

THE STATE OF KUWAIT

A LOOK AT THE KUWAITI REGULATORY SCHEME

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Abdullah Alharoun is a Legal Counsel at the International Counsel Bureau (ICB), having joined the firm in August 2013. During his as yet young career, Alharoun has worked and studied in four different countries, giving him a multi-disciplinary educational and professional background. Since coming on board at ICB, Alharoun has worked with a number of major local and multinational corporations across a multitude of sectors and industries, offering legal counsel and advice on various aspects of Corporate Commercial law, in addition to the practices of Energy, Banking and Finance, Regulatory, Capital Markets and Privatization and Projects.



The State of Kuwait is no exception when it comes to embracing Islamic finance. In this article we focus on the State of Kuwait's regulatory framework, examining in some detail the State's regulations concerning Islamic banking, finance and investment services. The State of Kuwait has been a pioneer within the region with respect to the Islamic banking industry, and currently the country's banking industry is projected to be taken over by Islamic banks. Several banks have converted fully into Shari'ah compliant institutions or, as is the case with the Commercial Bank of Kuwait, are in the process of doing so (by the end of the year in this particular case). The former shows the country's commitment to the sector and the demand thereof from the retail and corporate end-users. Furthermore, Kuwait has around 106 investment funds, 54 of which are established pursuant to Shari'ah. Overall, the total assets under Islamic financial institutions in the country are valued at KD 22.3 billion (which translates to 37.7% of the market).

KUWAIT BANKING LAW

The law regulating Islamic banking and finance activities in Kuwait is housed within Law No. 32 of 1968 concerning Currency, the Central Bank of Kuwait, and the Organization of Banking Business, with the recent amendment on 25th May 2003 which introduces a section regulating "the Islamic Banks". In a nutshell, Islamic banks are defined as banks that are Shari'ah compliant, providing financing services through instruments and contractual structures such as "Murabaha, Musharaka and Mudaraba" (as termed by the law), within the frameworks put forth by the Central

Bank of Kuwait. The law also stipulates that "it shall be formed in each Islamic Bank, an independent committee for Shari'ah compliance control... the committee shall submit an annual statement to the said bank's general meeting which shall be included in the bank's annual report containing the committee's opinion regarding the conformity of the bank's work with the Islamic Shari'ah regulations". One of the main issues that needs to be addressed from a practical perspective is that outside the licensing process that a bank has to go through to be certified as an Islamic bank, the application of Shari'ah principles – which differentiate such banks from conventional banks – can vary according to the permissibility granted by the committee and put forth by the "in-house expert". This means that one bank could be applying and adhering to either a narrow or broad construction of the Shari'ah according to the activist, albeit soundly substantiated, opinions. This creates uncertainty in application and unfair advantages gained due to the lack of standardized rules.

CAPITAL MARKETS AUTHORITY LAW

The above point has been considered by the Capital Market's Authority (or the "CMA" as it is known locally), which has jurisdiction over all "securities activities" including Islamic collective investment schemes, and publically traded Shari'ah compliant companies. The CMA bylaws provide for the establishment of a "Shari'ah Control Board", acting as a reference with respect to the CMA rules regarding all "Islamic securities activities". The Shari'ah Control Board, amongst other things, provides its opinion with



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respect to the Shari'ah compliance of new Islamic products and financial instruments offered in the capital markets. Additionally the board advises on the rules, regulations, and criteria that must be adhered to by Shari'ah licensed persons, and proposes the forms/templates of contracts and financial instruments to operate according to the Shari'ah principles and investment indices specific to publically traded



companies and collective investment schemes. The law further requires Shari'ah compliant listed companies to have an external audit bureau and internal audit unit. This is to ensure that all companies are operating within a leveled playing field and no company is gaining any advantage by selectively adhering to the rules through its internal control mechanisms.

THE DEVELOPMENT PLAN

The Law No. 9 of 2010 concerning the Economic Development Plan (the "Development Plan") has also tacitly, within the confines of its explanatory memo, encouraged the use of Islamic finance products. For instance the Kuwait Health Assurance Company, which has been established in the last quarter of 2014 as a PPP project pursuant to the Development Plan and projected to be the largest IPO in the history of Kuwait (valued at KD230 million), is required by its articles of association to operate within the Islamic Shari'ah principles.

CHALLENGES AND RECOMMENDATIONS

1. Notwithstanding the regulatory framework Kuwait has, there must be a robust and smooth application of the above regulations and specific rules pertaining to the issuance of specific instruments in the capital markets, such as Sukuk, must be well-defined.
2. This is shown by the Kuwaiti market's averseness to the issuance of private Sukuk (none have been issued in

2014 and only USD 43.75 million's worth in 2013).

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Shari'ah may not always have access to the cheapest funding opportunities, and therefore must make sure that no onerous approvals, long documentary cycles and inefficient applications of the rules are instituted.

4. It is recommended that the Shari'ah Control Board, or any proposed equivalent controllers, houses members that are competent and well-versed in financial and business matters with the training in the same, in order to understand the context and the application of the rules.
5. Therefore, it is recommended to introduce further legal certainty in the law applicable to Islamic banks and other institutions operating pursuant to the Shari'ah; a unified reference (i.e. a Code) of the core principles should be adopted by the regulators. This is not dissimilar to the standards and guidelines issued by the Islamic Financial Services Board.
6. Both Kuwait and the region as a whole should strive to be the thought leaders on Islamic finance, introducing innovative instruments that rival their conventional counterparts while genuinely adhering to Islamic principles.
7. Unlike several western jurisdictions (such as the US and the UK) which have professional law firms within which designated practice groups are dedicated exclusively to Islamic banking and associated financial transactions, Kuwait does not have specialized firms or professionals specifically practicing and advising on such transactions.

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