

Legal and Administrative Challenges in Kuwait's Commercial Environment: The Regulatory Framework of the Companies Law and its Application

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It is no secret that the GCC region as a whole has been undergoing a conscious evolution in a bid to become a more hospitable environment for local and foreign capital investment. Kuwait is no exception. Since 2006, Kuwait has promulgated and amended several laws in its pursuit to attract foreign investment, chief amongst them: New Companies Law¹, Capital Markets Law², Kuwait Direct Investment Promotion Law³, a new Public Private Partnership Law⁴, Competition Law⁵ and Anti-Corruption Law⁶. Yet despite these developments, Kuwait is still perceived as one of least attractive locales for direct investment within the GCC, scoring less than favorably on international corruption indices⁷. But why is that?

Our aim here is to shed light on the current state of the commercial environment in the State of Kuwait, with emphasis on the laws regulating business organizations and the application of these laws by public officials. We do understand that an assessment of the current environment based solely on how the law is applied would not necessarily provide a well-rounded understanding of how this environment has arrived at its current state. Yet for our intents and purposes, we will not be discussing the fundamental flaws in the legislative process nor the system of government. For although these matters demand serious consideration, they fall within a much larger and more complex debate.

The Interplay between Corruption and Incompetence

Not surprisingly and notwithstanding the legislative proactivity, public institutions in the State of Kuwait suffer from serious trust deficit. In many instances, when faced with the current regulatory framework, the average investor, entrepreneur or even legal and financial advisor, is unable to fully understand how the law will be applied. This is nowhere clearer than in the application of one of the main laws regulating commercial activities in Kuwait, the recently promulgated Law No. 25 of 2012 (*as amended by Law No. 97 of 2013*).

From an outside observer's perspective, any delayed transaction would be a prime suspect accused of shady practices given Kuwait's score on the corruption indicators. However, based on our teams' daily interactions with employees at the Ministry of Commerce and Industry (MOCI), we have reached a different conclusion; despite corruption being a prevalent

problem, incompetence is at the heart of the issue. To support this assertion, we simply refer to the indicators that show the average productivity of a public sector employee to be less than one hour per day. ⁸

Practical Problems with the Application of the Companies Law

Even though the current companies law is miles ahead of its 1960s predecessor, there remains a myriad of problems in the legislative and practical approaches of application. Below are a few we have experienced.

1. Lack of legislative planning following the promulgation of the law
 - Long, confounding and archaic documentary cycles are only made worse by absence of effective online portals and databases
 - Information on how the law would be implemented by the public body is scarcely available and unreliable
2. MOCI's encroaching attitude which aims to regulate the internal operations of companies
 - MOCI often requires that persons (corporate or otherwise) provide evidence of both the commercial viability of their venture and their financial ability to enter these ventures - especially when involving joint ventures with foreign entities.
 - In many cases MOCI intervenes and prohibits (without legal basis) certain actions expressly approved by company shareholders and not contrary to the law.
 - In some situations, MOCI employees and senior officers refrain from the provision of practical advice on their application of laws corresponding to a certain action, unless unrelated confidential information is disclosed.
3. Overlapping jurisdictions and ultra vires decisions of public bodies regulating the same matters
 - Article 172 of the companies' law⁸ entitles shareholders to dispose of their shares once the company issues its first balance sheet, but not before 12 months. However, the Capital Markets Authority maintains express and ultra vires prohibition on this article, an example being the prohibition imposed on Kuwait Telecom Company KSC ("VIVA") established more than 6 years ago.
 - Blanket bans are commonly enacted by public bodies in Kuwait. For example, MOCI stopped accepting applications for establishing general trading and contracting companies, citing that there are enough of them in the market, without consideration of market forces of supply and demand.
4. Lack of procedural legal knowledge in public officials implementing the law

- In one case, MOCI requested approval by the board of an under-establishment company as a requirement for establishing the company. By definition, the company could not even form a board yet.
5. Lack of uniformity in application of the law and non-constitutional abuse of power by senior officials
 - It is a common practice to request approval of a senior official at MOCI to carry out a certain procedure; however that can prove problematic.
 - For example, a notice of violation was sent to a client signed by the same official who had approved (*in conformity with the law*) the procedure a year earlier.
 6. Scarcity of commercially oriented judiciary and local legal practitioners to challenge application of the technical aspects of the law
 - The pathway to judicial appointments in Kuwait begins with a career in public prosecution. Therefore, although judges are extremely well-versed in the criminal aspects of the law they severely lack practical commercial knowledge and unfortunately the court designated experts in many instances lack the competence to do so.
 - There is a shortage of Kuwaiti legal practitioners focusing solely on non-contentious corporate matters, who can combine local know-how with an international outlook and standard of service.
 7. Lack of proper, systemized communication with respect to any application
 - The public sector has no system in place to proactively contact and update individuals and companies.

Survival Guide: How to Operate Within the System

In light of the above, it is obvious that advisors and practitioners are unable to offer clients solid advice or timeframes regarding the practical application of the law, as is customary in other developed jurisdictions. However, our firm has developed an approach that has proven to be time-effective in achieving our clients' objectives within the aforementioned constraints:

1. Studying all procedures related to the transaction and its relevant interactions with public employees.
2. Identifying gaps and challenges in application that might prejudice the transaction due to variant or ultra vires applications of the law.
3. Substantiating an opinion, based on solid references to the law, contrary to the application which is expected to be in violation of the law, (*our firm once conducted an extensive study to establish legal grounds for an action adopted on behalf of a client, which*

was then made available to the ministry to serve as reference for future uniform application.)

4. Making personal visits to the relevant department prior to any written communication.
5. Explaining the proposed approach thoroughly to the public official concerned.
6. Following up with written requests once approach receives tacit approval.
7. Following up regularly with the official or body concerned to ensure expeditious results and tracking the “documentary cycle of approvals” at every step.
8. Maintaining a record of previous decisions to enable replication of process.

Remedial Recommendations

For Kuwait to become a regional commercial and financial hub, the public sector has to decisively address the above serious challenges. The passing of major reformative laws is only half the battle, as they are rendered void if their application is lacking. Accordingly, we believe the following changes are crucial to remedy current situation:

1. Having a clear post-legislation plan
2. Investing heavily in the training of the human capital
3. Updating and introducing online platforms and investing in IT
4. Providing for a sternly applied accountability, reward and punishment policy
5. Improving public perception to counteract the trust deficit and restore the public’s trust in the system
6. Establishing publically available databases of resolutions
7. Streamlining and minimizing the unnecessary documentary/approvals cycle.

In the end, it is acknowledged that one of the main governing principles allowing any society to function effectively is the concept of the rule of law, defined as “*the supremacy of regular as opposed to arbitrary powers*”⁹. Based on all that we have laid out here, this is unfortunately not the case in Kuwait. More than anything, our commercial environment needs further legal certainty characterized by clear, uniformly applied rules and regulations.

¹ Law 25 of 2012 (as amended by Law 97 of 2013)

² Law No. 7 of 2010

³ Law No. 116 of 2013

⁴ Law No. 116 of 2014

⁵ Law No. 10 of 2007

⁶ Law No. 24 of 2012

⁷ Kuwait is ranked 69th worldwide and last in the GCC on the Corruption Perception Index (Source: <http://www.transparency.org/country/#KWT> retrieved August 26th, 2014)

⁸ Article 172 of Law No. 25 of 2012 (as amended by Law No. 97 of 2013)