

Client Alert: Enforcement Scenarios for Iraq's New Commercial Agency Law

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Iraq's new Commercial Agency Law ("the New CAL") comes into force on 13 November 2018.¹ The New CAL could substantially disrupt existing foreign investment for Iraqi import businesses, if it is fully enforced, but how its provisions will be implemented remains to be seen. Our original Client Alert summarizing the New CAL was published on 6th December 2017 and is available [here](#). This Client Alert outlines six possible enforcement scenarios and how foreign investors should plan mitigation.

New Restrictions on Foreign-Investment Importers

Prior to the New CAL, Iraqi companies wholly-owned by foreign investors could freely import products and services into Iraq, subject to holding the required approvals and licenses. However, two articles in the New CAL may drastically change Iraq's import business landscape:

- Article 4(2): If the applicant for a [Commercial Agency] license is a company [...] this company must be an Iraqi company and its capital should be one hundred percent (100%) owned by Iraqi citizens [...].
- Article 13: It is prohibited to import commodities, goods, products or to provide foreign companies services by the Ministry of Trade – The Iraqi General Company for Exhibitions & Commercial Services and the Ministry of Finance – General Customs Authority, except through an authorized Commercial Agent, for which the commercial agency contract is registered in his name on behalf of that company for the Commercial Agent territory in Iraq.

If implemented as written, the practical implications are twofold:

1. Any existing Iraqi company with any non-Iraqi shareholders that currently imports and distributes goods and services into Iraq may have to restructure its shareholding; and
2. Foreign companies will be required to engage a registered commercial agent that is either an Iraqi national or a company wholly-owned by Iraqi nationals.

Possible Enforcement Scenarios

Whilst monitoring the New CAL's implementation, we have seen no clear move towards enforcement. Some government agencies or state-owned companies have sporadically stated

¹ The Iraqi Parliament approved Law No. 79 of 2017 in August 2017. The President of the Republic of Iraq confirmed the Law on 1 November 2017, and the Gazette published it on 13 November 2017.

that importers must register, but these statements have often been expressly or quietly withdrawn once the practical ramifications of enforcing the requirement are understood.

Going forward, we believe that there are six reasonably foreseeable scenarios pertaining to how the New CAL's Article 4(2) and Article 13 may be implemented.

Scenario 1: No change in actual import and customs clearing practice.

It is possible that the New CAL will not be enforced. At present, this approach appears to be a reasonable possibility, given the Iraqi government's other priorities and the inevitable practical challenges that arise with enforcing commercial agency registration or approval of all imports (as explained below).

Scenario 2: A commercial agent is required, and only one registered commercial agent is permitted.

The New CAL makes no mention of exclusivity. If Article 13 is applied literally, then only registered commercial agents will be allowed to import products into Iraq, and that only one agent will be allowed to be registered, as is the case in many other Arab countries.

In this scenario, any company that is not a registered commercial agency will be prohibited from importing products, while potentially complicates business and may require existing foreign investment import businesses to structure their business through an Iraqi nominee shareholder. However, while initially challenging, this change could be beneficial in the long-term for companies that seek to block parallel importers and other unauthorized distributors.

This scenario seems unlikely, at least in the short term, because it would involve the complete overhaul of the Iraqi import market. It is, however, not inconceivable in the long term, and is comparable to Iran's recently implemented importer registration system.

Scenario 3: A commercial agent is required, but multiple registered commercial agents are permitted.

Because the New CAL does not mention exclusivity, it is possible that the literal application of Article 13 will result is a situation where a registered commercial agent will be required to import goods, but the authorities will allow multiple commercial agents to be registered.

Scenario 4: Any party can import, but approval (or "non-objection") is required by a registered commercial agent for a non-agent to import (e.g., "Passive Blocking").

Previously, in many Arab countries that have implemented commercial agency laws, the approval (or "non-objection") of a registered commercial agent was required for the importation of goods by an importer that was not a commercial agent. When these countries gained membership to the World Trade Organization (WTO), this Passive Blocking system was abolished. Unlike these countries, Iraq is not a member of the WTO, and if it adopted Passive Blocking, it would not violate the organisation's rules regarding import restrictions.

Countries in the region that changed their laws include:

- Oman: Article 5 of the Oman Commercial Agency Law (Royal Decree No. 26 of 1977) read in part that: “The Minister of Commerce & Industry may ban the import of goods that are the subject of an agency if the principal cancels the agency from his side without acceptable grounds.” After joining the WTO in November 2000, Oman did not enforce this provision, and it repealed this part of Article 5 with the amendment to the Commercial Agency Law in 2014 (Royal Decree No. 34 of 2014).
- Qatar: Article 17(A) of the Qatar Commercial Agency Law (Law No. 8 of 2002) provides that: “If the principal terminates the agency or rejects to renew it without any good reason, the Competent Department may resolve to prevent the import of the commodities or services, the subject matter of the agency.” Qatar passed this provision after joining the WTO in 1996, and it was intermittently enforced until Law No. 2 of 2016 amended the law and removed Article 17(A).
- Kuwait: The new Commercial Agency Law in Kuwait (Law No. 13 of 2016) expressly states that commercial agents cannot block the import of goods by parallel importers. This provision appears to be a result of the WTO’s requirements regarding trade rules.

Scenario 5: No change in the import of unregistered goods, but a commercial agent can petition authorities to block unauthorized imports or demand commission from unauthorized importers (e.g., “Proactive Blocking”).

Another possible scenario is that the authorities will not take action against unauthorized imports, but where a commercial agent is registered, that commercial agent can seek to enforce Article 13 by petitioning the authorities to block imports or demand a commission.

Under a Proactive Blocking system, existing importers with ties to foreign investment businesses would not have to take any action, but restructuring and formalizing their Iraqi business would be desirable in order to block competitors and unauthorized importers.

Scenario 6: Inconsistent enforcement.

It is very likely that the customs authority will apply the applicable provisions of the New CAL inconsistently and that implementation will evolve over time. Determining a countermeasure to this approach would prove challenging.

Kurdistan Region

The Iraqi Kurdistan Parliament is not currently reviewing the New CAL, and no immediate action is required for businesses operating in the Kurdistan Region and importing into Kurdistan directly, such as from Turkey. However, this may change, since while the management of customs is a local issue, customs law itself is subject to federal law.

Companies operating only in Kurdistan should be aware of the issues raised by the New CAL and be cognizant of the possible need to comply with some of its restrictions.

An English translation of the New CAL is available upon request.

If you would like more information about this topic, please contact us.

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