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Crisis in Libya: What Legal Options are Available to Oil and Gas Companies?

In 2010, Libya produced 1.65 million barrels of crude oil per day, more than 80% of which was exported. Over the past three months, production has plunged to less than 200,000 barrels per day and exports have virtually ceased as a result of the civil unrest and violence in the country and the sanctions imposed by the international community. Given the current political and military stalemate, it seems unlikely that the Libyan oil industry will get back on its feet any time soon. What legal options are available to international oil companies (IOCs) and oilfield service companies with operations in Libya?

The First Wave of Libyan Oil Arbitrations

The Qaddafi regime is no stranger to major international arbitrations. Following Libya's nationalization of foreign oil concessions in the early 1970s, British Petroleum, Texaco and LIAMCO (a subsidiary of Atlantic Richfield) brought arbitrations against the Libyan government claiming breach of their concession agreements. Each of the arbitrations resulted in an award of substantial damages against the government followed by a negotiated settlement. The awards constitute important precedents in the field of international investment law.[1]

Less than a decade after the nationalizations, U.S. oil companies and oilfield service companies operating in Libya were confronted with a new legal challenge. In 1981-82, the Reagan administration imposed restrictions on travel by U.S. citizens to Libya and required that U.S. companies obtain an export license for the export of oil and gas equipment and technical data to Libya. In *National Oil Corporation v. Libyan Sun Oil Company*, an arbitral tribunal ruled that these measures did not constitute *force majeure* excusing Sun Oil's failure to perform its obligations under its production sharing contract with the Libyan National Oil Corporation (NOC) because Sun Oil could have used its foreign affiliates' non-U.S. personnel and technology without violating U.S. regulations. Under Article 360 of the Libyan Civil Code, an event can constitute *force majeure* only if it renders performance of the obligation impossible. The *NOC v. Sun Oil* tribunal held that this "impossibility" test applies to contracts governed by Libyan law unless the parties expressly provide for a different standard in their *force majeure* clause.

Recent Events in Libya

Libya erupted in civil unrest and violence in mid-February. By the end of February, most foreign companies had evacuated their expatriate employees and the U.N. Security Council had voted to freeze the foreign assets of Qaddafi and his immediate family members and to prevent any funds from being made available to them. On March 17, the Security Council extended these orders to other individuals and entities, including NOC and its subsidiaries, and authorized Member States to take all necessary measures to protect Libyan civilians from attack. Coalition airstrikes began two days later. The European Union, United States and United Kingdom (among others) have adopted their own sanctions regimes.

Over the past month, a stalemate has emerged, with pro-Qaddafi forces generally in control of the western half of the country and rebel forces generally in control of the eastern half. The rebel-backed Transitional National Council (TNC) of Libya has established its own breakaway oil company, which exported one million barrels of oil in early April from the eastern port of Tobruk. On April 26, the U.S. Treasury Department's Office of Foreign Assets Control issued a general license authorizing U.S. companies to purchase oil exported from Libya under the TNC's auspices by engaging in transactions with Qatar Petroleum or Vitol, an oil-trading company. At a meeting in Rome on May 5, the international "Contact Group" on Libya discussed ways to facilitate further oil sales by the rebels.

Potential Pitfalls Related to Declarations of *Force Majeure*

It seems safe to assume that in the last three months most if not all IOCs and oilfield service companies operating in Libya have declared *force majeure* under their contracts.[2] While the "impossibility" test under Libyan law imposes a high hurdle, it is difficult to imagine that an arbitral tribunal would impose liability for non-performance by an IOC or contractor of its obligations over the last three months given the severity of the crisis and the international community's response. In *RSM Production Corporation v. La République centrafricaine*, a tribunal recently held that the armed conflict in the Central African Republic in the early 2000s constituted *force majeure* suspending RSM's obligation to acquire new seismic data under the parties' exploration and production contract. The tribunal reasoned that the conflict rendered performance of the seismic obligation impossible because it was industry practice to hire subcontractors to carry out work requiring special expertise and RSM had been unable to find a single seismic company willing to operate in the country.

As time goes on, however, a *force majeure* declaration may hold pitfalls for an IOC or contractor. In mid-March, NOC's Chairman called on western oil companies to send their employees back to Libya or risk seeing new contracts awarded to rivals from China, India and Brazil, which have not participated in the coalition airstrikes. Although NOC subsequently softened its position, the situation remains fluid and uncertain. Rebel leaders are also eager to resume production in the eastern half of the country with the support of the international community. As noted above, the United States and other governments are easing their sanctions regimes in order to enable oil sales by the rebels. Moreover, exceptions or exemptions may be available under the applicable sanctions regimes.

IOCs and contractors will have to determine if and when the security situation and international sanctions permit a return to business in the areas of the country where they operate, bearing in mind that non-performance of their obligations will most likely be excused only so long as performance is deemed "impossible." Other factors influencing the decision to return will include the IOC's or contractor's desire to retain a profitable contract (the *force majeure* clauses in some Libyan petroleum contracts provide for automatic termination if the *force majeure* situation lasts for more than a year) and its desire to establish good relations with whatever government emerges from the crisis.

Potential Claims Against the Libyan Government

IOCs and oilfield service companies may be able to bring compensation claims against the Libyan government in connection with the recent events. Libya has entered into bilateral investment treaties with 17 countries, including France, Italy, Spain, Switzerland and the Belgo-Luxembourg Economic Union (but not the United States or United Kingdom). These treaties entitle investors from one state party to submit claims against the other state party to international arbitration. Even if no treaty exists between an investor's home state and Libya, the investor may be able to bring claims under a treaty between Libya and a third country if its investment is held through a subsidiary incorporated in that country.[3]

While the language of each bilateral investment treaty must be carefully examined, most treaties mandate that an investor's investments shall enjoy "fair and equitable treatment," "full protection and security," and treatment no less favorable than that granted to the host state's own investors or to investors of any other state. Most treaties also entitle the investor to "adequate and effective compensation" if the host state expropriates or nationalizes its investment, and some also protect the investment from "unreasonable and discriminatory treatment."

IOCs and contractors with operations in Libya can claim that the government has violated these treaty standards by engaging in a campaign of hostility and violence and by committing other acts and omissions that have resulted in an untenable, unstable, and unpredictable investment environment. IOCs that operate under older concession agreements with the Libyan government may also be able to bring claims for breach of the government's obligation under Article 16(1) of the concession agreement to "take all steps necessary to ensure that the Company enjoys all rights conferred by this Concession," including the right to produce and export oil from the concession area. While enforcing an award against a sovereign state is often difficult, it may be possible for an IOC or contractor to attach the Libyan government's frozen assets held in foreign bank accounts.

Of course, it is uncertain which government or governments will emerge from the crisis. If the TNC or some other entity is recognized as the lawful government of a unified Libyan state, it would most likely be deemed responsible for the Qaddafi regime's violations of international law or breaches of contract under the principle of the continuity of states. However, an arbitral tribunal might be reluctant to impose substantial damages against Libya at a time when it is recovering from a major political, social, and economic crisis.

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Unless the situation in Libya improves dramatically in the near future, it seems likely that there will be a second wave of Libyan oil arbitrations. IOCs and oilfield service companies must continuously evaluate the security situation and the applicable sanctions regimes to ensure that they can satisfy the strict "impossibility" test for *force majeure* under Libyan law. In addition, they may wish to investigate whether they can bring claims against the Libyan government under a contract or bilateral investment treaty.

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[1] For a detailed discussion of the awards, *see* R. Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, Yearbook Commercial Arbitration 1998, pp. 1131-1210.

[2] In the unlikely event that an oil and gas contract does not contain a *force majeure* clause, the defense is still available if the contract is governed by Libyan law or the law of another civil law country.

[3] Libya is also a party to the Unified Agreement for the Investment of Arab Capital in the Arab States, which allows investors from one Arab state to submit claims against another Arab state to the Arab Investment Court in Cairo. To invoke the Unified Agreement, an investor must be a citizen of an Arab state or a legal entity organized under the laws of an Arab state and wholly owned by citizens of an Arab state. The Court, which is composed of judges appointed by the Economic Council of the League of Arab States, has issued only one decision in the more than 25 years since it was established.