Legal experts in the GCC have witnessed a discernible effort in Kuwait, particularly in reforming key aspects of its legal regime to sustain and enhance its economic and commercial objectives.

This article seeks to highlight some of the key changes to various subjects of law over the last two years.

Companies Law

The first overhaul of the companies law was introduced in 2012 by way of introducing Law Number 25 of 2012 (the "Companies Law") which saw to replace the predated Law No. 15 of 1960 in Kuwait, which in its era was considered as the regulatory foundation of companies in Kuwait. The 2012 reforms provided more clarity on several issues, which were not dealt with in its predecessor, such as non-profit companies, holding companies and shareholders' agreements. However, this inevitably led to some practical obstacles that surfaced after the law had already been promulgated. Accordingly, experts pushed for a number of amendments to some of the key provisions, resulting in additional overhauls in 2013 and more recently 2016.

The current and most recent amendment to the Companies Law was published in the Official Gazette (Kuwait Al Youm) by virtue of Law No. 15 of the 2017. The new amendments were made on grounds of practical implementation and in a bid to resolving the difficulties previously faced in enforcement of the law.

- In relation to email/postal addresses and the ability to add or replace the full address of the head office of the company in order to facilitate the means of communication and to conform to the international standard and the development of the companies and commercial sector;
- Payment of the full amount of the company's capital is no longer required and this shall effectively help small business to run and obtain the financial facilities from banks and financial institution, which requires the company to be established to grant such facilitates. The minimum capital of the company and the amount to be paid pre-incorporation shall be determined through the executive bylaw and according to the activities of the company;
- Deletion of the minimum nominal value of the share/unit, which was KD 100 as per the previous law. according to the new amendment, the partners will determine the nominal value of the shares without any observation to a minimum or maximum amounts provided that all shares/units be of the same value; and
- Deletion of the sufficiency of capital condition for the shareholding companies. The last amendment in relation to the shareholding companies and the deletion of the condition of capital sufficiency as stipulated in the previous law. According to the new amendment the minimum capital of the company shall be determined by executive bylaw according to the activity of the company. This amendment will allow all companies with the same activities to have the same

capital and conditions, without leaving the decision to the discretion of the officials and would provide equality.

Foreign Investment and the Tenders Law

2017 also observed Kuwait 'revamping' of some of its restrictive laws in order to make room for foreign investment. Kuwait's aspirations to attract foreign investors commenced with the promulgation of Law 116 of 2013 (the "Direct Investment Law and establishment of the Kuwait Direct Investment Promotion Authority which allows for the establishment of 'wholly foreign-owned' Kuwait entities).

This progressive trend has been sustained with the introduction of Law. No 49 of 2016 (the "New Tenders Law") which superseded Law No. 37 of 1964 (the "Old Tenders Law"). A notable highlight of the New Tenders Law is the protection of the local population in the Kuwait market. Now, a foreign contractor is obliged to purchase no less than 30% of its contractual requirements from the local market or from local suppliers registered with the Central Agency for Public Tenders (the "CAPT"). Moreover, the CAPT, in a step towards allowing more of a Kuwaiti presence in the public procurement marketplace, shall also manage compliance of foreign contractors by awarding not less than 30% of the contracting works to local contractors. This has been strategically poised with the transformation of bidding requirements for public tenders. Prior to the New Tenders Law, foreign contractors were unable to bid on public tenders without a local agent. This restriction has been now been removed after the promulgation of the New Tenders Law to foster in a new era of easing regulations for foreign investment.

It also is worth noting that despite not needing an agent to bid, the foreign bidder may still be in need of a local agent for the execution phase of the project in order to sponsor the employees being that a foreigner can only conduct business in Kuwait through the establishment of an entity with a local partner, arrangement of a local agency, or establishment of 'wholly foreign-owned' Kuwait entity. Thus, unless a foreign contractor has established a Kuwait entity, the need for a local agent may inevitably be required at some stage.

In addition to opening doors to potential investors, the New Tenders Law has also developed more organised criteria for potential bidders to follow. As a result, any company which appears to have issues with completing existing projects will not be awarded new projects until such issues are resolved and the project as a whole is completed. Where the Old Tenders Law did not recognize or regulate the technical evaluation of the various project tenders, the New Tenders Law introduces a 'points system' for allocating project work of a technical nature to a selected bidder based upon successful attainment against a specified 'points based' criterion.

The key provisions in the New Tenders Law are as follows:

- Foreign bidders can now bid on public tenders without a local agent;
- Foreign bidders must now purchase no less than 30% of its goods from the local market;
- Introduction of sophisticated criteria for approval of tenders;
- Establishment of a Grievance Committee to express any issues during tendering process; and
- Bidders are allowed to contract for any purpose without permission from CAPT as long as the contract value does not exceed KD 75,000 – an increase in contract value from the KD 5,000 in the previous tenders law.

To summarise, the New Tenders Law illustrates Kuwait's ambition to expand within the international commercial market by allowing more opportunity for foreign investors while simultaneously providing a dependable market for the local population to cultivate growth potential.

Agency Law

In support of the budding improvements to the business area of law and following almost four decades of enforcing the previous commercial agency law of 1964, the Kuwait Parliament considered it necessary to lay down new and more suitable regulations in order to support the rapidly developing domain of commercial agencies in Kuwait.

The highly anticipated Law No. 13 of 2016 Regulating Commercial Agencies (the “Agency Law”) was published on 13 March 2016. It supersedes the previous law and sets forth the regulatory and legal framework to be utilised in the organisation of commercial agencies. The Agency Law is intended to be read alongside Law No. 68 of 1980 (the “Commercial Law”).

The Commercial Law permits a foreign principal to carry out business activities in Kuwait by means of a distributorship contract with a local merchant under which the latter undertakes to distribute the principal’s products in Kuwait. While the Commercial Law distinguishes between agencies and distributorships and provides the basic framework for regulating commercial agencies together with compensation provisions consisting of the right to claim for early termination and/or non-renewal upon expiration. Article 286 of the Commercial Law states that if the appointed distributor is the sole distributor, then in accordance with Kuwait law, the exclusive distribution is deemed to be an agency contract.

The most salient articles in the Agency Law address anti-trust provisions, the ability to appoint more than one agent or distributor (in accordance to Article 273 (1) of the Commercial Law), and resolving disputes pursuant to an arbitration clause.

Summarising the key changes in the Agency Law are the following:

- The definition of Commercial Agency has been explicitly addressed in Article 1 of the Agency Law as ‘an agreement whereby the party holding the legal right entrusts a merchant/company in the State of Kuwait to sell, promote or distribute goods/render services in his capacity as an agent, distributor, franchisee or licensee of the product or the original supplier against a profit or commission’.
- A principal can appoint more than one agent/distributor.
- The import or supply of any goods or products are no longer confined to the respective agent or distributor, irrespective of exclusivity and rights to use the trademark, provided that the party importing or supplying them complies strictly with the terms and conditions of the Agency Law. We deduce that this provision permits parallel distributing even if the distributor is exclusive and includes the right to use the trademark.
- The Agency Law restates the registration requirement. Article 6 requires registration of agency agreements stating: that the existing Commercial Agencies Register in the Ministry shall continue to operate, in which all the accepted commercial agencies are to be registered in accordance to the provisions of the new law. Any commercial agency, not lodged on the Commercial Agency Register, shall not be considered valid and shall not be eligible to be heard by a court of law.”
- The Ministry of Commerce and Investment no longer allows agency registrations at the Commercial Agency Register after the passing of two months from the date of signing the agreement, and accordingly any claim that may be brought under the agreement shall not be eligible to be heard by a Kuwaiti Court.
- Under Article 20 of the Agency Law, the courts are likely not hear any disputes brought by an agent/exclusive distributor if there is a provision subjecting the exclusive distributorship agreement to foreign arbitration as well as foreign governing law, given that Kuwait is a signatory to the New York Convention regarding enforcing foreign arbitral awards. Alongside governing the agency/distributorship relationship from a procedural perspective the Agency Law also contains much of the substantive content in this subject area.
- Article 9 of the Agency Law stipulates that an agency may be re-registered in the Commercial

Agencies Register under the name of a new agent on the occurrence of any one of the following events:

- a. the agency registered previously is terminated amicably between its parties
 - b. the agency registered previously is revoked by an executable court judgement.
 - c. the agency registered previously is terminated according to its duration specified in the agency contract.
- The principal may not terminate the contract without a breach on part of the agent, otherwise the principal shall be obliged to compensate the agent for the damage sustained to the agent as a result of this termination. Every agreement to the contrary shall be invalid.

Labour Law

The Public Authority of Manpower has established and recently launched its new “easy service” via their web portal. This now allows the employer to carry out various application processes online i.e. issuing, renewing and cancelling an employee’s work permit. In addition to the successful inauguration on the online application process, 2017 has also seen some amendments to Law No. 6 of 2010 (the “Kuwait Labour Law”). Notably, Law No. 85 of 2017 (the “Amending Law”) amends two articles in the Kuwait Labour Law as summarized below:

- Article 51 of the Labour Law deals with end of service gratuity and pension contributions. The Amending Law states that upon ending his service, an employee is entitled to full end of service indemnity without deducting the contributions made by the employer towards the Public Institution for Social Security. Previously, some employers used to deduct the amount that they had contributed towards social security from their employee’s end of service payout. The Amending Law clarifies that this practice is no longer allowed; and
- Article 70 of the Labour Law deals with annual leave entitlements for employees. The Amending Law stipulates that “an employee has the right to a 30-day paid annual leave in the first year of service provided that he completed at least six months under the employer. Weekend holidays, public holidays and sick leave days shall not be counted as part of annual holidays.” Previously, the Labour Law did not specifically state that weekends, public holidays and sick leave days were not counted as part of annual leave and employers were therefore more inclined to give 30 calendar days’ leave. The Amending Law now clarifies that employees are entitled to 30 working days annual leave instead.

Conclusion

In the last few years the Kuwait government has taken numerous positive steps towards sustainable development and economic growth by reducing bureaucracy, speeding up administrative processes, passing legislative amendments and generally taking steps to promote the Kuwait economy. Additionally, a number of new laws have been passed in a bid to tackling the fundamental obstacles facing investors in Kuwait and a number of proposals in line with the foreign investment objective are still in the pipeline. It is accordingly fitting to conclude that Kuwait is headed in a direction of growth which may reinstate its historic reputation as the ‘the pearl of the Gulf.’