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Guide to Doing Business in Kuwait

Introduction

Doing business outside a person's jurisdiction can be challenging without proper guidance. It is therefore imperative for an investor to obtain useful information on the legal and regulatory requirements for doing business in the desired jurisdiction. Typically, useful information required will include the country's trade and investment policy, information on the legal vehicle for the business, regulatory requirements, employment matters and tax policies. Thus a potential investor in the State of Kuwait would have to make proper inquiries to ensure ease in carrying on business.

The State of Kuwait, though having a small land mass of 20,000 square kilometers, is a viable destination for foreign direct investment being a major producer of oil in the world and having a GDP US$158.089 billion and a per capita income of US$45,920.25 for the year 2008. According to the 2008 Index of Economic Freedom, its foreign reserves stood at US$213 billion in March 2007. With its dependence on oil for development, earnings by the government will boost economic development and businesses in Kuwait will continue to partake in the growth of the Kuwaiti economy.

This Guide therefore provides investors with relevant information for doing business in the State of Kuwait.

Trade & Investment Policy

One cardinal rule of establishing a business in Kuwait is that the investor must have a Kuwait partner. The Kuwaiti partner shall hold at least fifty-one per cent of the equity of the business[1]. These requirements were however relaxed in 2001 with the enactment of the Foreign Direct Investment Law No. 8/2001.

Law No. 8 of 2001 (100% Foreign Ownership)

This law liberalized the Kuwait business terrain by permitting foreign companies to incorporate as Kuwaiti companies without having a Kuwaiti partner and their activities were restricted to those specified in Resolution 1006/1 of 2003[2].

Such foreign companies are permitted to take part in the following activities:

- All kinds of industrial activities except for those in oil and gas exploration and production;
- Construction, operation and management of infrastructure enterprises in the fields of water, power, drainage and communications;
- Banks, investment corporations and foreign exchange companies which the Central Bank of Kuwait may agree to incorporate;
- Insurance companies which the Ministry of Commerce and Industry agrees to incorporate;
- Information technologies and software development;
- Hospital and medicines manufacturing;
- Land, sea and air transport;
- Tourism, hotels and entertainment;
- Culture, information and marketing except for the issuance of newspapers and magazines and opening of publishing houses;
- Integrated housing projects and zone development except for real estate speculation; and
- Real estate investment through foreign investor subscription in a Kuwaiti shareholding company by virtue of Law No. 20/2002

To further assure investors of the safety of their investments, foreign companies licensed under the FDI Law are not be confiscated or nationalized and where expropriation or nationalization is inevitable and in the public interest, compensation equivalent to the actual real economic value of the company as at the time of expropriation will be paid to the foreign investor[3]. Foreign investments made pursuant to this law also enjoy free transferability of ownership in accordance with the provisions of relevant laws and subject to the terms of the license[4]; while investors are guaranteed free repatriation of profits, capital and compensation[5]

[1] Art. 23 of Law 68/1980
[2] Art. 4 of Law 8/2001
[3] Art. 8 of Law 8/2001
[4] Art. 11 of Law 8/2001
[5] Art. 12 of Law 8/2001

Foreign Investment Incentives

The FDI Law confers certain privileges to foreign investors[6]:

- Exemption from payment of income tax or any other taxes for a period of 10 years as well as exempting every new investment in the same enterprise from such taxes for a period equivalent to that granted to the original investment when the enterprise was established;
- Relief from double taxation;
- Total or partial exemption from customs duties on certain imports such as machinery, equipment, and spare parts required for construction, expansion and development.
- Allocation of lands and real estate required for investment purposes in accordance with Kuwait law.
- Recruitment of required foreign manpower in accordance with the Kuwait labour laws.

Legal Framework

Kuwait like most jurisdictions has a body of laws regulating business activities but the most important laws are the:

- Commercial Companies Law No. 15 of 1960 (with its amendments);
- Civil Code No. 67 of 1980;
- Commercial Code No. 68 of 1980;
- Foreign Direct Investment Law No. 8 of 2001;
- Kuwait Tax Decree No. 3 of 1955 as amended by Law No. 23 of 1961 and Law No. 2 of 2008;
- Regulation of Commercial Agencies Law No. 36 of 1964;
- Kuwait Labour Law (Private Sector) No. 38 of 1964 as amended by Law No. 6 of 2010

However, many other laws exist to regulate specific industries. For example the Kuwait Marine Trade Law No. 28 of 1980 deals with all shipping and maritime matters while the Aviation Law (Kuwait Civil Air Navigation Regulations) No. 30 of 1960 regulates the activities in the aviation industry.

Business Licenses

A business license is required for the purpose of carrying on business or commercial activities in Kuwait. The Ministry of Commerce and Industry issues such a license for general trading, contracting, importing and industrial activities while relevant ministries regulating specific commercial activities issue another license (where this is specified under the law) in addition to that issued by the Ministry of Commerce and Industry.

[6] Art. 13 of Law 8/2001

Business licenses as a general rule are only issued to Kuwaiti nationals and companies and in a few cases, to GCC nationals and companies (where such GCC countries confer a similar advantage on Kuwaiti nationals) unless the license is issued in accordance with the FDI Law. These licenses are usually issued for a defined duration and are renewable.

Choice of Business Entity

Businesses in Kuwait can be carried on as a:

(1) Limited Liability Company;

(2) Joint Stock Company;

(3) Joint Venture

(4) Commercial agency; or as a

(5) Commercial representative

Foreign Company Branches

Under Kuwait laws, a foreign company will not be permitted to establish a branch in Kuwait or engage in commercial activities except through a Kuwaiti agent[7].

Limited Liability Company (WLL)

A limited liability company can commence business upon obtaining a trading license from the Ministry of Commerce and Industry. Its headquarters must be in Kuwait and incorporation may take about 3months. The limited liability company is not permitted by law to engage in banking business, insurance business or the provision of property investment services[8]. Also non-Kuwaitis cannot own more than 49% of the capital of the company while its shareholders are referred to as "partners".

The activities of this company is regulated by its Memorandum and Articles of Association and it is required to have a minimum share capital as provided in its articles which must all be taken up at incorporation. The minimum number of shareholders required to make up this company is two (2) while the maximum is thirty (30). A husband and wife are deemed to be one shareholder for the purpose of the statutory minimum. As the name implies, the liability of partners is limited to their shareholding ("portions") in the company's capital and such a company cannot raise capital by way of public subscription. A partner seeking to disengage from the company must first offer its shares to the existing partners in accordance with the requirements provided in the Company's articles of association.

The limited liability company is common in Kuwait and is not subject to the payment of personal or corporate income tax. Foreign corporate investors in such companies are however required to pay corporate tax in accordance with the Kuwait tax laws.

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[7] Art. 24 Law 68/1980

[8] Art. 187 Law 15/1960

Joint Stock Company (KSC/KSCC)

A joint stock may be private/closed (in which case its shares are not listed on the Kuwait Stock Exchange) or public. Foreign investors cannot take up more than 49% of the share capital of the company except where the company is licensed under the FDI Law. For a joint stock company, incorporation may take as long as six months and requires strict compliance with formalities and procedures prescribed by the Ministry of Commerce and Industry.

Public Joint Stock Companies (KSC)

Joint stock companies must have a minimum of 5 shareholders and its founders are required by law to subscribe to at least 10% of the capital in the case of public joint stock companies. These companies qualify to be listed on the Kuwait Stock Exchange and foreign investors can now own shares in some listed shareholding companies so long as foreign investors' shareholding in any company does not exceed 49%. In the case of banks, any investor seeking to own more than 5% of a bank's share capital must obtain the approval of the Central Bank of Kuwait.

Public Joint Stock Companies are allowed to raise capital by way of public subscription in accordance with the provisions of the law.

Closed Joint Stock Companies (KSCC)

Closed joint stock companies do not offer their shares by a public subscription and are incorporated by an official deed issued by the incorporators. The incorporators must have subscribed to all the shares and the shares must be fully paid up[9].

Incorporators of joint stock companies are not permitted to dispose off their shares in the company until after the lapse of three years from the date of incorporation. Any such disposition amounts to an illegality and will be voided by a competent court[10].

Joint Ventures

Joint Ventures under Kuwait law do not require to be registered and have no legal personality. There are no limitations on foreign participation in joint ventures and it is common for foreign contractors involved in major projects in Kuwait to form a joint venture or consortium for the purpose of the contract.

A joint venture usually transacts business through its individual partners. If the partner dealing with the third party is a non-Kuwaiti, he must be guaranteed in this dealing by the Kuwaiti partner. Transactions with third parties under the joint venture is not binding on other partners unless the company dealt with the third party in its capacity as a company in which case the partners are all exposed to unlimited joint and several liability whether or not they were personally involved in the transaction.

Where the non-Kuwaiti partner intends to transact any business on its behalf, he must obtain a guarantee from the Kuwaiti partner in the joint venture.

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[9] Art. 94 of Law 15/1960

[10] Art. 109 of Law 15/1960

Commercial Agencies

Commercial agencies are a very popular business vehicle in Kuwait and are regulated by Law No. 36 of 1964 and Law 68 of 1980. Only Kuwaitis can act as commercial agents and a violation of this provision attracts a punishment[11]. A commercial agency must be registered with the Ministry of Commerce and Industry within two (2) months of appointing the agent and the relationship between the foreign principal and the agent must be direct. Due to the important role commercial agencies play in the economic development of Kuwait, the Commercial Code has made provisions aimed at protecting commercial agencies. The following protective measures are provided:

- Commercial agencies must be registered in order to be enforceable;
- Kuwaiti law is the governing law in matters pertaining to public policy;
- The principal may not terminate the agreement without proving breach of contract by agent, otherwise, the principal is liable to pay compensation to the agent;
- The Principal may not refuse to renew the agency agreement when it expires without paying the agent equitable compensation for non-renewal if the agent proves that he committed no breach and that his activities led to the successful promotion of the principal's products;
- The agent may sue both the principal and any new agent if it is proved that the termination was as a result of the concerted action of both parties.

Under Kuwait law three forms of commercial agencies are recognized: contract agency, distributorship, and the commission agency. In a contract agency[12], the local agent undertakes to promote the principal's business on a continuous basis in the territory and to enter into transactions in the name of the principal in return for a fee. A distributorship[13] involves an agreement with a local agent to distribute the principal's products in a defined territory in return for a percentage of the profit. In a commission agency[14], the agent enters agreements in his/its own name and may only disclose the name of the principal upon obtaining the principal's permission.

Commercial Representatives

A commercial representative represents the business interests of a foreign company in Kuwait[15]. The scope of authority of a commercial representative is more limited than the authority granted an agent. The commercial agent in executing documents on behalf of the foreign company must sign his name and that of the company it represents and indicate that he is a commercial agent.

The limitation of this arrangement is that any such representation agreement between the foreign company and the Kuwaiti individual or company cannot be registered at the Ministry of Commerce and Industry.

[11] Arts 1 & 10 of Law 36/1964
[12] Art. 271 of Law 68/1980
[13] Art. 286
[14] Art. 287 – 296
[15] Arts 297 – 305

Taxation

Generally Kuwaitis and non-Kuwaitis are not subject to personal income tax. Companies income tax is however payable by foreign companies even when they shareholders in a Kuwaiti company. Companies owned by GCC nationals are also not subject to companies' income tax.

Companies' Income Tax

Prior to recent amendments made to the Kuwait tax law, company income tax was regulated by Income Tax Decree No. 3 of 1955 which provided tax rates ranging from 5% to 55% depending on the activities of the company. Law 2 of 2008 now introduces a 15% flat rate corporate tax regime for foreign companies carrying on business in Kuwait[16]. The 2008 amendments became necessary in order to encourage foreign investment by eliminating indiscriminate high taxes, clarify taxable standards under the Decree and bring Kuwait tax law in line with international tax standards.

Under Law No. 2, taxable income is determined after deducting all expenses and costs spent in achieving that income and such taxable income include:

(1) Profits realized on any contract that is partially or fully executed in the State of Kuwait;

(2) Amounts collected from the sale of, leasing, or from granting a franchise to use or utilize any trademark or design a patent or copyright;

(3) Commissions due or resulting from trading representation or brokerage agreements;

(4) Profits from trading and industrial activities;

(5) Profits from purchase and sale in the State of Kuwait of property or goods or rights therein, and from the opening of a permanent office in the State of Kuwait in which sale and purchase contracts are concluded;

(6) Profits from leasing any property in Kuwait;

(7) Profits from rendering of services

Profits of a company resulting from dealing in the Kuwait Stock Exchange are exempt from tax.

Withholding, Stamp Duty & Capital Gains

The concept of withholding tax is alien to Kuwait[17] so also is no stamp duty chargeable. Where a foreign company purchases assets of another existing entity in Kuwait, there is no tax consequence to the purchaser. However if the seller (an existing entity in Kuwait) is partially or fully owned by a foreign entity, the gain or loss on the sale of assets is added to the net profit or loss of the entity and taxed at normal tax rates. There is no separate capital gains tax.

Property Tax, VAT & Sales Tax

There is no property tax, VAT (Value Added Tax) and sales tax in Kuwait.

[16] Art. 1of Law 2/2008

[17] Investment companies and banks that manage portfolios or funds or act as custodians are required to deduct 15% of dividends and profits of foreign companies and deposit them with the tax department within 30 days from the date of deduction together with a listing of all amounts deducted against each company separately.

Statutory Retentions

Though Kuwait tax system does not recognize the concept of withholding tax, Kuwait ministries, authorities, public institutions, companies and private institutions that contract with foreign companies are required under Ministerial Order 44 of 1985 to retain a statutory 5% of the final payment to a contractor or sub-contractor until such a contractor or sub-contractor has settled its tax liabilities and has obtained a tax clearance certificate from the Director of Income Taxes (DIT).

Any monies retained pursuant to Ministerial Order 44 shall only be released to the contractor or sub-contractor when it presents to the company a tax clearance certificate showing that it has settled all its tax liabilities. Where the provision of this Order is not complied with, the Ministry will, when inspecting the tax declaration filed by the company with the DIT disallow all payments made to sub-contractors that have not been reported. Also, the DIT may under Ministerial Order 8 of 2003 request through a letter to transfer the amount making up the 5% in connection with the settlement of taxes from such foreign entities.

Contributions to KFAS and Zakat Tax

As part of the joint stock company's obligations to development of the society, the KSC is required to pay 1% of its net profit as contribution to the Kuwait Foundation for the Advancement of Science for the promotion of science and technology in Kuwait. A joint stock company listed on the Kuwait Stock Exchange is required to pay 2.5% of its net profit as employment tax in accordance with Law 19 of 2000 relating to Supporting National Manpower and Encouragement of National Manpower to work in Non-Government Agencies.

The joint stock company is also required to pay Zakat pursuant to Law No. 46 of 2006 at 1% of the company's net profit. Government entities and foreign companies are exempted from paying Zakat.

National Labour Support Tax

This tax is governed by Law 19/2000 and was made to encourage Kuwaiti nationals to work in non-governmental institutions. Only companies listed on the Kuwait Stock Exchange are required to pay this tax and it is computed at 2.5% of annual net profits.

Financial Reporting & Audit

All business enterprises are required to keep adequate financial records of their activities. Ministerial Order 206 of 1985 specifies the records to be kept by a foreign company.

For joint stock companies and limited liability companies, financial statements must be prepared in compliance with principles and standards issued from time to time by the International Accounting Standards Committee.

Limited liability companies are to submit their audited financial statements within 10 days of the company's annual general meeting to the Ministry of Commerce and Industry while public shareholding companies must submit their financial statements prepared in Arabic within 3months of the end of the financial year to the Ministry of Commerce and Industry and to the

AGM. Listed companies are also required to submit a copy of their financial statements to the Kuwait Stock Exchange. Unaudited reports are also required to be submitted quarterly.

Though partnerships, joint ventures and commercial agencies are not statutorily required to prepare financial audits, it is the practice for them to do so especially where there a foreign company involved.

Dispute Resolution

Kuwait courts have the jurisdiction to entertain all civil, commercial and administrative disputes. The Amiri Decree No 19 of 1959 establishes a three tier judicial system: the court of first instance, the Court of Appeal, and the Court of Cessation (the Supreme Court).

Disputes can also be resolved by way of arbitration or other alternative dispute resolution mechanism. Arbitration in Kuwait is governed by Law No. 11 of 1995 which provides for the establishment of one or more arbitration authorities at the Court of Appeal consisting of three judges and two arbitrators to be chosen by the parties to the arbitration. Kuwait courts usually decline to hear any commercial dispute where the agreement provides for a reference to arbitration. Parties may also include in their agreement a clause for reference to arbitration and appoint their own arbitrator.

The Kuwait Chamber of Commerce and Industry also provides arbitration and conciliation services according to its internal regulations.

Employment

Law No. 6 of 2010 (The Law of Labor in the Private Sector) replaced Law No. 38 of 1964 which formerly governed employment matters for employees in the private sector. Its provisions apply to all employees working in the private sector and those in the oil and marine sector only to the extent that its provisions are more beneficial to them. It does not apply to workers whose employments are governed by other laws and to domestic workers.

Only non-Kuwaitis holding valid working visa (Visa 18) are allowed to work. Employers are prohibited from employing foreign workers unless such workers receive a permit from the competent authority under the Ministry of Labor and Social Affairs.

Employers are required to contribute towards a health insurance scheme for all its expatriates resident in Kuwait and their dependents. The annual premium is payable at the time of initial application or renewal of the expatriates residency. Health coverage can also be provided through a private health service provider. They are also required to make payments to the Public Institution for Social Security on behalf of all its Kuwaiti employees. This scheme is contributory with the employer liable to pay 11% of the employee's monthly salary with the employee liable to contribute 7%. Contributions are capped at a monthly salary of KD 2,250.

Intellectual Property

Kuwait laws offer protection for trademarks, patents and designs, and copyrights. In the case of a trademark, once registered is protected for 10 years and is renewable for another 10 years[18]. A

[18] Art. 77 of Law 68/1960

registered patent owner is vested with the right to use the patent by any means for 15 years from the date of application which right to use can be renewed for an additional 5 years.

Conclusion

In the last few years, government has stepped up efforts to liberalize the economy and attract foreign investments. It has commenced privatization of some governmental owned establishments with the enactment of Law No. 6 of 2008 which is the law that governs the privatization of Kuwait Airways. Law No. 7 of 2008 (Public-Private Partnership (PPP) Law) which amends parts of Law 105/1980 is aimed at encouraging foreign companies to invest in the growth and infrastructural development of the State. Recently, Privatization Law No. 37 of 2010 was enacted.

In 2009, following the global economic crisis whose negative impact was felt in Kuwait, the government enacted the financial stimulus law (Law 2 of 2009 on Enhancing Economic Stability in Kuwait). This law was put together in an attempt to stabilize the financial sector, support local economic activity and encourage financing to local economic sectors by banks. The law therefore provides for several kinds of financial and economic stimuli intended to promote financial stability and improve economic conditions.

Proper implementation of all laws that impact directly and indirectly on foreign investments and the provision of a conducive enabling business environment in line with global acceptable practices are keys to growth and development of the State of Kuwait and it is hoped that the Kuwait investment climate would become more attractive to the foreign investor.

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