Kuwait

Chamber of commerce:
Kuwait Chamber of Commerce and Industry
PO Box 775
13008 Safat
Kuwait
Tel: +965 80 180 5580
Fax: +965 224 29 051
Email: kcci@kcci.org.kw
Web:www.kuwaitchamber.org.kw

Professional body:
Kuwait Bar Association
North Shuwaikh
Area 7, Street 71
PO Box 2365
Kuwait
Tel: +965 483 5596
Fax: +965 483 5593
Email: admin@kbar.org

World Bank statistics 2011:
GDP
$176 billion

Population total
2.89 million

Income level
High income: non-OECD

Evolution of Kuwait corporate governance – the rise of fairness opinions

Jeffrey Greene & Adel Abrahim
ASAR – Al Ruwayeh & Partners
Kuwait

In recent years, the Kuwait legislature has seemingly been working in overdrive, enacting a spate of new laws, many having the potential to fundamentally alter the country's legal landscape. Such new pronouncements run the gamut of subject matter, including a comprehensive re-write of the private sector labour law in 2009, a build operate and transfer (BOT) law promulgated in 2008, as well as a law effected in 2010 concerning regulation of securities activities and the establishment of a capital markets authority (CML). As to matters of corporate governance, the CML has been heralded as a much needed step in the evolution of Kuwait's insular and opaque capital markets to becoming more open and transparent.

However, despite two years having gone by since its passage, many provisions in the CML remain untested. Therefore, the practical implications of certain provisions is somewhat unclear. This is particularly the case with respect to the law's takeover provisions. Some of this is a result of the significant delay between the CML's enactment and the subsequent creation of the capital markets authority (CMA) – i.e., the regulatory body tasked with overseeing, implementing and enforcing the CML. Moreover, because Kuwait's capital markets continue to develop, many of the complex and sophisticated transactions needed to fully vet a law as expansive as the CML, simply do not arise often. One such element of the CML that has yet to be tested, but is likely to become more prominent is the concept of fairness opinions.

This article focuses on those corporate governance provisions of the CML dealing with the obligation of a target company's board of directors to obtain a 'consultation' from a licensed investment advisor in connection with a 'takeover' transaction, and how such 'consultation' compares to what is commonly referred to as a 'fairness opinion' in other jurisdictions.

Traditional fairness opinions

In the 1980s, courts in certain Western jurisdictions became concerned with the process by which boards of directors recommended takeover transactions to their shareholders and whether they sought independent advice as to valuation and fairness of the proposed transaction. As a consequence of a number of key court rulings, boards welcomed fairness opinions as a means of offering demonstrative evidence of their having satisfied their fiduciary duty of care.

A traditional fairness opinion is generally provided by an independent financial advisor (typically an investment bank) and delivered to a corporation's board of directors in connection with a corporate change of control transaction (although not limited solely to such context). The standard Western-type fairness opinion consists primarily of disclaimers and a discussion of the valuation methodology underlying the opinion. Generally, the actual 'opinion' itself is not much more than a single sentence to the effect that the "transaction is fair from a financial point of view."

The recipient of a traditional fairness opinion should be aware that it is not an appraisal. As such, the opinion does not specify a set value or determine a specific price, but rather is the opinion/assessment of the financial advisor of whether a specified transaction is within a valuation range that is considered financially fair and reasonable.

Kuwait (CML) approach

The CML does not require a 'fairness opinion' per se. Indeed, that term is not used in the law. However, the substantive undertakings imposed on the boards of both the target and the bidder requires that they obtain independent advice concerning the transaction and that they present such advice to their shareholders. This is obviously consistent with the traditional fairness opinion concept.

However, as alluded to above, unlike those jurisdictions in which the notion of fairness opinions evolved over time (as a common law judicial creation), the requirements under the CML are codified as a matter of law, and are thus mandatory when a party submits a 'takeover bid' for a listed Kuwait shareholding company.

Article 247 of the CML Executive Regulations (Bylaws) defines a 'takeover bid' as:

Any bid, attempt or request to take possession of the following: (i) all of a company's listed shares or all shares of one or more classes within a listed company, excluding the shares already owned by the bidder, their subsidiaries or their allies on the date of the bid; (ii) All shares remaining in the target company whose purchase has already been requested from the company's other shareholders after the bidder, their subsidiaries or their allies have acquired a majority share in the company, granting them control over the board of directors.

Once a takeover bid has been made, Article 254 of the Bylaws requires that the boards of directors of the bidder and the target company "must provide their shareholders with information and advice to enable them to reach a sound decision on whether to accept or reject a bid." However, the form in which such advice must be presented is not spelled out.

Although the form of the assessment is not expressed, guidance as to whom the source should be is given pursuant to Article 255 of the Bylaws, which states that "[the board] must obtain independent specialist advice from an investment consultant...." In support of this, a recent CMA pronouncement (Instructions No. 1 of 2012), elaborates on this 'information and advice' requirement and further explains who is qualified to provide it. Namely, the 'concerned parties' (i.e. board of directors) must "obtain an independent and specialised consultation on the proposal from an independent and unrelated investment consultant licensed by the CMA, and inform the shareholders of such consultation." Pursuant to Article 253 of the Bylaws, the CMA considers 'independence' to mean that investment advisors to either party must be "without a personal interest in the bid".

Additional requirements apply when a party already having effective control of the company proffers the takeover bid. Under those circumstances Article 285(6) of the Bylaws require that "[a] report showing the opinion of the members of the Board of Directors regarding the proposed bid, whether it is fair and reasonable to the other shareholders other than the party with effective control, and whether the members of the Board of Directors have reached this opinion without being influenced in any way by the party with effective control".

Article 255 of the Bylaws further provides that the shareholders must peruse the investment advisor's findings in detail. Note – this is a very different circumstance from the standard fairness opinion model in that "perusal" would seem to suggest that the advice rendered by the investment advisor must be detailed. Accordingly, a single sentence that the deal is "fair from a financial point of view" will not likely pass muster with the CMA. In that sense, it is not clear what the market will offer as its response to the CML requirements. It is possible that the Kuwait model may have elements more consistent with an appraisal than would be the case in traditional 'fairness opinion' context.

Conclusion

The CML offers considerable promise for increasing the transparency in the Kuwait capital markets. The requirement that shareholders be provided independent advice in takeover transactions is a positive step in the evolution of Kuwait's corporate governance and its capital markets.

Financial and corporate

Recommended firms
Tier 1
ASAR – Al Ruwayeh & Partners
Bader Saud Al-Bader & Partners
Tier 2
Abdullah Kh Al-Ayoub & Associates
International Counsel Bureau
Tier 3
Al Tamimi & Company
Anwar Al-Bisher & Partners
Mashora Advocates and Legal Consultants
Mishare M Al-Ghazali & Partners
Salman Duaij Al-Sabah Law Office

Other notable firms
Taher Group Law Firm

Context and trends

With the first PPP (public-private partnerships) projects to utilise the new process under the PTB (partnership Technical Bureau), which was implemented in 2008, progressing well and the major restructurings in Kuwait's investment sector near resolution, there is positive momentum in the country and a steady flow of mandates for law firms. "A lot of the new work is still the government sponsored PPP projects, that is the biggest generator of deals," says one partner. The Ras Al Zour IWPP (independent water and power project) is the closest to being finalised. "The IWPP is almost there all the way down to contract negotiation, but I don't think the contracts have been signed just yet. I expect by the end of the year that will be closed at least with the government," explains one lawyer. Currently there are "five or six" further transactions in the pipeline under the government's $140 billion five-year programme including metro, rail and energy projects

Outside of project's restructuring work is the mainstay for firms in Kuwait. The impact of the financial crisis was most pronounced in Kuwait's dense and heavily over-leveraged investment sector and ever since the cracks began to appear in 2008 and these investment companies were unable to balance the books lawyers have had a steady flow of deals. However, while this variety of work shows no signs of abating, the most prominent cases: TID (The Investment Dar) and Global Investment House, are nearing closure. "The TID continues to generate work for lawyers because people are trading in their debt. They have split the claims into three groups A, B and C. The As were individuals, they were paid off straight away, the B claims were non financial institutions and C's were financial institutions. There's been some settlement in kind," explains one lawyer. Global Investment House is in its second restructuring which will be a more permanent solution. "The first was more an amend and extend which was insufficient. Now it's a more wholesale restructuring. They are going to give the creditors the non core assets while retaining the fee business and inviting the creditors back in to take a 70% portion of it," notes one lawyer, adding "The seed of all this was four years ago but things are still being billed so it's been a slow process. The positive development is permanent resolutions are nearing."

The demise of the investment sector has stunted activity on the financing side. "A lot of the loans we did see were in the investment company sector and that's still a sector that's not healthy in Kuwait so there's no appetite to make loans into it," say one partner.

In terms of the transactions that do make it to market it's a familiar story, Kuwait's banks have adopted the cautious approach being seen the world over and are only lending to the blue chip companies. "Some of the big established corporates are doing things, the KIPCOs, the GICs, but the smaller loans, the $100 million to corporate, we don't see a lot of, especially on the cross border side," says one lawyer, blaming "the lack of quality credit".

Difficulties in securing finance are leading local businesses to the bond market. "In the last year we've done six bond issuances. It was something that went dead in 2008 - the public money lending to Kuwaiti companies, but it's picked up now." These were the first bond issued since the Capital Markets Authority was introduced. The oldest stock exchange in Gulf, which is only second to Saudi Arabia's in term of size, was the last to introduce legislation conferring powers to an independent regulator. Kuwait's self-regulated stock exchange has been struggling with a dearth in new listings amid speculation there had been a large degree of market manipulation prior to the crisis. Attempting to assuage investors concerns and encourage people to list, a Capital Markets Authority was introduced in April 2011. The new regulators monitor everything from take-over bids to listing compliance and protection of minority shareholders. Lawyers, however remain unconvinced, seeing the new measures as more for appearances sake than to actually address the issues facing the exchange. "I don't think the affect will be very significant because as usual the main problems are being danced around. What we need in this country is proper insider dealing law and an anti-corruption similar to the UK Anti-Bribery Act," says one lawyer, further explaining: "Gentlemen of the same tribe and the same business persuasion meet once a week to talk and to exchange news and that makes it very difficult to police. It's so well established, it goes back years in Kuwaiti society. If you started introducing snoopers I don't think that would work. It seems to me that if you want to introduce transparency and stability, you need to go the whole hog, not just introduce an authority that can do everything but may do nothing."

In practice the main complaint with the CMA is that it's been very slow to get transactions over the line. "I don't want to be unkind but it was basically: 'Here's a law, go organise yourself.' The people that were hired at the CMA had a huge job - they basically had to build everything from scratch and that's a difficult thing to do. I'm not criticising the CMA but it is a slow process right now but with more experience these guys will get faster."

Lawyers say some of the issues with the CMA are indicative of a more general problems within government. "People are afraid of doing things, they are afraid of making decision. Even though we have the CMA in some respect we feel the CMA is afraid to make any decision for fear of offending the wrong person," remarks one partner. Kuwait's governement comprises a parliamentary constitutional monarchy governed by the Emir and an elected parliament has been blighted by infighting for some time, seeing 10 different cabinets and six parliamentary dissolutions since February 2006. "We're even having debates about whether the last parliament is still effective. It's been like that for so many years but it's on what a country has to go through to even out democracy," notes one partner. The latest issues arose over the last parliamentary election, which saw the opposition win in February only to be deposed in June after the election was ruled void. This constant fluctuation makes it "very hard to get a law passed or to get implemented," notes one lawyer. "We have a competition law, I think it was passed in 2007 and its still waiting for its implementation and competition board to be established. It's not that they never try it just gets bogged down."M&A has never been a particularly active area in Kuwait with most transactions being of the small to mid cap variety, but as the deals aren't dependent on leverage it has been unencumbered by the financial crisis. "M&A in Kuwait isn't bank finance driven so if someone has some cash – and it's not a poor country they still have cash – and there are opportunities, investments are made," notes one partner.

ASAR – Al Ruwayeh & Partners

Kuwait's largest firm, ASAR – Al Ruwayeh & Partners, has an outstanding reputation in the local market and continues to be of the country's leading firms. "I find them to be the best in town. They have protected us on more than one front. They have a team which is expert on both international and Arabic law," is one client's reference. Another praises the firm for its lawyer's business orientated approach; "They don't only take care of legal issues but they also advise on the commercial issues." Another observes that: "When it comes to the international touch then ASAR is one the best firms in the country."

Of the firm's partners Hossam Abdullah, who heads the international practice, Sam Habbas and Rob Little are its leading figures. "If I were to become a prime minister I would hire him as my legal consult. With Sam the response time is excellent," says one client of Habbas. Abdullah is rated for being "technically a very sound guy" with "excellent local knowledge in Kuwaiti law".

Deals

Currently the firm is involved in one of the country's most eagerly anticipated projects, the construction of the Al Zour independent water and power producer (IWPP). Not only the first IWPP to be built in Kuwait, Al Zour is also the pilot project for the government's new process for awarding PPP (public-private partnerships) tenders. Rob Little, Ibrahim Sattout and Akusa Batwala are part of a consortium of advisors counselling the Kuwait Ministry of Electricity and Water (MEW) and the Partnerships Technical Bureau (PTB) on $1.8 billion deal.

With many investment companies struggling to keep up with their repayments, restructuring remains a common instruction for lawyers in Kuwait and the firm has been involved in a number of transactions in this space. One substantial example was its advice to Global Investment House and its financial advisors, Evercore International, on the restructuring of $1.7 billion in debt. On the creditor side, ASAR is assisting the committee holding Aayan Leasing and Investment Company's debt, which exceeds $1 billion.

Another active practice for the firm has been capital markets with the major deals falling into the debt category. One such matter saw ASAR act for KIPCO Asset Management Company and Watani Investment Company, the joint lead managers on the KD800 million ($286 million) bond for Kuwait Projects Company, which closed in January 2012. Additionally, the firm is advising Alghanim Industries, the originator and obligor of a $100 million securitisation *sukuk* (Islamic bond) MTN Programme, the first from a Kuwait originator.

Leading lawyers

Hossam Abdullah
Sam Habbas
Rob Little

Abdullah Kh Al-Ayoub & Associates

Well regarded locally, Abdullah Kh Al-Ayoub & Associates is divided into an Arabic law division and an international practice, which are led by Mohammed Hassan Omar Ali and Prateek Shete respectively.

One client describes the experience of working with the firm as "super" and "a delight". The client pinpoints Shete as the key reason for this, describing him as: "Very client friendly, very commercial, very nice and a good lawyer."

Deals

Recommended for its oil and gas experience, the firm has added to its tally of deals in the sector over the last 12 months. Acting on behalf of a Norwegian company in the industry with a subsidiary in Kuwait, Prateek Shete, Anupama Nair and Hussein Hassan are advising on the acquisition of a target based in Bahrain. Elsewhere, on the corporate side the firm has advised on two notable deals for Indian clients. One deal concerned the acquisition of a controlling stake in a company involved in infrastructure while the other, for a separate client, involved setting up a joint venture with a financial services business.

The firm has also had its share of restructuring work. One role came when advising a Kuwaiti conglomerate on restructuring its subsidiaries. Additionally, it represented a Singapore-based fund with interests in a Kuwait company undertaking a restructuring.

Leading lawyers

Mohammed Hassan Omar Ali
Prateek Shete

Al Tamimi & Company

While still a relatively nascent practice, Al Tamimi & Company has lawyers with a wealth of experience in the local market most notably practice head Alex Saleh. Formerly managing partner at DLA Piper's Kuwait office, Saleh launched regional player Tamimi's local offering. "Alex has been in the Kuwaiti market for some time. It is a growing firm, I would certainly see them in the rankings," notes one peer. Another notes: "They should be on the list. Alex is a nice guy, he's a good talker."

In recognition of a strong 12 months work and some positive feedback the firm joins tier three.

Deals

A highlight for Al Tamimi in the last 12 months has been its work on a deal which represents a number of landmarks for the country as both its first PPP (public-private partnership) and first IWPP (independent water and power project) projects. Practice head Alex Saleh, Philip Kotsis and Ramy Shabana have been advising four of the five companies, comprising the consortium of lenders and investors involved in the $1.8 billion Al Zour IWPP.

Another substantial project that the firm is advising on is the establishment of an early production facility for Kuwait Oil to separate water, gas and sulphur from crude oil. Saleh and Kotsis are representing the financial advisor of Khorafi National, HSBC, which has been awarded the $1 billion contract for the construction, maintenance and ownership of the facilities.

Islamic finance and restructuring are the other two types of transactions the firm is most commonly mandated on. An example of its work in the former was its advice to Boubyan Bank, the lead arranger of a *murabaha* agreement worth $130 million for the Boubyan Petrochemicals Company, which also included a conventional tranche. In regards to the former, the largest transaction the firm advised on was involved in was the KFIC's (Kuwait Finance & Investment Company) three tranche - one Kuwaiti Dinar conventional tranche, one Islamic financing tranche and one bondholder – restructuring. The $440 million deal, the KFIC's second debt restructuring, was closed in March 2012.

Leading lawyers

Alex Saleh

Taher Group Law Firm

Domestic firm Taher Group Law Firm covers the full range of financial and corporate work.

One client was entirely satisfied with its work, saying: "I have a lot of regard and faith working with the firm. Whenever we meet they are very punctual, they study the issues before we meet so they are very precise and to the point, and they also give us very good legal opinion."

Deals

The firm's largest deal in the last 12 months was advising on the $150 million contract for a company to staff a joint venture between Saudi Aramco and Kuwait Gulf Oil. Taher Alkhateeb represented the firm's client ASMACS, an Indian outsourcing company, on the deal.

Other corporate transactions for the firm include advising SAVECO, a new retail venture. The firm has been advising the company on lease agreements and contracts with partners, in addition to plans to acquire retail space. Additionally, it is advising the Commercial Real Estate Company on acquiring the Salmiya Park through a BOT (build operate transfer) project via a public tender for $8.9 million.

Leading lawyer

Taher Al-Khateeb

Abdullah Kh. Al-Ayoub & Associates

Souk Al Kabir Building, Block "B", 9th Floor
Fahad Al-Salem Street, P.O. Box 1714,
13018 Safat, Kuwait.

Tel: +965 22464321
Fax: +965 22434711
Email: alayoub@al-ayoub.org / p.shete@al-ayoub.org
Web: www.al-ayoub.org

Contact Persons:
Abdullah Kh. Al-Ayoub, Managing Partner
Prateek Shete, Head – International Law Division

Areas of practice:

Arbitration; Agency & Distribution; Banking and Finance; Corporate Finance; Dispute Resolution; Employment Relations; Intellectual Property; Islamic Finance; Mergers & Acquisitions; Project Finance; Privatization & PPPs; Oil & Gas; Real Estate; Maritime & Shipping

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Al Oula Law
Adel AbdulHadi & Partners

Office Nos. 11/12 3rd Floor
Plaza Complex
Hawally
P. O. Box 16107
35851 Qadsiya
Kuwait

Tel: +965 2265 0630 / 2265 0640
Fax: +965 2265 0610
Email: info@aloulalaw.com
Web: www.aloulalaw.com

Partners:
Mr. Adel Abdulhadi (Founder & Managing Partner)
Mr. Fayez Al Dousari (Senior Partner)
Ms. Sanabil Jafar (Director of Int'l Law Dept)

Firm profile:

Al Oula Law is a full service law firm comprising of committed, deeply knowledgeable and well informed attorneys and legal consultants with extensive hands-on experience to handle all kinds of legal matters. Our goal is to provide timely, effective, excellent and affordable legal services to clients putting their interest first at all times. It is our philosophy to develop personal working relationships with clients while ensuring that their legal needs are attended to. Our attorneys and consultants understand the intricacies of international legal practice and are able to blend international practice with local practice thus proffering qualitative and bespoke legal advice. Our commitment to our clients, our focus on integrity and excellence, and a deep understanding of the law continue to guide our practice.

ASAR

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(In association with Stephenson Harwood, London)

IFLR Law Firm of the Year

Gate 1, 3rd Floor, Salhiya Commercial Complex
P. O. Box 447, Safat 13005
Kuwait

Tel: +965 224 00061 or 229 22700
Fax: +965 224 00064
Email: asar@asarlegal.com
Web: www.asarlegal.com

Contacts: Sam Habbas/Ahmed Barakat/Rob Little

Offices: Bahrain

Associated Offices: London, Paris, Hong Kong, Shanghai, Guangzhou, Piraeus, Singapore

Languages:

English, Arabic, French, Portuguese, Urdu, Afrikaans, Swahili, Lusoga, Luganda, Tagalog, Punjabi.

Areas of practice:

Corporate and Commercial; International Banking and Finance; Islamic Finance; Franchising; Construction; Securities; Taxation; Commercial Litigation & Arbitration; Capital Markets; Intellectual Property; Restructuring; Government Contracts; Foreign Investment; Real Estate; Insurance; Maritime & Shipping; International Trade; Oil and Gas; Projects and Privatization; Agencies & Distributorships; Private Client Services; Offset; Mergers & Acquisition.

P.O.BOX # 2532, Kuwait City

Tel: +965 22552590
Hotline: +965 1803020
Fax: +965 22552595
Email: support@tahergrp.org
Web: www.tahergrp.org
Facebook: Taher Group Law Firm
Twitter: @Tagkuw

Contact person:
Mr. Taher K. Al-Khateeb

Firm profile:

Taher Group Law Firm is Kuwait's oldest boutique law firm. Founded in 1969, the firm specializes in Company Law, Joint Ventures, PPP's, Banking and Litigation.