Africa Investor

CLYDE&CO

Briefing

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Focus on North Africa

Clyde & Co is a leading international law firm which works across 120 countries. Our work is cross-border, high profile and complex. With over 2,400 staff based in 30 offices and associated offices worldwide, we have genuine in-depth knowledge of our chosen industry sectors.

On the African continent, we have extensive experience through our offices in Dar es Salaam, Tanzania and Tripoli, Libya and through work our lawyers have carried out in the region over the last 20 years.

We provide a wide range of legal services, covering sectors in which we are expert and we offer our clients in-depth local expertise and know-how supported by international law firm standards and experience.

Introduction

The Africa Investor is produced for clients and contacts of Clyde & Co and as well as looking at the latest developments in our core sectors from a legal perspective, we endeavor to provide practical information that will aid our clients in conducting business on the continent.

In this issue we focus on North Africa, a region transformed since the advent of the 'Arab Spring' in December 2010. As well as new hydrocarbon regulations in Algeria, we consider developments in post-revolution Tunisia, difficulties faced by Egypt in freezing assets and the development of new laws in Libya.

Follow up

We welcome questions on the issues raised in the Africa Investor. If you would like more information please contact:

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Energy

An Overview of the Libyan oil and gas regime

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Libyan oil reserves, estimated at 47.1 billion barrels, are the largest in Africa and among the largest in the World. A large part of these oil reserves lies in fields that have remained underexplored in recent years. There is also the possibility that new fields will be discovered and technological advances mean that enhanced oil recovery could increase production from existing fields.

As Libya recovers from the conflict in 2011, International oil companies (IOCs) are gradually lifting their force majeure and resuming operations in the country. At present, the oil and gas framework remains unchanged from what was in force under the old regime. However, there are indications that the current legal framework is likely to change when the transitional process comes to an end following the expected enactment of the new constitution in early 2013.

This is the first of four articles Clyde & Co aims to publish over the coming months, each of which will examine different aspects of the legal and regulatory framework affecting the oil and gas industry in Libya.

This first article will set out the current legal framework governing the oil and gas industry in Libya. It will briefly outline the historical development of the oil and gas industry and go on to provide an analysis of the various laws and regulations in existence and the various governmental bodies. Finally it will analyse which parts of this framework are most likely to be amended in the future.

Petroleum Law No 25 of 1955

Libya's key petroleum legislation is the Petroleum Law No. 25 of 1955 (the **"Petroleum Law"**), which came into force the same year that saw the first Libyan concessions awarded. It was seen as one of the more sophisticated oil laws in existence, offering smaller concession areas and including relinquishment requirements. By 1968, 137 concession agreements were in place with over 40 different companies. Over the following decades the Petroleum Law has been amended by various regulations, negotiations and new versions of model contracts.

After the enactment of the Petroleum Law, the Libyan government conducted numerous renegotiations of concessions previously offered under the original Petroleum Law and managed to impose tough fiscal terms on IOCs, using favourable market conditions to its advantage. By the 1970s the Libyan Government began to demand higher shares of petroleum revenue and exercised greater control over the industry. This led to a series of various degrees of nationalisations of oil assets. In 1972, participation agreements replaced the concessions, transferring 51% of all concessions to the Libyan National Oil Company (NOC). During 1971-1973 BP, Occidental and Hunts' Libya assets were fully nationalised.

In 1973 the Libyan Government introduced Exploration and Production Sharing Contracts **(EPSA**). EPSAs are subject to the principles set out in the Petroleum Law (as amended by subsequent amending acts and regulations).

Under an EPSA, the Libyan Government, through the NOC, retains exclusive ownership of oil fields while signatory oil companies are considered contractors. Numerous versions of the EPSA have since been released. The last EPSA round under the old regime was held in 2005 on an arguably more attractive version of the EPSA, "EPSA-IV", as a post-sanctions initiative to invite the much needed foreign investment to the country's oil and gas sector. The key difference between various versions of EPSA relates to the scope of obligations of the Government and the IOC with respect to the recovery of development and production costs. In addition, EPSA-IV contracts were awarded on a competitive-bidding basis rather than the negotiated method used in the previous rounds.

EPSA IV

EPSA-IV created tough terms for oil companies, who agreed to low profit shares and the handing over of large signature bonuses in return for licenses in order to win

the concessions. Whilst being criticised for their lack of transparency, EPSA-IV contracts remain in force under the General National Congress (**GNC**), although it was reported that the GNC was to subject them to a corruption review process.

Under the EPSA IV, an IOC or a consortium of IOCs commonly enter into a joint venture with the NOC. The IOC or consortium undertakes exploration work and bears the costs for a minimum of 5 years, while the NOC retains exclusive ownership. The joint venture company management is assigned to a committee comprising of two NOC representatives and one IOC with decisions being made using unanimous voting.

Over the course of 2008, a number of IOCs had the terms of their Exploration and Production contracts with the NOC renegotiated outside of the bidding rounds, to bring them into line with the new EPSA IV framework.

Possibility of an EPSA V?

The EPSA-IV contract is seen as having particularly tough commercial terms relative to the global oil industry and IOCs have been keen to express their desire for a new version of the EPSA offering more attractive terms (Royal Dutch Shell has recently ceased exploration under its Libyan licenses citing poor exploration results that cannot be economically justified under the EPSA-IV terms).

The National Transitional Council (**NTC**) (the predecessor to Libya's General National Congress) made suggestions in June of this year that production-sharing agreements with IOCs will be offered on improved terms in order to encourage IOCs to invest more money in exploration and enhanced oil recovery. However, it has also made clear such a development will not occur this year. More recently NOC officials have been reported as stating that there are plans to make Libya a more attractive upstream destination by offering more favourable contract terms.

The NOC recently indicated that there will no new bidding rounds until at least a permanent fully sovereign Government is in place which will not occur until after new elections are held following enactment of the new Constitution. Such elections are currently estimated to take place in July 2013. However, they failed to elaborate further on the nature of any contracts that will be offered in the future.

NOC

The NOC of Libya is a state-owned company that is responsible for implementing EPSA-IVs and controlling Libya's oil and gas production. The NOC was established in 1970 replacing the Libyan Petroleum Company and oversees all petroleum activities in Libya including oil and gas exploration, drilling and production; refineries operation; petrochemical production; marketing and distribution of petroleum products and petrochemicals. The NOC's main upstream subsidiaries are:

- The Sirte Oil Company
- Arabian Gulf Oil Company (AGOCO)

The main downstream subsidiaries are:

- Ras Lanuf Oil and Gas Processing Company
- Zawia Oil Refining Company
- Brega Petroleum Marketing company

The Future of the NOC

The role of the NOC going forward is unclear. It is unlikely that there will be any significant changes to the oil and gas sector prior to the establishment of a permanent government and the enactment of the new constitution.

Also unclear is the new structure of the NOC. The creation of the Ministry of Oil by the NTC indicates that some of the NOC's power will be re-distributed to the new Oil Ministry. Prior to the 2011 conflict, control over oil and gas was heavily centralised in Tripoli. It seems likely that power will be somewhat decentralised in order to reflect the geographical distribution of oil and gas reserves and allow greater autonomy for the oil-rich region of Cyrenaica in the East of Libya. Certainly the Eastern Region's arguments for federal rule have been driven by the long-standing complaint that it has been deprived of a fair share of oil wealth. Given Benghazi's importance in relation to the oil sector it is likely to become a new economic hub in Libya and will want its own policy making role.

Energy

Understanding the Libyan Oil and Gas Production Sharing Agreement

George Booth, *Partner, London*
Dr Amir Kordvani, *Associate, Abu Dhabi*

This is the second of four articles Clyde & Co aims to publish on the legal and regulatory framework affecting the oil and gas industry in Libya. This second article will outline and analyse the material terms of the Exploration and Production Sharing Agreements (**EPSAs)** that govern the relationships between International Oil Companies **(IOCs**) and the Libyan National Oil Company (**NOC**). It will also raise the issue of the review of these contracts which reports suggest will be carried out by the Libyan Government in the near future.

The Libyan Oil Regime: Background

In the previous Clyde & Co article we set out the current legal framework governing the oil and gas industry in Libya. In short, Libya's key petroleum legislation is the Petroleum Law No. 25 of 1955, which came into force the same year that saw the first Libyan concessions awarded. In 1974 the Libyan Government introduced the first EPSAs. Numerous versions of the EPSA have been released since its inception with the latest being EPSA-IV, introduced for the first time in conjunction with Libya's first post-sanctions licensing round in January 2005.

EPSA-IV Terms

Selection criteria

The principal difference between EPSA IV and its predecessor EPSA III is that winners of EPSA-IV contract bidding rounds are determined largely based on how high a share of production and the size of signature bonus each IOC is willing to offer the NOC. As a consequence, EPSA-IVs feature significantly higher production shares for the NOC than EPSA-III contracts. This method of determining bid winners is relatively unusual because, normally, the national oil company's production share is pre-determined in a model contract or is determined during the negotiations. Commentators have noted that the average overall NOC take for EPSA-IV blocks is around 88%, which is considered as one of the highest in the world.

Bonus Payments

IOCs are required to pay two types of bonuses to the NOC, a signature bonus and a production bonus: a signature bonus is payable as part of the EPSA-IV bidding process whilst the production bonus, variable depending on the level of production, is pre-determined.

Ownership of Assets

EPSA-IV contracts do not convey any ownership rights over oil and gas resources to the foreign operating companies. Rather, they are risk-based contracts under which the IOC undertakes to finance and carry out an exploration program at its own risk, and eventually develop the resources if a commercial discovery occurs. If no commercially viable oil or gas deposits are found, exploration costs are borne entirely by the IOC; the acreage is released and can be offered to another party.

Revenue and costs

Under EPSA-IV, the NOC normally takes around 80-90% of the oil and gas production, while the foreign company must recover capital and operating costs and eventually make a profit from the remaining share in production. Under these agreements, the developer bears all exploration and appraisal costs. Development costs are to be shared 50:50 between the NOC and the developer. Operating costs are shared on the basis of the primary production allocation.

While under previous EPSA agreements the IOCs had enjoyed deals based on a fixed margins, thereby insulating them from fluctuations in the market price of oil by receiving a fixed price for every barrel produced, EPSA-IV terms are much more dependent upon market fluctuations which, whilst advantageous during high oil prices makes future returns more uncertain.

The Libyan Government also has complete control, via the NOC and the Ministry of Finance, over exploration and development plans and budgets (which have to be pre-approved), capital and operational expenditure (which has to be certified to become eligible for reimbursement) and oil exports (for which a quota must be approved and separate loading schedule granted for each cargo).

Arbitration

Under the EPSA IV, disputes between the parties will be dealt with under the Rules of Arbitration of the International Chamber of Commerce (ICC) in Paris. One of the issues that arise out of the existence of such a clause is the feasibility of enforcing an arbitral award against a government entity, given their sovereign status and their ability to influence the decisions of local courts.

For instance, if the NOC refuses to comply with an arbitral award in favour of the IOC arising out of an ICC arbitration in Paris, the IOC may encounter difficulties enforcing the award in Libya given that Libya is not yet a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the **"New York Convention"**) which is an international convention providing for the mutual enforcement of foreign arbitral awards. Nor is Libya a signatory to the "International Centre for Settlement of Investment Disputes Convention" the primary purpose of which is to provide facilities for conciliation and arbitration of international investment disputes between states and nationals of other states.

Whilst recourse to arbitration provisions under the Libyan Civil and Commercial Code may provide grounds for requesting the enforcement of a foreign award, in principle it is not generally considered a practical option. However, it is hoped that this situation may change under the new Government.

It is worth noting that if the NOC has assets in a New York Convention ratifying state, particularly illiquid assets that would be hard to relocate, then the IOC may well be able to enforce the arbitral award granted in the Paris arbitration proceedings in that ratifying state, under the New York Convention.

One other possible solution to the enforcement problem in Libya is to secure a judgment or arbitral award in a State that is a signatory to the 1983 Convention on Judicial Co-operation between States of the Arab League (the **"Riyadh Convention"**)[1]. The Riyadh Convention applies to foreign judgments and arbitral awards and consequently an award from an arbitration conducted in a ratifying country to this convention would be the best possible option to enforce an award in Libya. Certain countries which are signatory to the Riyadh Convention have well-established arbitration laws and arbitration centres (for example, the DIFC-LCIA in the Dubai International Financial Centre). Therefore, the IOC may seek to amend the arbitration clause in future EPSAs to provide for arbitration to take place in Dubai. However, as far as we are aware this strategy has never been successfully applied in Libya.

Force Majeure

The force majeure provision in the EPSA-IV contract allows for a suspension of performance of obligations whilst force majeure circumstances exist. The model EPSA-IV 2006 states:

"Any failure or delay on the part of a Party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to force majeure. Force majeure shall include, without limitation: Acts of God; insurrection; riots; war; and any unforeseen circumstances and acts beyond the control of such Party which render the performance of its obligations impossible."

In the majority of instances, IOCs relied on this clause during the turmoil of 2011.

Investor Protection

IOCs may have their investments protected under bilateral investment treaties (**BITs**) signed between Libya and numerous other nations. As of the date of this article, Libya had entered into 33 BITs with countries such as Jordan, Slovakia, Turkey, Singapore, Italy, Austria, Morocco, Croatia, Portugal, Switzerland, Belgium, Luxembourg and France. There are no BITs with the US or the United Kingdom.

BITs provide certain guarantees to investors of both parties to the treaty. Most importantly, an investment treaty restricts the acts of a contracting party from taking any action to deprive and limit the ownership of investors from the other contracting party. Were such a deprivation to take place, an investor from a contracting party would be entitled to initiate arbitration proceedings.

Recent developments

It has been reported that Libya is holding its own corruption review of the Gaddafi-era oil contracts. The National Transitional Council (**NTC**) announced that it was setting up an NTC Oil Committee with the power to end, amend or renegotiate current contracts if corruption is discovered.

However, the NTC tried not to worry established investors in Libya over the proposed review. It emphasised that all agreements and contracts that were signed with the old regime would be "respected" and that it had no intention of "nationalising or doing anything radical". It was further stated that if a contract was found to be "unfair", then the Libyan authorities would work with the counter-parties to achieve an agreed solution.

More recently the chairman of the NOC, Nuri Berruien, was reported as saying that "some contracts would be reviewed" but did not provide further details as to which contracts or what form such a review would take.

So far the new Libyan authorities have been slow to meet the hopes of IOCs for more preferable terms. The interim government chose to maintain contracts that are based on EPSA-IV terms and the new government looks set to do the same for the near future at least. So far none of the parties represented in the General National Congress have made comments upon their oil policy. It seems unlikely that anything significant will occur until the new Constitution has been enacted.

[1] The other signatories of the Riyadh Convention include Jordan, Bahrain, Tunisia, Algeria, Djibouti, Saudi Arabia, Sudan, Syria, Somalia, Iraq, Oman, Palestine, Qatar, Kuwait, Lebanon, Morocco, Mauritania, UAE and Yemen.

Energy

Amendments to Algerian hydrocarbons law

Paul Jones, *Senior Associate, Dar es Salaam*

Towards the end of 2012, the Chief Executive of Sonatrach, Algeria's state-run energy group, announced plans to invest USD 80 billion in oil and natural gas projects from 2012 to 2016 in the North African country. These grand investment plans were presented against the background of the development of new hydrocarbons regulations offering incentives to investors.

Background

In 2005, the Hydrocarbons Law No 05-07 (the "**2005 Law**") came into force replacing the previous Hydrocarbons Law No 86-14. The 1986 Law had established the monopoly of the Algerian State over hydrocarbons exploration, exploitation and transportation activities so that international oil companies (**IOCs**) could only carry out their activities in partnership with Sonatrach.

The 2005 Law set up two new agencies, relieving Sonatrach from its regulatory function and simplifying the legal and tax regime (though many investor benefits were reversed by amendments to the 2005 Law made during 2006).

The two new entities established by the 2005 Law were:

(i) the Authority for the Control of Hydrocarbons (**ARH**) responsible for implementing and enforcing technical regulations (e.g. regulations on third party access to pipelines and storage facilities); and

(ii) the Agency for the Development of Hydrocarbons Resources (ALNAFT) responsible for the development of the petroleum industry (e.g. by promoting upstream investments, issuing prospecting licenses and agreeing exploration and production contracts).

New Amendments to the 2005 Law

On 8 January 2013, Algeria's Minister of Energy and Mines, Youcef Yousfi, presented a new hydrocarbons bill to members of the National People's Congress (NPC) ahead of an anticipated 21 January vote on whether to adopt the new legislation. The bill (already passed by the Council of Ministers in September 2012) introduces amendments to the 2005 Law aimed at making the sector more attractive to investors.

The most significant amendment links taxes on IOCs to profits instead of turnover from their projects and the amended law will also offer fiscal incentives for companies wishing to invest in unconventional energy resources (such as shale oil and gas) and offshore exploration. Sonatrach will continue to be a majority partner holding at least a 51% stake in all upstream and downstream projects under the new regime though it will carry a bigger share of the risk of project failure. Sonatrach will also retain exclusive responsibility for pipeline transportation of oil and petroleum products. A windfall tax, levied on an investor's revenues once the oil prices exceed a certain threshold (and previously disputed by IOCs), will also remain.

Another substantive change relates to the strengthening of the powers of the ARH for the protection of the environment during mining operations for shale oil and gas which Algeria appears committed to developing (Italy's Eni was the first mover in this market, signing an agreement with Sonatrach in 2011).

Under the new regime, investors in unconventional hydrocarbons would be granted prospecting licenses for up to 11 years and exploitation licenses of 40 years for shale gas and 30 years for shale oil. Conventional resource licenses are kept unchanged at seven years for prospecting and 25 years for exploitation, with a five-year supplementary period for natural gas deposits according to Reuters.

The amendments are seen as a response to the failure of Algeria's last three rounds of bidding for oil and gas permits which each attracted limited interest from IOCs, raising questions about whether the country has enough new projects coming on stream to maintain output levels and meet growing demand. The draft bill explained the goal of the new legislation as being "to introduce

new incentives to improve the attractiveness ... so as to intensify the exploration effort and discover new reserves of conventional and non-conventional hydrocarbons". IOCs active in Algeria in recent years include BG Group as the holder of an interest in and as operator of the Hassi Ba Hamou permit.

The amendments to the 2005 Law also stipulate that foreign energy firms interested in partnerships with Sonatrach in the refining sector are required to have their own storage capacity. This comes as Algeria plans to build five new refineries with a total production capacity of 30 million tonnes per year to increase the country's refining products output to 52 million tonnes.

LNG

Algeria is one of the world's top liquefied natural gas (**LNG**) exporters and at the close of 2012 it announced an increase in LNG capacity which would be in place from 2014 following the commissioning of two new trains. Turkey has recently agreed to extend Algeria's current 4.5 billion cubic meters LNG contract for another ten years. Sonatrach is heavily involved in the marketing of Algeria's LNG and has a fleet of 10 LPG tankers held through subsidiary companies.

Infrastructure

Developments in Post-Revolution Tunisia

Peter Kasanda, *Legal Director, Dar es Salaam*

It is important for the international investor to appreciate the political background in Tunisia in order to make sound business decisions. The Tunisian revolution in 2011 was the catalyst for the 'Arab Spring', leading to changes of government in Egypt, Libya and unrest in several other countries, most recently in Syria.

Political Background

President Zine El Abidine Ben Ali fled Tunisia on 14 January 2011, after 23 years in power. His decision was preceded by months of protest against unemployment, corruption and a lack of civil rights in the North African country. Tunisia had been a constitutional republic with a head of state and prime minister as head of government. It was purportedly a multi-party democracy; however in practice the Constitutional Democratic Rally (**RCD**) controlled the country since independence in 1956, firstly under President Habib Bourguiba and subsequently under President Ben Ali from 1987.

Following the revolution, the National Constituent Assembly (**NCA**) was elected on 23 October 2011 after what was recognized internationally as Tunisia's first free and fair national elections. The NCA is a ruling coalition dominated by the moderate Islamist Nahda party. The NCA then appointed Moncef Marzouki as President of Tunisia on 12 December 2011, Hamadi Jebali as Prime Minister and Mustapha Ben Jaafar as Speaker of the NCA. It should be noted that this is an interim arrangement. Further elections are proposed following the adoption of a new constitution. The NCA is charged with preparing the new constitution with further national elections proposed for June/September 2013.

Legal Framework and Constitution

The Tunisian legal system is a civil law system based on a combination of French civil code and Islamic law. The highest court of the land is the Tunisian Court of Cessation, modelled on the French Court of Cessation.

The legal framework must be viewed against the NCA's adoption of a new constitution. Until the adoption of a new constitution, laws previously on the statute books and institutions such as the Tunisian Court of Cessation remain in place. International investors therefore need to work with Tunisian counsel on the basis that business affairs and the courts operate largely as they did under the old constitution of 1 June 1959 (as amended in 1988 and 2002). This particularly applies to companies incorporated in Tunisia (or international companies with branches in Tunisia) prior to 14 January 2011. Principles of company and business law will remain the same until the adoption of a new constitution and any legislative changes pursuant to that event.

The NCA was due to unveil the new constitution no later than November 2012, however there have been several delays. The second draft of the constitution has now been made public and nationwide consultation began in December 2012. The Tunisian legal system is therefore going through a period of great uncertainty. Indeed 'uncertainty' is the challenge for international companies operating in Tunisia. This is reflected in the significant decrease in foreign direct investment into Tunisia over the past two years.

The Future

Despite the challenges highlighted above, Tunisia remains an attractive future investment option in North Africa for the following reasons:

Social Cohesion

The civilian sacrifices made during the revolution cannot be underestimated, however the fact that the country did not descend into all-out civil war between 2010 and 2012 is reflective of the relative social stability and cohesion which Tunisia is identified with, both during the Ben Ali era and post-revolution. This contrasts with Tunisia's neighbours in the region who are subject to ethnic and tribal differences that compound the difficulties of transition.

Educated workforce

Prior to the revolution, Tunisia was identified with youth unemployment. However, what is rarely discussed is the fact that a significant proportion of this unemployed group are highly educated youth, many of whom have university degrees from Tunisian educational institutions. This, coupled with the relatively modest remuneration paid in Tunisia over the past twenty years, means the country is an attractive destination for foreign companies looking for a skilled workforce at a reasonable cost.

Active Sectors

Tunisia's economy is dominated by the agriculture, mining and commodities, tourism and manufacturing sectors. Despite corruption during the Ben Ali era, the economy grew at an average rate per year of 3.5% for the past 15 years. The first contraction to (minus) -2% occurred in 2011 – the year of the revolution. The tourism sector in particular collapsed.

Tunisia's service sector is still seen as strong given the skilled and educated workforce. Outsourcing from several sectors in Europe is pushed to Tunisia. Indeed, legal service outsourcing from France is one of the big growth areas over the past 5 years. The European Union is Tunisia's biggest trading partner accounting for over 80% of trade.

The oil and gas sector, for many years seen as lagging behind Tunisia's North African neighbours, is seen as a potential growth area which is yet to be properly exploited. Telecoms will also grow in the coming years.

Support of Development Partners

Tunisia enjoys the support of development partners both bilaterally from USA, France, the UK and EU and through development finance institutions such as the World Bank and significantly the African Development Bank (**AfDB**), the latter having its temporary relocation headquarters in Tunis.

AfDB's response in support of its host country following the revolution was immediate, with a loan of $500 million provided on 30 May 2011. Since this initial contribution, AfDB has been active not only with further funding but also on capacity- building within various Tunisian institutions. Although the AfDB is due to return to its permanent headquarters in Abidjan, Cote D'Ivoire, it will retain a presence in Tunisia focusing on North Africa.

The African Legal Support Facility (**ALSF**) has also supported the Tunisian government in the tracing of former President Ben Ali's assets which were taken from the State of Tunisia.

We welcome enquiries on Tunisia. Experts across the Clyde & Co network and in particular our Paris office work closely with counsel in Tunisia and we are able to fully support clients operating in the country.

International Dispute Resolution

Egyptian struggles to recover Mubarak-regime assets

Paul Jones, *Senior Associate, Dar es Salaam*

Efforts by post-revolution Egypt to recover assets held around the world by the former President Mubarak, his family and associates have caused frustration and embarrassment for some of the countries in which assets are held, not-least in the UK where the Government has been accused of failing in its commitment to freeze assets of the regime. While assets are believed to have been concealed in a number of countries, few states have taken active steps to freeze funds and differing approaches have been adopted by those that have.

UK

The UK was last year accused by Egypt of hiding stolen wealth and breaching anti-corruption accords by failing to effectively trace and freeze funds linked to the Mubarak regime. It was suggested that the UK and other EU states delayed in applying sanctions, in which time the accused officials were able to move money elsewhere. Assets belonging to former President Mubarak's son Gamal and to others whose assets were supposed to have been frozen were still being identified over a year after the fall of the regime.

Egypt's Legal Affairs Minister has claimed that "The UK is one of the worst countries when it comes to tracing and freezing Egyptian assets" while Foreign Office Minister Alistair Burt responded that "It is crucial that the recovery and return of stolen assets is lawful. It is simply not possible for the UK to deprive a person of their assets and return them to an overseas country in the absence of a criminal conviction and confiscation order". On this basis, to maximize the chance of recovery Egyptian authorities must ensure that domestic convictions relating to assets said to be illicitly obtained are secured. Britain is also bound by its membership of the European Union and the diplomatic processes required to agree an approach to the freezing of assets across 27 member states.

Switzerland

Switzerland's response to the enforcement of sanctions has been considered much more robust than that of the UK. The country froze assets within half an hour of former President Mubarak's resignation last year and its Federal Prosecutor has said that a team of more than 20 police investigators had been deployed to track suspected illicit Egyptian assets. The total amount frozen had risen from £270m to £470m from February 2011 to September 2012 while it was alleged that the corresponding amount had not risen in the UK during 2012.

Canada

Canada emerged as another favored destination for associates of the fallen regimes in both Tunisia and Egypt.

On 10 March 2011, the Freezing Assets of Corrupt Foreign Officials Act (**"FACFOA"**) became law and empowered the Government of Canada to make orders or regulations freezing assets of persons that were misappropriated or inappropriately acquired in a foreign state through their office or by virtue of a personal business relationship ("politically exposed persons").

FACFAO was swiftly followed by the Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations which named certain politically exposed Tunisians and Egyptians and imposed restrictions on all persons in Canada on dealings with those politically exposed persons.

Clyde & Co Sanctions Expertise

Managing issues related to the freezing of foreign-held assets forms part of wider sanctions work in which Clyde & Co has developed a particularly strong record. Our sanctions expertise is supported by in-depth understanding of our key sectors – trade and commodities, transportation, insurance, infrastructure and energy – and by our extensive experience of working in new and emerging markets.

Sanctions regimes have been evolving very quickly in a rapidly changing environment, particularly as a result of the ongoing instability in the MENA region. The scope and complexity of sanctions regulation is also increasing, meaning multinational businesses should carry out an assessment of all such regulation to establish whether any sanctions are applicable to the business they intend to carry out to ensure they stay on the right side of fast moving international sanctions law.

We have recently advised many of our trading clients on the implications of the imposition of trade sanctions against Iran, Syria and Libya by the US and the EU and the recent actions of the Arab League and Turkey. In addition we have advised an EU domiciled bank on EU sanctions regulations applicable to trade finance operations between the EU bank and its Libyan subsidiary bank.

More information can be found on our **Sanctions Microsite**.

Local Insight

Recent Notable Legislation in Libya: A Commentary on Decree No. 207 of 2012

Fatima Swehli, *Legal Consultant, Tripoli*
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2012 saw the application of Decree No. 207 ("**Decree 207**") concerning "participation of foreigners in joint ventures, branches and representation offices of companies operating or wishing to operate in Libya." This piece of legislation from the Libyan Ministry of Economy places restrictions on foreign companies wishing to do business in Libya. Signed in July 2012, it replaced Decree No. 103 of 2012 which was a reaffirmation of existing law and yielded greater scope to foreign investors in Libya than had been available throughout the early 2000's and the 1990's. The application of Decree 207 of 2012 threatens to make it tougher for both foreign investors and the smaller Libyan competitor, whilst putting some foreign companies, who were previously established legally, in a precarious position. As stated in the decree, persons or companies subject to the new regulation have until the beginning of January 2013 to address their legal situations.

Decree 207 places a minimum capital requirement of 1,000,000 LYD on any joint venture entered into between a foreign entity and a Libyan entity in the case of joint stock companies (JSCs), and 50,000 LYD in the case of limited liability companies (LLCs). The decree states that the participation of foreigners in a joint venture shall not exceed 49% however with special dispensation from the Minister of Economy, the shareholding of the non-Libyan party may be increased to 60%. Decree No. 103 of 2012, which was in existence for no more than two months prior to its rescission, allowed for 65% ownership of share capital by the foreign party, which could be increased to 80% by the Minister of Economy.

Decree 207 also introduces a strict requirement that the Chairperson of the Board of Directors must be a Libyan national if the entity established is a JSC, and the General Manager must be a Libyan national if the entity established is an LLC. Under this decree, LLC's are limited to certain industries including food, paper, clothes and specific types of manufacturing. There are also certain activities which are wholly restricted to Libyans. These include retail and wholesale trade, importation activities, catering services, land transport services, the activity of handling shipments at airports, and civil works where the value of the contract is less than 30,000,000 LYD, amongst others.

For those other activities in which non-Libyans are permitted to participate, there are stringent local content requirements that foreign companies must adhere to do. They must transfer knowledge, as well employ national labour in accordance with existing regulations. They must also lay out annual programs of training and qualifications for the local workforce, as well as annual programs to replace foreign labour with national labour. They are also obliged to utilize equipment and raw materials available in the local market.

Alternatively, foreign companies are permitted to open a branch in Libya if their activities fall within certain categories, listed in Article 8 of Decree 207. Unlike a joint venture, a branch is not a separate legal entity from its parent company, and thus there is no ring-fencing of liability and risk within Libya. Decree 207 raises the minimum capital needed to establish a branch from 150,000 LYD to 250,000 LYD. New to the list of permitted activities for a branch include civil works where the project value exceeds 50,000,000 LYD; construction of desalination plants relying on renewable energy; supervision of engineering projects and training for the local labour market. A new requirement was introduced that either the branch manager or his deputy must be Libyan. Companies with no established legal entity in Libya may also open a representative office for the purposes of market research for a period of two years, renewable only once, and no other activities may be carried out. The minimum capital requirement needed to open a representative office under this decree is 150,000 LYD.

Unsurprisingly, Decree 207 is not without its detractors. Its introduction by the previous Minister of Economy Ahmed Alkoshli, a former civil servant, has been criticized both in legal and commercial circles, cited as a threat to much needed economic growth, a further strangulation of the private sector, and a means by which monopolists can retain hold over industries in which they dominate.

From a legal standpoint, Article 375 of Law No. 23 of 2010 (the "**Commercial Code**") specifies that the Minister of Economy shall fix the percentage of ownership allowed to foreign companies and shall determine the industries they apply to. The text of Decree 207 however distinguishes between different types of corporate entities (namely branches, LLC's and JSC's) and assigns particular industries to each, whilst it also prohibits foreign or part-foreign investors from forming a holding company. It also specifies a capital requirement which is arguably outside the remit provided by the Commercial Code.

Pursuant to Law No. 8 of 2011 under the former National Transitional Council, Libyan law stipulates that for decrees to be binding they must be published in the Official Gazette. Unusually, this is not the case, and remains so six months after its signing, which means that while the decree is applied, there are questions surrounding its legal status. In relation to company management, it may be perceived as inconsistent to require foreign or part-foreign owned companies to install a Libyan national in a management position, when a fully Libyan owned company is free to appoint fully foreign management. The ex post facto nature of the decree, as well as the discretionary powers afforded to the head of the Ministry of Economy under Decree 207, have separately been deliberated.

Commercial law in Libya is typified by its highly changeable nature, not least in the past eight years, where more than twenty commercial laws were removed or amended under the old regime. This trend has continued in the past two years in post-revolution Libya. Investors will be looking for some stability in the legal framework and also for more favourable business conditions. The much deliberated Decree 207 is currently being challenged in Tripoli's Court of Appeal with the first hearing set to take place on February 13th 2013. Six months on from the signing of the decree and just as companies are formally required to comply with it, the new Minister of Economy Mustafa Abu Fanas, a former Chamber of Commerce head, has stated that Libya needs to be more open to foreign investment and promised to review all commercial laws and legislation, whilst a new legal committee has been appointed. At the time of writing, Decree 207 is still very much applied. Foreign investors and Libyans alike, who are looking at the huge potential of investing in the new Libya, are urged to watch this space.

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Further advice should be taken before relying on the contents of this newsletter.

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