Bahrain Liberalizes Commercial Agency Law

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In April 1998, Bahrain enacted substantial amendments to its commercial agency law, liberalizing a number of provisions and abolishing the statutory requirement of exclusivity for local commercial agents. Contained in Decree Law No. 8 (1998), the amendments became effective on April 1, 1998, the date of the decree's publication in the official gazette.

The amendments, which overshadow the much-heralded but less significant overhaul of the Bahraini commercial agency law in 1992, should have an important effect on future Bahraini commercial agency arrangements, particularly on the resolution of disputes arising from their termination or nonrenewal.

The 1998 amendments reflect the government's continuing efforts to allow for a more equitable relationship between principals and commercial agents,[1] and to open the market for competition among local traders, thus expanding options for consumers.[2]

Bahrain's first commercial agency law, Decree Law No. 23 (1975), contained so-called "dealer protections" and remained essentially unchanged for many years. Then in 1992, after years of groundwork by the Ministry of Commerce to overcome the objections of established Bahraini traders, the government enacted Decree Law No. 10 (1992). The 1992 Law was heralded as a significant liberalization of Bahrain's dealer-protection rules, but appeared inadequate to many observers. In mid-1995, Bahraini government officials began a campaign to overcome the traditional business community's resistance to changing some economic rules, and in April this year, the 1998 amendments were enacted.

This article first reviews Bahrain's traditional commercial agency law, with its "dealer protections" in favor of local merchants, and then examines the 1992 Law and the 1998 amendments liberalizing the law.

I. Early Dealer-Protection Law

Over 20 years ago, Bahrain enacted a commercial agency law, Decree Law No. 23 (1975), which governed the qualification, registration and operation of local commercial agencies.[3] As noted, the 1975 Law remained essentially unchanged for many years. (Although Articles 165-174 of the Bahrain Commercial Law (Decree Law No. 7/1987) essentially replaced Articles 1-10 of the 1975 Law, the substance of those provisions was scarcely altered.[4])

Article 1 of the 1975 Law (Commercial Law Article 165) defined "commercial agency" as, among other things,

> . . . any person who represents the principal in the distribution or sale of, or dealings with, commodities and products for profit or commission, provided that the commercial agent shall possess the sole right of distribution or sale of the said commodity or product to the exclusion of others . . . .

This broad definition, confirmed over the years by Bahraini practice, includes both commercial agents representing a principal in exchange for commission and distributors who purchase and then resell products for their own account.[5]

Article 11 of the 1975 Law required that all commercial agencies in Bahrain be registered in the Commercial Agencies Register at the Ministry of Commerce (the Ministry).[6] Under the 1975 Law, individuals and corporations had to meet the following requirements in order to register:

- *individual* registrants had to be Bahraini nationals who had not been convicted of any economic offenses (such as hoarding, black-marketing, profiteering), and not adjudicated bankrupt unless subsequently discharged.[7]

- *corporate* registrants had to be established (and with their main office) in Bahrain, authorized to engage in the commercial activities contemplated in the registration application,[8] and with at least 51-percent Bahraini ownership.[9]

This nationality requirement forced at least two major all-British companies with long histories in Bahrain—Gray Mackenzie & Company Ltd. and African and Eastern (Near East) Ltd.—to restructure their operations.[10]

In addition, Article 13 of the 1975 Law required every commercial agent to have a direct relationship with the principal or the principal's "official local agent" (for example, a regional distributor or an export agent).[11]

The 1975 Law was not the first commercial agency law in the Arabian Gulf to impose qualification and registration requirements upon local commercial agents. In the early 1960s, for example, Kuwait and Saudi Arabia had enacted similar requirements.[12] However, the 1975 Law was the first such Arabian Gulf law to also contain so-called dealer protections. It was influenced by similar legislation enacted eight years earlier (1967) in Lebanon. Bahrain's 1975 Law, however, substantially expanded upon the dealer protections available under the earlier Lebanese law. Some of the more prominent dealer protections under the 1975 Law related to: exclusivity, commission for parallel imports, compensation for termination/nonrenewal, resolution of disputes provisions, an agent's ability to block registration of a successor, and to block imports.

Exclusivity

Under the 1975 Law, a qualified commercial agent would be deemed exclusive as to the territory and products covered, regardless of any contrary provision in the parties' agreement.[13] Under Article 1, for example, exclusivity was part of the literal definition of "commercial agency" (quoted above). Moreover, Article 4 of the 1975 Law (Commercial Law Article 168) emphasized this statutory obligation of exclusivity: "A principal shall not engage the services of more than one agent in a specific area of activity for the type of commercial business covered by the agency."

Commission for Parallel Imports

Article 6 of the 1975 Law (Commercial Law Article 170) confirmed a qualified commercial agent's right to exclusivity by entitling a commercial agent, unless otherwise agreed, to a commission or profit from every transaction in Bahrain within the commercial agent's area of activity, even if the transaction was attributable to another's efforts. Thus, Bahraini law would permit the parties to agree that for so-called parallel imports, the registered commercial agent would receive a reduced commission or fee.

In practice, however, the Bahraini commercial agent wielded even greater power under the 1975 Law: Bahraini customs authorities could seize so-called parallel imports at the behest of a registered commercial agent, and they could refuse to allow the products into Bahrain unless the local commercial agent agreed in writing.[14]

Compensation for Termination/Nonrenewal

Under Article 8 of the 1975 Law (Commercial Law Article 172), a qualified commercial agent was entitled to claim compensation or indemnities for its foreign principal's "unjustified" termination or nonrenewal of the commercial agency, regardless of any contrary provision in the parties' agreement.[15]

The 1975 Law made certain distinctions between termination and nonrenewal, as well as between definite- and indefinite-term agreements. For example, if a principal refused to renew a *fixed-term* agreement, the Bahraini distributor's claim for damages had to be supported by proof that its business activities resulted in successful promotion and distribution of the principal's products, and that, as a result of the nonrenewal, the distributor was prevented from earning profit from such market success.

Resolution of Disputes

Although the 1975 Law did not explicitly prohibit foreign governing law clauses in Bahraini commercial agency agreements, a 1976 Minister of Commerce circular was issued to that effect:

> We would like to inform you that certain commercial agency contracts provide that the contract is made subject to the laws of a foreign country instead of the laws of Bahrain . . . . As these agencies are registered in Bahrain in accordance with [the 1975 Law], it is requested that Bahraini agents, while drafting their agency contracts, pay attention to the requirements that such contracts are made subject to Bahraini law only . . . . [16]

In addition, the Ministry would usually refuse to register commercial agency agreements containing foreign governing law provisions.[17]

Similarly, the 1975 Law did not explicitly prohibit foreign dispute resolution clauses in Bahraini commercial agency agreements, although the Minister of Commerce circular also addressed this matter:

> . . . In the case of Arbitrations the regulations of ICC should be followed and the agreement should provide that all disputes arising out of the contract should be resolved and finalised according to the Rules of Arbitrations of the International Chamber of Commerce by an Arbitrator or Arbitrators appointed under the Rules.[18]

In addition, Article 8 of the 1975 Law (Commercial Law Article 172) stated that "the court" shall assess the compensation a principal must pay for failing to renew a fixed-term commercial agency agreement. Bahraini courts and administrative officials apparently interpreted this text to give exclusive jurisdiction to Bahraini courts.

Blocking Registration of Successor

In addition to a Bahraini commercial agent's right to claim compensation upon a principal's unjustified termination or nonrenewal, a commercial agent was also entitled to some administrative protections under the 1975 Law.

For example, under Article 17(1) of the 1975 Law, Bahraini government authorities were to refuse to register a "replacement" commercial agent's agreement if there was a dispute pending between the principal and the former (qualified) commercial agent. The Ministry normally did not deregister such a commercial agent unless it received:

- a letter from the terminated commercial agent, authorizing such deregistration;
- a court order instructing the Ministry to deregister it; or
- satisfactory evidence that any compensation ordered by the court to be paid to the terminated commercial agent had in fact been paid—in other words, that the court's judgment had been satisfied.

Article 20 of the 1975 Law imposed some other transitional requirements on the principal and the successor commercial agent:

> An agent to whom a commercial agency has been transferred shall be obliged to purchase from the former agent any goods held by the former agent covered by the agency at their market price. The agent and the principal shall be jointly and severally liable for all the undertakings made by the former agent *vis-à-vis* third parties and arising out of the agency agreement.[19]

Blocking Imports

According to Article 17(3) of the 1975 Law, if a principal unilaterally terminated its agreement with a qualified Bahraini commercial agent, the Minister was entitled to ban the importation of the goods which were the subject of the terminated commercial agency.[20]

Moreover, as a matter of practice under the 1975 Law, the Bahraini customs department often required a no-objection letter from the registered commercial agent before permitting imports of the relevant products by other parties.

II. Recent Liberalization

As the Bahraini market matured, and other Arabian Gulf markets developed, Bahraini government officials began to focus not just on the advantages, but also on the disadvantages of its dealer protection law.

On the one hand, large multinational manufacturers usually have stronger bargaining power than their Bahraini commercial agents—a situation perhaps remedied by the latter's statutory right to claim compensation for unjustified termination or nonrenewal; also, the wide administrative power held by the Ministry often proved to be very effective in convincing foreign manufacturers to negotiate settlements with their Bahraini commercial agents. On the other hand, the government was aware that such dealer protection laws inherently impede the free market.

For example, making exclusivity a statutory obligation in favor of a local commercial agent in essence grants the latter a monopoly in the Bahraini market on the import and sale of a particular product.

As noted, after years of groundwork by the Ministry to overcome the objections of established Bahraini traders, Bahraini Decree Law No. 10 (1992) was enacted. Issued on July 14, 1992, and effective November 1, 1992, the 1992 Law explicitly repealed the 1975 Law and "any provision which conflicts with the provisions" of the 1992 Law, thereby implicitly also repealing Articles 164-174 of the Commercial Law.[21]

The 1992 Law was heralded as a significant liberalization of Bahrain's dealer-protection rules, but it retained the earlier statutory obligation of exclusivity in favor of a local commercial agent, as well as most of the administrative protections that had existed under the prior Bahraini law. Many observers quickly realized that the 1992 Law had not gone far enough to significantly liberalize marketing and distribution in Bahrain.

In recent years, the Bahraini government has looked increasingly to the private sector as a source of long-term local economic growth.[22] In mid-1995, a new Minister of Commerce took office and, together with the Prime Minister and other relevant government officials, began a campaign to overcome the traditional business community's resistance to changing some economic rules. The 1992 Law appeared inadequate to some observers, in part because the changes contained in that law did not significantly alter the system of sole agencies, whereby a Bahraini merchant had a form

of monopoly or preference over the import of goods covered by its agreement. In this context, the Bahraini government enacted the recent (1998) amendments to the 1992 Law.

The 1992 Law and 1998 amendments did not significantly change any of the qualification requirements that existed under prior Bahraini commercial agency law. For example, local commercial agents must still register their agreements with the Ministry, and Bahraini law still requires registrants to be Bahraini nationals (or companies majority owned by Bahraini nationals).

Article 15 of the 1992 Law retained the prior general requirement (Article 13 of the 1975 Law) that a Bahraini commercial agent have a direct relationship with the principal. However, the 1992 Law expanded on the exceptions to this general rule: the Ministry would register a commercial agency agreement with the principal being either an affiliate of the manufacturer or an unaffiliated third party—so long as the product manufacturer had authorized that principal to sign commercial agency agreements for such products in the Middle East.[23]

The 1998 amendments further broaden the scope of the exceptions: the Ministry may permit the registration of a commercial agency agreement between a qualified local commercial agent and a company, export house or *any other party* that is authorized to execute a commercial agency agreement for the products or manufactured goods.[24] As discussed below, this liberalization is consistent with the elimination of statutory exclusivity for commercial agents, as well as with the reduction of some of the other Bahraini dealer protections that had existed under prior law.

Exclusivity

Article 5 of the 1992 Law retained the provision (which first appeared in the 1975 Law) that a principal was not permitted to use the services of more than one agent in a specific area of activity for the same commercial activity covered by the agency (quoted above).

For many years, foreign principals sought to ameliorate the effect of this provision by appointing different commercial agents for different *classes* of products, such as a vehicle manufacturer appointing one commercial agent for automobiles, another for buses, and another for trucks.[25] In recent years, moreover, Bahraini law and practice permitted principals to appoint different commercial agents for different *brands* within the same general class of product.

Such a strategy may now be less critical, as the 1998 amendments permit a principal to appoint multiple commercial agents for identical products. The 1998 amendments accomplish this significant change by canceling Article 5 of the 1992 Law in its entirety, and revising Article 1 to eliminate the deemed exclusivity contained in the definition of "commercial agency." (Before this revision, Article 1 of the 1992 Law had contained the proviso: ". . . the commercial agent (and not any third party) shall have an exclusive right to distribute the product, for profit or commission . . . .")

Despite these changes, the 1998 amendments do not prohibit contractual parties from agreeing to negotiate an exclusive commercial agency appointment. Thus, the 1998 amendments do not seem designed to overturn express provisions in existing contracts whereby the principal has granted the local commercial agent exclusive rights to market and promote relevant products. Similarly, the 1998 amendments do not seem designed to prevent future agreements whereby a principal grants such exclusive rights to the local commercial agent.

In accordance with the 1998 amendments, however, if a commercial agency agreement executed after April 1998 is silent as to the commercial agent's exclusivity, the Bahraini courts and government departments should not presume exclusivity. The opposite presumption would have been the rule prior to the 1998 amendments.

More difficult questions may arise, however, if the parties have a pre-April 1998 agreement that is silent on the issue of exclusivity, or states that the commercial agent's rights shall be "in accordance with applicable law," and/or has operated for many years as *de facto* exclusive given prior Bahraini law and practices.

Commission for Parallel Imports

The impetus for the 1992 Law came, in part, from widespread customer complaints about the Bahraini market, such as of shortages of certain medicines at pharmacies, and the unavailability of spare parts for some consumer products—despite the requirement in the 1975 Law that registered Bahraini commercial agents be responsible for providing sufficient spare parts for products sold.

As a result, the 1992 Law weakened (somewhat) a Bahraini commercial agent's right to exclusivity by permitting third-party imports of spare parts that did not originate from the principal but were covered by existing commercial agency agreements—so long as the existing commercial agent received appropriate commission.[26] The 1992 Law provided that in cases where products originating from the principal were imported by third parties for the purpose of wholesale/retail distribution and sale, the commercial agent shall "refer to the principal" to obtain the mutually agreed commission; where products were imported for a consumer's personal use (or for reexport), the commercial agent was *not* entitled to any commission.

The 1998 amendments further reduce a local commercial agent's rights to what some businessmen call a "commission override" for parallel imports. As now amended, Article 7 of the 1992 Law provides:

- The local commercial agent is entitled to commission for goods and products (the article had previously read simply "spare parts") imported by third parties for purposes of trade, when those imports do not originate from the principal—a decree from the Minister of Commerce shall determine the applicable rate, not to exceed five percent of the price of the goods or products;

- The commercial agent may be entitled to commission (depending on the agreement between the principal and the commercial agent) for goods and products imported by third parties for purposes of trade, when those imports originate from the principal;[27]

- The commercial agent is not entitled to commission for products imported by a consumer for such consumer's personal use, or for materials or products imported with the intent of reexport, or materials or products exempt from customs duties and used in manufacturing (this latter situation was not explicitly addressed in the 1992 Law); and

- In accordance with the procedures and conditions to be issued by decree, the Minister of Commerce may exempt some goods and products from the commission payable to the commercial agent—if the public interest so requires (this situation similarly was not addressed in the 1992 Law).

Compensation for Termination/Nonrenewal

The 1992 Law and the 1998 amendments did not significantly change the legal rules applicable to compensating a Bahraini commercial agent for a principal's unjustified termination or nonrenewal of their relationship.

Thus, in the case of fixed-term commercial agency agreements, Article 8(c) of the 1992 Law confirms that a qualified commercial agent may claim compensation upon the principal's termination of a fixed-term agreement before the end of its term. Moreover, in the event such a fixed-term agreement expires, Article 8(d) entitles a qualified commercial agent to claim compensation from the principal if the agent's efforts resulted in obvious success (in promoting the products or gaining customers) and the agent was prevented from profiting from such success due to the principal's failure to renew the arrangement.[28]

In the case of indefinite-term commercial agency agreements, Article 9© of the 1992 Law confirmed that a qualified commercial agent may claim compensation upon the principal's termination if the commercial agent's efforts resulted in obvious success (in promoting the products or gaining customers) and the agent was prevented from profiting from such success due to the principal's decision to terminate the arrangement. This provision has been retained as Article 9(b) following the 1998 amendments and is textually similar to the provision (Article 8(d)) entitling a commercial agent to claim compensation in the event a foreign principal fails to renew a fixed-term commercial agency.

The nature and extent of compensation or indemnities that would actually be awarded to a commercial agent in any particular case has been very difficult to estimate, since it would depend on an *ad hoc* decision of the court in light of all the circumstances it believed relevant—including volume of sales, market share, estimated lost profit, purchases of inventory, other costs incurred, and length of the relationship.

Some legal advisers suggest that a commercial agency agreement should contain a ceiling on such compensation, or an agreed liquidated amount of damages to avoid unreasonable claims by the local commercial agent.[29] A commercial agency agreement with such a liquidated damages clause will probably be accepted for registration with the Ministry. In addition, under Bahraini contract law, the foreign principal and its Bahraini commercial agent are generally bound by the terms of their agreement.

However, the Bahraini courts may disregard any contractual clause that conflicts with Bahraini law or "public policy," which could include a Bahraini commercial agent's right to claim termination/nonrenewal compensation in accordance with the 1992 Law. In at least some circumstances, therefore, a Bahraini court might ignore a liquidated damages clause if a qualified Bahraini distributor establishes that termination resulted in damages that substantially exceed the liquidated amount.[30]

In any event, the commercial agent must substantiate its claim for termination or nonrenewal compensation. Bahraini law entitles a qualified commercial agent to claim compensation for termination or nonrenewal, and such right cannot be waived. However, Bahraini law does not automatically entitle the commercial agent to such compensation without regard to the surrounding circumstances.

Resolution of Disputes

Neither the 1992 Law nor the 1998 amendments explicitly prohibit foreign governing law clauses in Bahraini commercial agency agreements. To our knowledge, the Minister of Commerce has not retracted the 1976 circular (see above, page 10) that advocated Bahraini governing law clauses in such agreements. However, Article 2(1) of the 1987 Commercial Law, regulating sources of law applicable to obligations, suggests that a choice of governing law clause in a commercial agreement, if mutually agreed upon by the contracting parties, should be recognized by the courts, unless their agreement conflicts with mandatory legal provisions.[31]

When the Bahraini courts take jurisdiction over a matter, they have wide discretion to decide the "mandatory legal provisions" of Bahraini law that apply to disputes. Even if the Bahraini courts permit an agreement to be interpreted under a foreign law, they are likely to apply Bahraini law at least to certain dealer protection issues (such as termination or nonrenewal compensation claims).

In connection with the resolution of commercial agency disputes, the 1992 Law and 1998 amendments recognize the growing importance of arbitration, although a distinction is made between resolution of disputes involving definite- and indefinite-term commercial agency agreements.

- ***Disputes Involving Definite-Term Agreements***

Neither the 1992 Law nor the 1998 amendments explicitly address how disputes involving definite-term agreements are to be resolved—for example, whether by local or foreign courts or arbitral tribunals. The Bahraini courts may be expected to enforce a choice of foreign arbitration clause in a commercial agency agreement, given the provisions of the 1992 Law which favor arbitration of disputes.[32] (In 1994, Bahrain enacted an International Commercial Arbitration Law, Law No. 9 (1994),[33] and also recently became a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.)

However, based on prior practice, we believe that the Bahraini courts may not uphold a choice of foreign judicial dispute resolution clause (as distinct from a foreign arbitration clause). Similarly, a foreign court decision regarding a Bahraini commercial agency dispute is not likely to be enforced by the Bahraini courts. If Bahraini courts do decide to recognize a foreign judicial judgment, that judgment would be enforced on the same conditions as are laid down in the foreign jurisdiction's law for enforcing Bahraini judgments (reciprocity). In addition, the following conditions would need to be met:

- that the Bahraini court has no jurisdiction to hear the case in respect of which the court judgment or order was issued and that the court in the foreign country had jurisdiction in accordance with the rules of transnational jurisdiction set down in that foreign country's laws;

- that the litigants to the case in respect of which the judgment was issued were duly summoned and properly represented;

- that the court judgment or order has become final in accordance with the law applicable to the court that issued it; and

- that the judgment is not inconsistent with any judgment or order previously issued by the Bahraini courts, and does not infringe Bahrain's *ordre public* or morals.[34]

- ***Disputes Involving Indefinite-Term Agreements***

Article 9(a) of the 1992 Law required disputes over the termination of indefinite-term agreements to be resolved by arbitration. The 1992 Law established a special arbitration committee in the Ministry and expressly prohibited judicial authorities from hearing any dispute pertaining to the termination of an indefinite-term Bahraini commercial agency agreement.[35]

The statutory establishment of this arbitration committee was intended to reflect the Ministry's then-current practice in resolving disputes over the termination of indefinite-term commercial agencies. Nonetheless, the arbitration procedures were somewhat lengthy and complicated.[36] In fact, many observers found those arbitration procedures to be too difficult and burdensome for the Bahraini market.

Fortunately, the 1998 amendments eliminate all references to any special Ministerial arbitration committees or proceedings—implicitly repealing these relatively complicated arbitration provisions resulting from the 1992 Law. Most observers believe that as a result, termination of indefinite-term commercial agency agreements will be simpler and easier.

Blocking Registration of Successor

Unlike the 1975 Law, the 1992 Law distinguished between the deregistration of definite- and indefinite-term commercial agency agreements. Although the 1998 amendments have made some additional changes, the distinction between definite- and indefinite-term agreements continues to be followed.

- ***Definite-Term Agreements***

Article 8 of the 1992 Law applies to definite-term agreements; it states that

- the commercial agency shall terminate upon the expiry of its term, and the Ministry is empowered to deregister that agency or register it in the name of the foreign principal's successor commercial agent; and

- if either contractual party wishes to terminate the agreement before expiry of its fixed term, both contractual parties must agree before the agency will be deregistered (or registered in another party's name).

As noted (see footnote 28), a number of disputes have arisen from the misperception that a fixed-term commercial agency agreement *and* its registration at the Ministry will automatically terminate on the agreement's expiry date. In practice, what has happened is that the principal, upon expiration of the agreement, applies to the Ministry to strike off the agency registration. Although the Ministry is empowered to strike off the registration, it is not required to do so.

In the past, the Ministry has usually written to the commercial agent who, in virtually all cases, objects to his agency being struck off. Considerable correspondence and negotiation occupying several months may have followed before the Ministry made a decision as to whether or not to strike off the agency. In the absence of agreement by the agent, the Ministry has often decided not to strike off the commercial agent's registration. In that case, it was often left to the parties to negotiate terms on which the agent would agree to sign the essential form applying for the cancellation of his agency registration. Despite this prior practice, however, the Ministry has more recently been somewhat less reluctant to strike off expired definite-term commercial agency agreements.

The 1998 amendments have not changed the applicable rules. However, in light of the 1998 amendments liberalizing rules for striking off indefinite-term agreements (discussed below), we would not be surprised if, in the future, the Ministry exhibits even less reluctance to striking off expired fixed-term agreements.

- ***Indefinite-Term Agreements***

The 1992 Law did not explicitly address deregistration of indefinite-term agreements. Prior to the 1998 amendments, deregistration of indefinite-term agreements was dependent on either

- agreement between the contractual parties, and a formal application by the commercial agent to deregister; or

- the order of the execution court in executing an arbitral award to the effect that the commercial agency had been validly terminated or that all conditions of termination (such as payment of compensation) had been satisfied.

As a result of the 1998 amendments, Article 9(a) of the Bahraini commercial agency law is more explicit on this issue:

> A competent committee, formed by decree of the Minister of Commerce, shall have authority to cancel the registration of an indefinite-term agency, whether upon the agreement of the contractual parties or the request of either party to cancel it despite the objection of the other party. The aggrieved party shall have the right to claim compensation for the harm which it has suffered.

Thus, Article 9(a) appears to distinguish between the deregistration of a terminated commercial agency and the commercial agent's claim for termination compensation. As discussed above, the 1998 amendments have not changed a terminated commercial agent's right to claim compensation, but they delink administrative matters relating to termination—such as registration (and entry of goods, discussed below)—from the question of compensation.[37]

Blocking Imports

Article 12 of the 1992 Law narrowed the circumstances in which the Ministry could ban the importation of products encompassed by a commercial agency agreement.

For example, a foreign principal's products should not be prevented entry merely because a terminated Bahraini commercial agent was seeking damages through court or arbitral proceedings. Under the 1992 Law, however, the Ministry could ban entry of a foreign principal's products if the principal terminated an indefinite-term commercial agency agreement without the commercial agent's consent; if a resulting dispute

was not referred to a special Ministerial arbitration committee; or if the Bahraini public interest so required.

We are aware of circumstances in the past when goods were allowed entry although a dispute between agent and principal was not yet resolved. In other instances, the Ministry prevented entry of such goods. Our experience indicates that the Ministry's decision was on a case-by-case basis. Moreover, in the event of such a dispute, and pending the outcome of the trial or arbitration, a commercial agent could apply to the court for an injunction to stop entry of goods or registration of a new agent pending resolution of the dispute. It was then left to the court to accept or refuse such application.

The 1998 amendments seem to reduce the scope for blocking entry of a foreign principal's products into Bahrain. Amended Article 12 now provides:

> Institution of legal proceedings, recourse to arbitration or the like shall not prevent entry into the country (in accordance with the provisions of this law) of the goods or property, or the continuation of the services, covered by the agency. The Minister of Commerce may ban entry of the goods or property, or the continuation of the services, if public interest so requires.

In general, under prior practice, and even absent termination litigation, the Bahraini customs department often required a no-objection letter from the registered commercial agent before permitting imports of the relevant products by third parties. At least to date, this practice continues. Therefore, the liberalization in third-party "parallel imports" intended by the 1998 amendments may be more apparent than real.

However, in at least some recent cases where the customs department has prevented clearance of goods in the absence of a no-objection letter, the Ministry has declared itself willing to intervene and authorize clearance of goods (on the basis that the registered commercial agent must seek his commission from the principal, not simply block entry of the goods).

Long-Term Prospects

The 1998 amendments have made some significant changes to the literal provisions of the Bahraini commercial agency law. For example, elimination of statutory "deemed exclusivity" is a significant liberalization in Bahraini commercial agency law, allowing principals to appoint multiple nonexclusive local agents for the same products.

In practice, however, the effects of the 1998 amendments might be less dramatic, particularly in the short term. For example, the Bahraini government's administrative practices may not immediately change. Similarly, elimination of statutory "deemed exclusivity" probably will not affect the terms of an existing Bahraini commercial agency agreement—for example, one in which the parties may have already contractually agreed to product exclusivity. Moreover, one would expect

that in future negotiations, the larger Bahraini merchants will press hard for contractual exclusivity, particularly given the relatively small size of the Bahraini domestic market for some products.

Most importantly, a qualified Bahraini commercial agent remains entitled to claim compensation in the event of a principal's unjustified termination or nonrenewal. However, such compensation claims will now be complicated by the fact that a principal may appoint more than one Bahraini commercial agent for the same products.[38] For example, a terminated *nonexclusive* Bahraini commercial agent might have greater difficulty demonstrating that its efforts (and not those of other nonexclusive agents in the market) led to increased sales of and customer loyalty to the foreign manufacturer's product.

Despite the 1998 amendments, other provisions of the Bahraini commercial agency law continue to present traps for the unwary. In the past, for example, some disagreements arose concerning the question of whether a commercial agency could be passed by inheritance, or was an asset capable of sale.[39] Article 24(b) of the 1992 Law addressed this issue:

> If the agent dies and his heirs succeed him or if the company or firm through which the agent carries on his agency business activities is sold or if it is merged with another company or firm, the agency shall remain in being and in effect towards the principal if the heirs, buyer, or the merged company or firm accept the continuation of the agency . . . .

This provision was not changed by the 1998 amendments.[40]

What about the long term? While the 1992 Law had shortcomings, Bahrain persisted in its efforts to open its domestic markets to greater competition and to make them freer. And the 1998 amendments demonstrate Bahrain's continuing commitment to move in that direction.

When Bahrain enacted special dealer-protection legislation in 1975, it was the first of the Arabian Gulf countries to do so; perhaps it will again be in the vanguard of the Arabian Gulf, reappraising and revising its commercial agency legislation to move its market economy into the next century.

E N D N O T E S

[1] Bahraini Minister of Commerce and Agriculture Habib Ahmed Kassim, "Innovative Marketing Policies Pay Dividends,"*Bahrain Country Report* (1994), p. 2.

[2] *See* comments of Bahraini Minister of Commerce Ali Saleh Abdullah Al-Saleh, *Middle East Economic Digest* (March 27, 1998), p. 18.

[3] Articles 154-209 of the Bahraini Contract Act (1969) contain rules applicable to "agency." Article 154 broadly defines an agent as "a person employed to do any act for another or to represent another in dealings with third persons," a definition that at least literally would seem applicable to the customary commercial agency arrangements (but perhaps not distributorships) currently used by multinational manufacturers.

In practice, however, the agency provisions of the Contract Act are not often considered applicable to such commercial agencies. One reason for this practice may be that the Contract Act's provisions on agency are primarily designed for "true" agency arrangements, where the agent has authority to legally bind its principal. *See* Article 196 of the Contract Act. *See generally* Saleh, "Bahrain," in *Commercial Agency and Distributorship in the Arab Middle East* (1995), at page 8-1 footnote 1.

A second reason may be that local lawyers refer less often to English common law rules as Bahrain evolves into a more typical Arab civil law jurisdiction. The Bahraini Contract Act (essentially the old Indian contract act) is based on English common law principles. It was initially prepared in English, for use in England's extraterritorial jurisdiction within Bahrain, then translated into Arabic for use within the Amir's jurisdiction. *See* Ballantyne, *Commercial Law in the Arab Middle East: The Gulf States* (1986), p. 81.

[4] In addition, Articles 175-93 of the Commercial Law regulate "commission agency," which is defined as a contract whereby an agent undertakes to do in his own name a legal act for the account of the principal in consideration for remuneration. Commission agencies are not commonly used in Bahrain. *See*, *e.g.*, Hatem Zu'bi and Stokes, "Agency and Distribution Agreements in Bahrain," in 3 *International Agency and Distribution Agreements* (1991), p. Bah-6.

[5]"[W]hatever legal expressions are used for the definition of commercial agents, administrative practice, particularly with regard to qualifications, mandatory registration and compensation of the commercial agent upon termination, treats a distributorship agreement as a commercial agency agreement for purposes of [the Bahraini commercial agency law]." Saleh, *supra* note 3, at pp. 8-3 and 8-4.

[6]According to Article 14 of Decree Law No. 23 (1975) (the 1975 Law), an unregistered commercial agent would not be recognized, and no legal action arising out of an unregistered commercial agency would be heard. This general rule continues to be applicable in Bahrain, in accordance with Article 13(b) of Decree Law No. 10 (1992) (the 1992 Law).

[7]The 1975 Law, Article 12(1).

[8]For example, if an agent's business registration (commercial registration) authorizes trade in "electrical goods," that would be interpreted to include any goods related to electricity, whether generators, household appliances, cables or other such products. *See* Zu'bi and Stokes, *supra* note 4, at p. Bah-10.

[9]In practice under the 1975 Law, the Ministry of Commerce (the Ministry) usually refused to register a commercial agent unless the agent was a Bahraini citizen or a company wholly owned by Bahrainis. *See*, *e.g.*, Zu'bi and Stokes, *supra* note 4, at p. Bah-9. Unless wholly owned by Bahrainis, a company trying to act as a local commercial agent also frequently encountered other administrative and practical difficulties.

[10]*See*, *e.g.*, U.S. Embassy telex, "Subject: Amiri Decree on Commercial Agencies" (October 23, 1975), copy on file in Law Offices of Howard L. Stovall, Chicago. *See also* "Bahrainisation or Bust," *The Economist* (December 13, 1980), pp. 46 and 51.

[11]In practice, the phrase "official local agent" meant the agent formally appointed in accordance with a binding and unexpired agreement to negotiate and enter into contracts with the Bahraini commercial agent or distributor—even though the official local agent was not the manufacturer. Despite this provision, the Ministry normally insisted that (I) the manufacturer also be made a party to the commercial agency agreement, (ii) the manufacturer provide a letter of authority in favor of the official local agent, or (iii) the agreement between the manufacturer and the official local agent expressly contain authorization for the latter to appoint a Bahraini commercial agent. The official local agent would normally be a company located in the home country of the manufacturer. For example, it has been quite common for certain manufacturers (such as Japanese car makers) to appoint a company to handle its sales and distribution overseas.

[12]Kuwaiti Law No. 36 (1964) and Saudi Arabian Royal Decree No. M/11 (1962). Both laws currently remain in effect, albeit with subsequent amendments. *See also* Abu Dhabi Law No. 11 (1973), now superseded by U.A.E. Federal Law No. 18 (1981) as amended. Although distinguishable from laws drafted specifically to regulate commercial agents, the 1961 Kuwaiti Commercial Code, Law No. 2 (1961), contained some provisions (Arts. 591-596) applicable to "contract agents" which reflected embryonic dealer protections.

[13]In Bahrain, the Ministry would usually refuse to register a commercial agency agreement that was expressly nonexclusive, or perhaps merely silent on the point. If the agreement was registered containing such a "nonexclusive" provision, that provision would have been ignored as contrary to mandatory Bahraini law. As discussed *infra*, the 1998 amendments change the situation.

[14]*See*, *e.g.*, Saleh, *supra* note 3, at p. 8-18.

[15]The 1975 Law contains some potentially misleading statements, to the effect that neither contractual party may terminate an indefinite-term commercial agency without valid reason. Similarly, the Ministry has in the past occasionally sent a standard letter to foreign principals which states, in part, that "it is not possible" to unilaterally terminate a commercial agency. In fact, a foreign supplier has had the right or

authority to terminate the commercial agency, subject to the legal consequences of the protective legislation.

[16]Ministerial letter to the Bahraini Chamber of Commerce Ref. 129/1544 (June 8, 1976), for circulation among Chamber members; quoted in Zu'bi and Stokes, *supra* note 4, at p. Bah-8.

[17]*Id.*

[18]*Id.*

[19]By comparison, the Lebanese commercial agency law was amended in 1975 to expand a local agent's administrative rights against unjustified termination or nonrenewal by the foreign principal. For example, if the Lebanese courts issued a judgment in favor of the terminated commercial agent, a successor commercial agent was required to pay that judgment (with recourse to the foreign principal) or else withdraw from the commercial agency. *See* Article 4(3), Lebanese Law No. 34 (1967), as amended by Decree No. 9639 (1975).

[20]In that case, the Bahraini dealer protection was broader than its counterpart under Lebanese commercial agency law. The 1975 amendments to the Lebanese law recognized that a terminated commercial agent could apply to block imports of the relevant products, but in general only after issuance of a Lebanese court judgment in its favor. *Id.*, Article 4(4).

[21]*See* Article 32 of the 1992 Law. *See also* Hassan Ali Radhi Law Office, "New Agency Law," *Middle East Executive Reports* (*MEER*) (September 1992), p. 9.

[22]This paragraph is based generally on Hepburn, "An Economy in Transition: Bahrain is First GCC State to Face the Post-Oil Era," *MEER* (July 1997), p. 9.

[23]*See* Qays H. Zu'bi, "Commercial Agency Law in Bahrain Including Dispute Resolution," in Proceedings of the International Bar Association's Arab Regional Forum, Dubai, March 29-30, 1994, p. 2.

[24]As a result of the 1998 amendments, Article 15 of the 1992 Law now also states that "[t]he termination of the relationship between the manufacturing company and the company, export house or [other] party signing the [Bahraini commercial] agency contract shall not prejudice the obligations of the principal to the agent."

[25]Qays Zu'bi, *supra* note 23, at p. 5.

[26]*See*, *e.g.*, Loring, "Business-Legal Round-up," *MEER* (March 1990), p. 10 (apparently discussing the draft law which was ultimately to become the 1992 Law). Ministerial Order No. 4 (1993) stipulated a commission ranging between 0.5 percent and 5 percent of the C&F price of spare parts. *See* "Commission Rates Stipulated For Imports of Spare Parts Covered by Agency Agreement," *MEER* (April 1993), p. 10.

[27]This provision of the 1992 Law as amended permits the foreign principal and commercial agent to negotiate their agreement either to specify the percentage commission that will be payable to the commercial agent in the event of the foreign principal's sales of products to other Bahraini traders, or to specify that the agent will not be entitled to commission on such sales.

[28]The 1998 amendments have not changed Article 8(a) of the 1992 Law, which states in part: "An agency shall be terminated upon expiry of its fixed term unless the two parties agree upon the renewal thereof." However, the U.S. Embassy's Commercial Section in Manama has reported that many commercial disputes have arisen from this provision of Bahraini law. In practice, a principal cannot change its commercial agent or simply allow an agreement to expire without the prior agreement of the commercial agent and the approval of the Directorate of Commerce and Companies Affairs at the Ministry. If the principal insists on nonrenewal of the commercial agent's contract, often the commercial agent must be duly compensated. *See, e.g.*, U.S. and Foreign Commercial Service, *Country Commercial Guide, Bahrain, Fiscal Year 1998* (1997), pp. 15-17.

[29]*See, e.g.*, Article 94(1) of the Bahraini Contract Act, and *see generally* Stovall, "Drafting Commercial Agency Agreements to Ameliorate Middle East 'Dealer Protection' Laws," *Corporate Counsel's International Adviser* (May 1, 1998).

[30]For one author's analytical struggle with these difficulties, *see* Saleh, *supra* note 3, at p. 8-22.

[31]*See also* Bahraini Law No. 11 (1971) as amended, Establishing the Judiciary.

[32]Even prior to the 1992 Law, and despite the letter of the Minister of Commerce expressing a preference for ICC arbitration (*supra* note 16), other arbitral rules had been acceptable and registered by the Ministry in Bahraini commercial agency agreements. Not surprisingly, for example, the Ministry supported a choice of Bahraini Chamber of Commerce Arbitral Procedures. *See* Zu'bi and Stokes, *supra* note 4, at p. Bah-10.

[33]*See, e.g.*, "Bahrain: Recent Developments," *Arab Law Quarterly* (1995), pp. 385-388.

[34]Article 252 of the Law of Civil and Commercial Procedure, Law No. 12 (1971). Article 253 states that "[t]he provisions of the preceding article shall be applicable to awards issued by arbitrators in any foreign country." However, in accordance with Bahrain's subsequent (1994) International Commercial Arbitration Law, foreign arbitration under this 1994 law is not subject to the rules of the Bahraini Civil and Commercial Procedure Law.

[35]Prior to the 1998 amendments, the Bahraini commercial agency law contained specific and detailed rules on the resolution of disputes concerning termination of (and compensation for) indefinite-term agreements. Thus, under these earlier rules, a party wishing to terminate such an agency was required to submit a request to the Bahraini arbitration committee or, if the parties had agreed in writing, to another (including non-Bahraini) arbitral panel. Bahraini law contemplated that the arbitral panel would issue a decision on the termination request, which would be final. Similarly, the special Bahraini arbitration committee had jurisdiction to hear such claims for termination compensation, unless the parties agreed in writing to give jurisdiction over such compensation claims to another arbitral body or court.

[36]Bahraini Order No. 7 (1993) specified these arbitration procedures. *See also* Qays Zu'bi, *supra* note 23, at p. 15.

[37]*See, e.g.*, Hassan Radhi Law Office, "Bahrain—Amendment to the Commercial Agency Law No. 10 of 1992," *Afridi & Angell Newsletter* (April 15, 1998), at p. 6. The Omani Authority for the Settlement of Commercial Disputes similarly ruled that a terminated commercial agent's claim to compensation should be distinguished from deregistration of the commercial agency agreement:

> [B]oth parties have an absolute right to terminate an agency agreement should they wish to do so, and although if that right is abused, one party may be required to pay compensation to the other, that does not fetter its contractual right to terminate. Upon termination, the Authority for the Settlement of Commercial Disputes made it clear that the agency registration should be canceled.

Edmondes, Trower and Wilson, "Oman," in *Yearbook of Islamic and Middle Eastern Law* (1996), p. 316.

[38]Similar issues are raised by recent liberalization of the Omani commercial agency law, which now also permits multiple nonexclusive commercial agency appointments. *See* Adler, "Oman Commercial Agency Law Amendments: Effects on Future Agreements, Dispute Resolution," *MEER* (January 1997), p. 8.

[39]In at least one case, the Bahrain High Court of Appeal had ruled that a commercial agency was not an asset capable of being passed on to a commercial agent's heir(s) without the consent of the foreign principal. This ruling was consistent with Article 22 of the 1975 Law. *See generally*, *International Business Lawyer* (February 1988), p. 52. However, other Bahraini court decisions reached an opposite result.

[40]There is some question whether Article 24(b) would override an express term in a commercial agency agreement that the death of the commercial agent, or sale of the commercial agent if it is a company, shall be valid cause for termination of the agreement. *See* Qays Zu'bi, *supra* note 23, at p. 13.

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