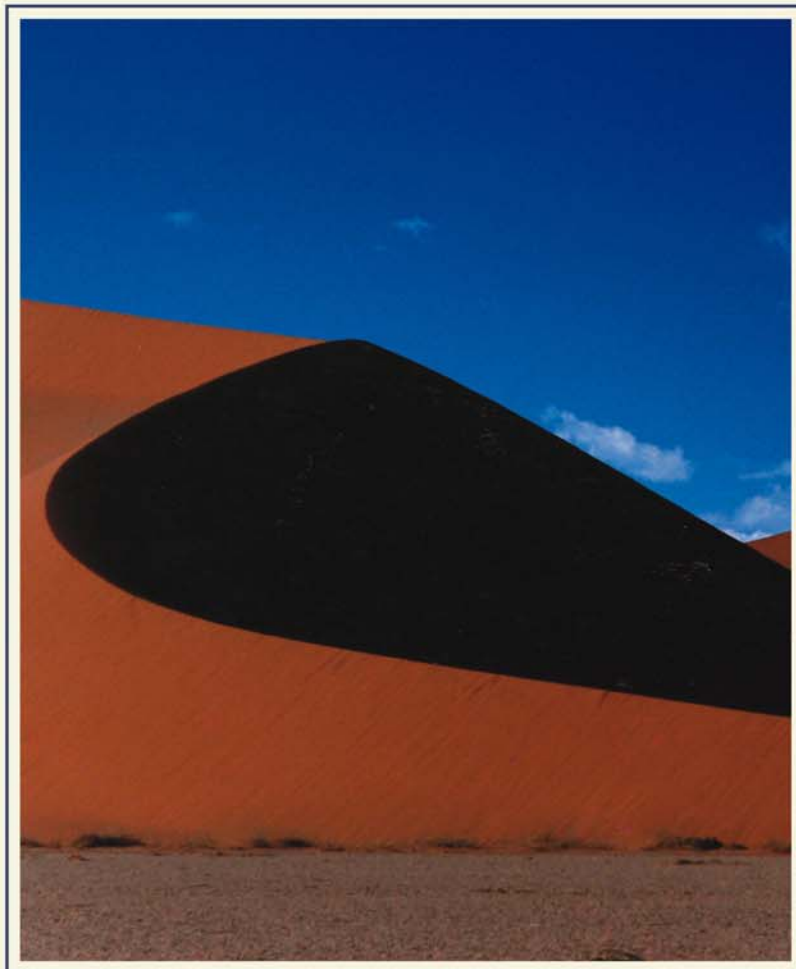


MENA ASSOCIATES



**DOING BUSINESS IN LIBYA –
OPPORTUNITIES AND CHALLENGES OF THE TRANSITION**

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Doing Business in Libya – Opportunities and Challenges of the Transition



Geographical map of Libya

The Market

The fall of the Ghaddafi Regime in August 2011 marks the end of an era and it is difficult to predict what direction Libya will take in the future. The weeks and months ahead inevitably will provide both opportunities and challenges for companies active in Libya or targeting the Libyan market.

Presently¹, political power is exercised by the National Transitional Council (NTC) comprising stakeholders from different backgrounds and with differing political agendas. The NTC has announced that rebuilding the country is a top priority. This will require oil production to start up again without delay. In view of the shortage of high-quality crude in the global markets, this is a shared interest of both Libya and the international oil industry.

In September 2011, at the invitation of the NTC, the World Bank joined the United Nations and the European Union to coordinate international assistance for Libya as the country defines a path forward after months of violent conflict.

The political transition in Libya will take time and the outcome is still uncertain. With regard to the economy, however, analysts expect that it will not take long before confidence returns and the oil industry starts pumping once more. Nevertheless, it will take time for the economy to recover.

The civil war inflicted enormous damage to the economy. Oil production and exports, which had previously generated 90 % of the country's GDP, came to a halt. A global market research company has revised its forecast for real GDP growth in 2011 downwards to minus 23.2%. A full assessment of the damage to the country's infrastructure will not be possible until security has been fully restored.

The waiver of the asset freeze and the lifting of international financial sanctions will help the NTC in its efforts to kick-start the Libyan economy. It is expected that investments will focus on oil and gas (and related services), refining, energy and construction. In the medium term, opportunities also are expected to arise in infrastructure, healthcare, tourism, manufacturing, financial and insurance services and consumer goods.

The Constitutional Framework

According to general principles of International Law, foreign investors are protected against a political regime change, and be it as radical as the end of the Qaddafi Regime. Protection includes, in principle, the changes in domestic legislation which are prejudicial to investors or inconsistent with the principle of the continuity of the State. First, the Libyan state and state entities will continue to be bound by international treaties and state contracts.² However, it is expected that the NTC will gradually introduce a number of legislative amendments. International law protects both the legitimate expectations and the vested rights of foreign investors and contracting parties, and to that extent, prejudicial regulatory changes could be excluded.

¹ This report was completed on 28 September 2011.

² An exception may be made for such laws which are in flagrant violation of the principles of justice and obligations which are "odious". Both doctrines, however, will only apply in very rare circumstances.

In August 2011 the NTC proclaimed a Constitutional Declaration consisting of 37 Articles. The Constitutional Declaration governs the exercise of political power in the transitional period until the election of the National General Council, which will take over power from the NTC. A constitutional assembly will be entrusted with drawing up a new Libyan constitution and submitting it to a referendum, probably in late 2012. Although the legal nature and effects of the Constitutional Declaration are difficult to determine, it does provide some pointers to the future. In addition to political liberalization and democratization, one of the main objectives is to diversify the economy which has traditionally been heavily dependent on oil. The promotion of private sector initiative is another priority. Until the new Constitution comes into force, the declaration replaces the Constitutional Proclamations and Declarations of the former Regime (which mainly served to cement Ghaddafi's rule).³

The Legal System

Libya has a civil law system, influenced to a limited extent by the Islamic Shari'a. The key pieces of legislation are similar to Egypt and other Arab countries.

The Libyan Civil Code sets out the following hierarchy of legal sources: legislation, principles of Islamic Shari'a followed by custom and principles of natural law and equity. The main pieces of legislation are the 1954 Civil Code, the Code of Civil and Commercial Procedure of 1953, and the Commercial Code, which was enacted in 2010 and which covers matters such as company law and insolvency. In addition, there are numerous decrees from the Ghaddafi Era regulating various aspects of the economy. These decrees have made it challenging for foreign investors to navigate the Libyan legal system. A comprehensive revision of economic legislation will be a key task for the future Libyan legislator.

At present, the Libyan administration is in the slow process of getting back to normal. Significant delays in administrative proceedings, including registrations and applications, must be expected. The functioning of public administration came to a complete halt during several months of fighting. The result is a huge backlog of pending matters.

Setting up Business in Libya

Foreign companies operating in Libya must set up a local entity. Under Libyan law it is not permissible to do business in the country without a registered presence.

At present, the following forms of establishment exist:

³ Prior to the regime change, Libya's legal and governmental structure was based on two constitutional documents: the Constitutional Proclamation of December 1969 and the Declaration of the Establishment of the People's Authority, enacted in March 1977. Both embedded a very peculiar form of government, termed the Jamahiriya ("rule of the masses"), which was a mixture of Islamic and socialist ideals.

- Joint Venture: The joint venture (“Mushtarika”) company is a joint stock company with a minimum of 35% Libyan ownership. The minimum share capital of a Mushtarika Company is one million Libyan Dinars, at least 30% of which must be paid in on incorporation, with the remainder to be paid within five years. This vehicle is commonly used for foreign-Libyan joint ventures.
- Branch Office: The registration of a branch office of a foreign company does not require a Libyan partner (or sponsor). However, the foreign company must demonstrate that it has particular experience in its planned area of activity. In addition, the activities which may be performed through a branch are confined to those mentioned in a list published by the Ministry of Economy. On registration, the parent company is obliged to deposit a minimum of 150 000 LYD with a local commercial bank. A branch office has the advantage that the foreign company is not dependent on a Libyan partner.
- Investment Enterprise: Under Investment Law No. 9 of 2010, investors can establish investment enterprises for activities in all the main industry sectors, with the exception of oil and gas exploration and production. The investment project may be wholly owned by the foreign investor, provided that the amount of the funds invested exceeds five million LYD. The minimum investment is reduced to two million LYD if a Libyan partner holds at least 50% in the investment. An investment enterprise benefits from certain exemptions from taxes and customs duties. Net profits and dividends are freely transferable and the investor may own real property in Libya. An investment enterprise is particularly suited to a foreign investor wishing to undertake a capital intensive project in the country.
- Free Zone Enterprise: The establishment of a free zone enterprise under Law 9 of 2000 is subject to a special legal regime. Under law 9 of 2000 and its executive regulations, a free zone enterprise can be established, for the manufacturing or processing of goods and the provision of services. A free zone enterprise must have a paid up capital of at least USD 100,000. Free Zone Enterprises qualify for exemptions and benefits similar to those available to investment enterprises. At present, there is only one free zone, located at Misurata, 200 km east of Tripoli. The Misurata Free Zone enjoys a certain popularity among investors. However, for the moment it cannot be compared to the free zones in Egypt or the Gulf States.

It should be noted that further restrictions, such as limits on foreign shareholdings, are contained in specific regulations, such as those covering oilfield services, banking and insurance.

Structuring business activities in Libya requires careful legal planning and, in view of restrictions of foreign ownership, corporate government arrangements are often complex.

At the present point in time it is unclear what changes the NTC intends to adopt in the medium term and what liberalizations, if any, will be implemented.

Concession and Production Sharing Agreements with the National Oil Company

The oil and gas industry is expected to play a key role in the rebuilding of the Libyan economy. Wood Mackenzie characterizes Libyan oil and gas resources as "highly unexplored" pointing out that only around 25% of Libya is covered by exploration agreements with oil companies.

The exploration and production of oil and gas in Libya is governed by the Petroleum Law (Law no. 25 of 1955, amended up to 1983) and Decree no. 10 of 1979, which reorganised the National Oil Company (NOC) and empowered it to enter into all kinds of petroleum exploitation agreements. In the recent past there were many attempts to enact a new petroleum law and several drafts were submitted for legislative discussion, however none were approved. A bill submitted in 2010 was quickly withdrawn by the Government.

At present, international oil companies operate in Libya either on the basis of an exploration and production sharing agreement (EPSA) or a development and production sharing agreement (DEPSA). The EPSA is the most common way for a foreign company to engage in oil exploration activities in Libya. The agreements are based on standard forms and there have been four generations of EPSA since 1974.

Normally, the choice of law provisions in the agreements with NOC explicitly refer to the Petroleum Law and the regulations issued in relation thereto, incorporating them into the agreement. The agreements regularly provide for international arbitration (often under ICC rules).

Commercial Agency

Commercial agency and distribution are mainly governed by the Commercial Code which has abrogated the Commercial Agency Law No. 6 of 2004. The Executive Regulations of the Commercial Agency Law No. 136 of 2004 (which continue to be in force) provide an extensive list of goods and services for which a local commercial agent is required (notable exceptions are foodstuffs and construction materials). Only a Libyan national or a wholly Libyan owned company can act as commercial agent. However, the importation for private use or for the purpose of a specific project does not require a local commercial agent or distributor.

The laws governing agency and distribution have been subject to numerous amendments, reflecting policy changes of the Libyan government in this area.

Contracting with the Public Sector

Special rules apply to contracts with the public sector. It is expected that such contracts will continue to play a key role in Libyan business in the foreseeable future.

Contracting with the public sector is subject to the Administrative Contracts Regulation no. 563 of 2007 which applies to all contracts with Libyan government entities or relating to development projects which are funded from the public budget. In addition to tender rules, the Administrative Contracts Regulation contains special rules for state contracts. The provisions of the Administrative Contracts Regulation are mandatory. A choice of law is not permissible and the Regulation provides for the exclusive jurisdiction of the Libyan courts.

An agreement to submit disputes to arbitration is only permissible with the prior approval of the General People's Committee.

EPC Contracts

EPC Contracts are often based on standard government models and in addition are subject to the rules of the Administrative Contracts Regulation and the Civil Code, depending on whether the employer is a state entity or a private company. It should be noted that Libyan law imposes a ten year warranty on the architect and contractor in relation to "fixed installations" (so-called "decennial liability"). The rules on decennial liability are mandatory and form part of Libyan *ordre public*.

In general, it is permissible to cap or exclude certain types of damages, with the exception of gross negligence and fraud.

The contractor normally is obliged to employ a certain percentage of local workers, subject to the availability of skilled workers.

Force Majeure

Both the Civil Code and the Administrative Contracts Regulation contain provisions on force majeure and impossibility. In many instances, international companies relied on these provisions during the last months (and continue to rely on them). These provisions normally are amended and detailed in the respective agreements. In general, however, force majeure can only be invoked as long as the exceptional circumstances persist. This means that international companies no longer can rely on them when life goes back to normal.

Dispute Resolution

Enforcing claims through the Libyan courts is generally challenging and lengthy.

Libyan courts are competent to hear claims against Libyan nationals or entities, or relating to real property located in Libya. It is permissible to choose the proper law of the contract, although it may be difficult to enforce the choice of law in practice.

The arbitrability of disputes is subject to certain restrictions. In contracts subject to the Administrative Contracts Regulation, the prior approval of the Peoples Committee (or the body replacing it in the future) is a prerequisite.

Libya is not a member State of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). However, the Riyadh Convention on Judicial Cooperation (1983)⁴ may apply, which also contains a basic mechanism for the recognition and enforcement of judgements and arbitral awards among the (Arab) member states.⁵

In addition, the Code of Civil Procedure permits, in principle, the recognition and enforcement of foreign judgements and arbitral awards. In the past, however, this was not a practical option, and it remains to be awaited if and when this situation would change.

Investment Protection

Libya has entered into bilateral investment treaties (BITs) with a number of countries, including Italy (2000), Austria (2002), Switzerland (2003), Portugal (2003), Germany (2004), France (2004), Belgium-Luxembourg (2004), Malta (1973 and 2004) and Spain (2007). In addition, Libya has signed BITs with other countries which did not enter into force yet, including South Korea (2006), India (2007), Russia (2008), Turkey (2009), and China (2010). There are no BITs in relation to the US or the United Kingdom.

Libya has not ratified the ICSID Convention (International Center for Settlement of Investment Disputes). This means that the forum for disputes between investors and the Libyan government will depend on what has been agreed in the respective BITs, and it may be recommendable that international parties agree to submit disputes to the ICSID under the so-called Additional Facility Rules.

⁴ In force since October 1985. The Convention regulates the enforcement of judgements rendered in civil and commercial matters among Arab States, and applies to Arbitral awards.

⁵ The Convention was signed by 20 Arab States (Algeria, Bahrain, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, the Sultanate of Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen. The Convention was ratified by Iraq, Yemen, Mauritania, Jordan, Syria, Somalia, Tunisia and Libya.

Mena Associates in Association with Amereller Rechtsanwälte

The Firm

MENA ASSOCIATES is part of AMERELLER RECHTSANWÄLTE , an international law firm with offices throughout the Middle East and Germany. The firm specializes in corporate and commercial law in the Middle East and is one of the few law firms with a direct presence in key markets in the region. This enables us to keep our finger on the pulse of this dynamic legal environment and provide tailored advice to clients consistent with evolving practices in the Arab World.

We have had leading roles in some major transactions in the Middle East, especially in Egypt, Libya, Iraq, Saudi Arabia, Syria, Oman, Qatar and the UAE. Clients consult us for expert advice and commercial guidance that we provide. Our personalized focus on supporting clients across country borders and industry sectors is central to our firm's culture. We aim to provide our clients with the professionalism, depth of expertise and quality offered by top-tier international law firms, together with the personal attention and practical knowledge available only through on-the-ground presence.

AMERELLER RECHTSANWÄLTE has offices in Cairo, Damascus, Dubai, Ras Al Khaimah, Baghdad, Basra and Erbil, as well as in Berlin and Munich. Our six partners lead a team of 30 internationally trained, multilingual and experienced lawyers, who are sensitive to the cultural and legal nuances of conducting business successfully in the Arab World. Through our network of best friend firms we cover all jurisdictions in North Africa and the Middle East - including Iran and Afghanistan.

Our Libya Desk

MENA ASSOCIATES in Association with AMERELLER RECHTSANWÄLTE has advised on transactions in Libya for many years. We represent leading international corporations and financial institutions in the Libyan market. We have extensive experience in the oil and gas sector. We have also been involved in some of the first foreign investments in the financial services sector in Libya. We regularly advise construction and engineering companies on Libyan real estate and infrastructure projects. In addition, we have advised on international law issues in relation to Libya, including sanctions and obligations arising out of international agreements, as well as risks relating to compliance and disputes.

In 2011 Islam Saeed has joined our Cairo office, after heading the transactional department of a leading Libyan law firm in Tripoli for more than three years. Islam is one of the leading experts of the new generation on Libyan law.

For the moment, our Libya desk is based in Cairo. This gives us a proximity to the Libyan market while avoiding local unrest and infrastructure limitations. Through locally-based partners, we can handle company registrations and licensing processes.

Recent Transactions

MENA ASSOCIATES in association with AMERELLER RECHTSANWÄLTE have been active in the MENA markets for many years. Our recent Libya experience includes:

- Advising an international oil company on the restructuring of its operations and the effects of the political transition on an EPSA concluded with NOC;
- Advising an international technology company on the restructuring of its Libyan operations;
- Advised a number of international contractors on questions of force majeure under Libyan law.
- Advised a number of EU companies on the EU and UN sanctions and their effect on existing contracts;
- Advised a Middle Eastern company and its US based investors on the acquisition of an oilfield services provider in Libya;
- Advised an international health insurance company on a management agreement with a leading Libyan health insurance provider;
- Advised the PE arm of an international development bank on the acquisition of a stake in a Libyan commercial bank, being the first transaction of its kind;
- Advising a leading Arab family business on the restructuring of its business in Libya;
- Advising on a mega real estate project with international hotel, serviced apartments and commercial units in Tripoli;
- Advising an international market leader in relation to a possible acquisition of a Libyan consumer products company .
- Advising a global car maker on structuring its business in Libya.
- Extensive experience in advising international companies on bids for Libyan government projects.

Publications

MENA ASSOCIATES in association with AMERELLER RECHTSANWÄLTE regularly publishes articles on legal developments in Libya. Recent publications include the country chapter “Libya” in Geimer/Schütze, Internationaler Rechtsverkehr [International Litigation and Arbitration], C.H.Beck, 2009 (by Kilian Bälz).

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