DOING BUSINESS IN

Kuwait
Overview
Kuwait is a small but rich desert nation with the world’s fifth largest oil reserves. Petroleum accounts for nearly half of the GDP, almost all of Kuwait’s export revenues and the vast majority of government incomes. Since the discovery of oil in Kuwait in the 1930s, Kuwait’s economy has seen unprecedented growth to become what is now the world’s fifth richest nation in terms of per capita income.

Legal background
Kuwait is a constitutional Emirate with a civil law system where judicial powers are vested in courts which enforce Kuwait law promulgated by Amiri decree. The court system makes provision for the resolution of all disputes and is based on French law adapted from Egypt. It is made up of three levels: the Court of First Instance, the Court of Appeal and the Court of Cassation – the highest court in Kuwait. Matters such as marriage, divorce and inheritance are dealt with under a law which is based on Sharī’a.

Structures for doing business in Kuwait
Other than the exemptions granted by Kuwait Direct Investment Promotion Authority (KDIPA) as mentioned below, Kuwaiti law states that no person other than a Kuwaiti may perform business in Kuwait, unless he has one or more Kuwaiti partners who own title to not less than 51% of the total capital of the trading firm. Kuwaiti law further states that no foreign company may establish a branch or carry on trading activities in Kuwait except through a Kuwaiti agent.

Therefore, a foreign entity seeking to conduct business in Kuwait would usually be required to appoint a Kuwaiti agent or participate as a minority shareholder in a Kuwaiti company.

Foreign companies or individuals wishing to establish a business presence in Kuwait have various options available to them, the most common of which are outlined below.

A. JOINT STOCK COMPANY OR SHAREHOLDING COMPANY ("KSC")
A KSC must have at least 51% of its issued share capital owned by GCC nationals or entities. However, with the exception of specified banks and insurance institutions, there are no foreign ownership restrictions on the share capital ownership of companies listed on the Kuwait Stock Exchange ("KSE"). Furthermore, it is possible for non-GCC entities to beneficially own more than 49% of the share capital of a KSC not listed on the KSE by employing a Kuwaiti custodian to own legal title to shares in the company on trust on behalf of the non-GCC entity, with an agreement that the non-GCC entity retains all economic and beneficial rights to the shares.

All KSCs must have at least five shareholders but there is no maximum limit on the total number of shareholders. The liability of each shareholder is limited to the nominal value of the shares held by that particular shareholder.

The KSCs are governed by a Board of Directors ("BoD") headed by a chairman. The day to day management however is in most cases carried out by a Chief Executive Officer appointed by the BoD.

B. WITH LIMITED LIABILITY COMPANY ("WLL")
Many of the provisions relating to the establishment and operation of a WLL are similar to the provisions for a KSC. Kuwait nationals or entities must own at least 51% of the equity in a WLL. The custodial arrangement discussed above with respect to KSC is also feasible with respect to WLLs. WLLs must have at least two owners but no more than fifty.

As a recent development to attract foreign investment, non-Kuwaiti natural persons who participate in the incorporations of the company do not any longer need to have a valid residence for the state of Kuwait. The WLL is managed by a General Manager who must have residence in the state of Kuwait. WLLs by far remain the most favoured incorporation option as they are both comparatively easier to incorporate and don’t require as much statutory obligations. The initial capitalisation requirement has been reduced to KD100 with no need to make the actual deposit or open a bank account as part of incorporation process however the complete share capitalisation amount needs to be reflected in the first annual financial statement.

C. JOINT VENTURES/ PARTNERSHIPS
A partnership or joint venture may be established between a Kuwaiti citizen or company and non-GCC entity in circumstances where it is anticipated that the Kuwaiti citizen or company will perform a greater role than merely being the agent of the non-GCC entity.

A joint liability partnership may be formed between two or more partners and is considered an independent legal entity in Kuwait. Joint ventures however, are not recognised as distinct legal entities in Kuwait. Under Kuwaiti law, a joint venture is defined as a commercial partnership formed between two or more entities provided that the
partnering is to be confined to the relationship between those entities – it is not valid with regard to third parties. Also, the legal relationship of third parties to the joint venture is restricted to the partner with whom the third party has contracted. Joint ventures do, however, provide the parties wishing to do business in Kuwait with more flexibility in their arrangements than if those parties were to establish a company in Kuwait. Joint ventures are not required to be registered.

D. BUSINESS OPTIONS UNDER KDIPA
KDIPA is an initiative of Kuwait government to attract foreign investment in almost all the sectors of the economy with only limited exclusions. It offers up to 100% of foreign ownership, taxes and customs duty exemptions for foreign companies intending to set up a business presence in Kuwait. Eligibility for this option is dependent upon meeting various criteria, such as transfer of technology to Kuwait, job creation and training of national labour and utilization of local products and services.

Commercial agencies in Kuwait
As an alternative to establishing a joint trading firm in Kuwait, foreign persons or entities may legally do business in Kuwait under the auspices of a local Kuwaiti agent. The agent must be a Kuwaiti national or a Kuwaiti company which is ultimately owned in its majority by Kuwaiti nationals. The agent must hold a valid commercial license permitting them to engage in the business activities which the foreign principal wishes to undertake. In order to properly formalize the agency, there must be an agency agreement which is registered with the Agency Department at Kuwait Ministry of Commerce and Industry. Once the agency is registered, the Kuwaiti agent will be entitled to certain compensation rights in the event of unjust termination or even the natural expiration and non-renewal of the agency agreement.

Employment in Kuwait
In order for a non-GCC national to work in Kuwait, his employer must obtain a work permit on his behalf from the Ministry of Social Affairs and Labour. Kuwait has strict laws and regulations for the protection of employees. Under Kuwait Labour Law, expatriate employees who complete their employment contracts are entitled to end of service payments.

Real property in Kuwait
Foreign ownership of real property is generally prohibited in Kuwait. However Decree No. 1 of 2004 allows GCC nationals to own real property in Kuwait as long as Kuwaiti nationals are entitled to own real property in the relevant GCC country.

Tax in Kuwait
There is no income tax on individuals in Kuwait, however, non-GCC body corporates carrying on trade or business in Kuwait are liable for income tax. Authorities interpret the term “body corporate” as meaning a legal entity which is separate and distinct from that of its individual owners. Taxable activities include, but are not limited to: activities or works carried out wholly or partially within Kuwait; collection of franchise royalties; profit resulting from industrial or commercial activity in Kuwait; income from money lending to Kuwaiti citizens or companies; and capital gains (except for gains made on assets listed on the KSE).

Tax is assessed on the non-GCC body corporate’s gross income (after deduction of allowed expenses and costs) whether distributed or not. The income tax rate is a flat rate of 15%. Gross income. Allowed expenses and costs shall be determined according to the International Financial Reporting Standards.

Non-GCC body corporates operating within Kuwait must obtain a tax identification number prior to commencement of business and submit annual audited tax returns to the Department of Income Tax.

General
This guide only highlights material legal issues which DLA Piper believes are relevant to potential foreign investors in Kuwait. It does not constitute legal advice nor does it purport to address every legal issue or summarise all current rules, structures or regulatory frameworks.

The regulatory system in Kuwait is dynamic and changes frequently in application and interpretation. This guide is based on material available to DLA Piper as at 1 August 2016 and will require amendment from time to time as legislation is amended or new policies or interpretations are adopted by government authorities, courts and/or regulators. We therefore recommend that you obtain legal advice and liaise with the relevant government authorities on how the law applies to foreign investors in respect of a particular investment or business activity at the relevant time.

We hope that you find this guide to be a useful overview of the high level legal issues associated with doing business in Kuwait. Please do not hesitate to contact us if you have any queries in relation to the material set out in this guide or if you require specific legal advice in respect of an establishment.
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The information contained in this briefing does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.