

NEW LEGISLATION LIFTS CONTROLS

ON IRAQI COMMERCIAL AGENTS

by

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Iraq's Revolutionary Command Council, in its 20 April 1989 session, issued an important law which amends the Iraqi Commercial Agency & Intermediation Law, Law No. 11 of 1983 (MEED 16:6:89). Most significantly, the amendments repeal the strict prohibitions on commercial agents and intermediaries in connection with sales to Iraqi government ministries and other departments.

These amendments, contained in Law No. 45 (1989), were published on 1 May in the Official Gazette No. 3253. The changes will increase the opportunities for commercial agents and intermediaries to participate and assist in national economic development and trade, and reflects the Iraqi government's efforts to encourage private sector commercial activity.

Until administrative interpretation and practice develops, analysis of these changes will be preliminary. Nonetheless, it appears that several legal issues, absent from Iraqi law for many years, will now require review, and certain prior legal advice on the use of commercial agents and intermediaries will no longer be applicable.

Despite these amendments, however, parties subject to U.S. anti-boycott regulations may still have difficulty in appointing a registered Iraqi commercial agent or intermediary.

Commercial agency activities

Article 5 of Law No. 11 has previously provided that the Trade Minister shall classify commercial agents and intermediaries according to the specific commodities with which they deal; a license would then be granted and the commercial agent or intermediary registered on that basis. The recent amendments change this provision to enable commercial agents and intermediaries to deal in all types of goods and commodities, rather than being limited to any particular classification.

According to Article 12, a commercial agent or intermediary must maintain a special book in which to record, inter alia, the commission due inside and outside Iraq, the sums transferred to the commercial agent or intermediary through authorized banks, and the names and addresses of all relevant parties. In addition, the commercial agent or intermediary must present a statement of its activities (including details on commissions due and received) to the registrar each year. The registrar may also inspect and audit

the books and records of the commercial agent or intermediary. The recent amendments add a fourth paragraph to the above-mentioned Article 12, as follows:

"The commercial agent or intermediary may import commodity requirements at a rate of 30 percent of his accrued commissions, and return the balance of the commissions to the country.

The commercial agent or intermediary may import productive machinery and plant at a rate of 100 percent of his accrued commissions."

The latter amendment is consistent with other Iraqi laws in the past few years, which have liberalized the rules applicable to private sector importation and foreign currency transactions, in part to reduce the strain on government foreign currency reserves.

Removal of prohibitions

The primary rules governing the use of commercial agents and intermediaries have been contained in Law No. 11, and instructions issued by the Trade Minister and published on 11 August 1986 in the Official Gazette No. 3110. Certain civil code and commercial code provisions also have particular relevance to commercial agencies.

Prior to the recent amendments, Article 10 of Law No. 11 prohibited the use of commercial agents or intermediaries in contracts with Iraqi government and socialist sector departments, and popular and professional federations and organizations. Instead, such departments, federations and organizations were required to conclude their import contracts by dealing directly with foreign manufacturers or suppliers, approved branches of such companies in Iraq, or through Iraq's commercial offices abroad.

Under Article 11 of the same law, if such an Iraqi department, federation or organization in a case of "extreme necessity" needed to deal through a commercial agent or intermediary, it was required to obtain prior permission, on a case-by-case basis, from the Trade Minister.

Under Article 16 of that law, responsible officials of such Iraqi departments, federations and organizations could have been sentenced to long prison terms, involving life imprisonment, for violating the requirements of Article 10 or 11.

The recent amendments repeal Articles 10, 11 and 16 of Law No. 11, dramatically eliminating some of the most significant restrictions of the Iraqi Commercial Agency & Intermediation Law. Reportedly, under earlier liberalization of economic regulations, use of intermediaries and agents was allowed for state factories

and enterprises in the industry ministries, to import raw materials (MEED 15:8:87).

These changes also eliminate some of the uncertainty which had existed as to the penalties applicable to foreign companies directly or indirectly involved in a violation of those prior restrictions of the Iraqi Commercial Agency & Intermediation Law. Certain earlier Iraqi laws and regulations, issued before enactment of Law No. 11, had provided that a foreign company was to be blacklisted for using a commercial agent or intermediary without permission when dealing with Iraqi government entities.

Due to the absence of any explicit penalty against foreign companies in Law No. 11, the US Interests Section in Baghdad had concluded that Law No. 11 "does not impose any requirements or obligations on foreign companies." Included with the Interests Section's analysis was a "question and answer" attachment, which included: "...can a foreign manufacturer or supplier be penalized for dealing through an unauthorized agent?" It added: "Law No. 11 penalizes commercial agents for operating against its provisions, as it provides for penal action for government officials dealing with agents or intermediaries. However, it does not provide for action against a foreign manufacturer or supplier dealing through an agent."

At least some Iraqi lawyers took issue with the latter conclusion and, until the 1986 instructions were issued, there was a strong argument that blacklisting penalties might still be expressly applicable to foreign companies. Moreover, Article 4 of the 1986 instructions gives the Trade Minister discretion to decide on the appropriate action to take in the event of any violation of Law No. 11.

In practice we are unaware of the imposition of any fines, imprisonment or blacklisting on a foreign company based solely on a violation of the Iraqi Commercial Agency & Intermediation Law. Apparently there have been instances when a prohibited commercial agent's fee or commission was deducted from the contract price paid by an Iraqi government purchaser to a foreign company, but the precise basis for such a penalty is unclear.

In the past 10 years, there have been several publicized Iraqi court cases involving alleged local agents or intermediaries, resulting in death sentences for Iraqi nationals (MEED 27:2:88). However, we understand that such punishments were based on violations of the provisions of Iraqi bribery, forgery and espionage laws, rather than on violations of the Commercial Agency & Intermediation Law.

Qualifications and registration

The recent amendments make some nominal increases to the fees required for issuance and renewal of the license and the registration of a commercial agency or intermediary. More importantly, the recent amendments will focus greater attention on the Iraqi law requirements concerning the qualifications and registration of local commercial agents and intermediaries.

Law No. 11, Article 4, requires, inter alia, that an Iraqi commercial agent or intermediary satisfy the following conditions:

- An individual must be an Iraqi national and reside in Iraq and a company must be registered in Iraq and have all its shares owned by Iraqi nationals
- Individuals must be at least 25 years old
- The commercial agent or intermediary must be legally competent and must be known to be of good character and reputation
- The commercial agent or intermediary must have a place of business in Iraq, have a trade name which is registered in the commercial register, and be registered with an Iraqi chamber of commerce
- The commercial agent or intermediary must work full-time in that capacity.

Article 5 requires all authorized and qualified commercial agents and intermediaries to apply to the Registrar of Agency & Intermediation for a license. A commercial agent or intermediary must request renewal of this license within 60 days of the beginning of every (Gregorian) calendar year.

Moreover, Article 9 requires an "authorized agent" to submit an application to the same registrar to register its "agencies of foreign companies and establishments." Law No. 11 does not elaborate on the information required for such registration. Under the 1986 instructions, a commercial agent or intermediary is required to submit, at the time of registering its agency or intermediation, documentation containing the following information:

- An authorization, from the foreign principal, that the agent or intermediary is that party's representative, and that it is authorized by and has that party's trust in Iraq
- The rate of the commission, salaries or fixed fees the agent receives from that party, as well as any other fees it receives, whether or not as a party in the transaction

□ The effective duration of the contract.

In addition, the principal has been required to supply answers to the "seven questions," essentially serving as an affidavit of the principal's compliance with the Arab Boycott of Israel. As discussed below, this boycott-related requirement raises significant issues for foreign companies subject to U.S. anti-boycott regulations.

Boycott issues

The recent amendments to the Iraqi Commercial Agency & Intermediation Law apparently remove significant restrictions on the role of commercial agents or intermediaries in sales to Iraqi government ministries, departments and other bodies. However, they do not address another concern relevant to companies which might otherwise wish to use agents but which are subject to the U.S. anti-boycott regulations. As mentioned, the foreign company has been required to supply responses to the seven questions when a commercial agency or intermediation agreement is presented to the Iraqi authorities for registration -- amounting to an affidavit of the foreign company's compliance with the Arab Boycott of Israel. A company subject to U.S. anti-boycott laws is prohibited from supplying such responses, subject to extremely limited and narrow exceptions.

At times, Iraq has been one of the most difficult countries in which to avoid conflicts between local Arab Boycott regulations and the U.S. anti-boycott laws. There have been indications of flexibility on the part of some Iraqi authorities, at least on a case-by-case basis during the Gulf war. We are unaware, however, of any instance where the boycott affidavit has not been required in connection with the registration of an Iraqi commercial agency. Unless Iraq takes an approach similar to the other major Arab countries -- which do not generally require such an affidavit in these circumstances -- manufacturers and suppliers subject to the U.S. anti-boycott regulations will face a distinct disadvantage in the promotion and distribution of their products in the Iraqi market.

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