LIBYA

A GUIDE TO COMMERCIAL LAW, BANKING LAW AND ACCOUNTING

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GLOBAL MARKET BRIEFINGS

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About the Authors

Mukhtar, Kelbash & Elgharabli is one of the longest-established law firms in Libya. It is engaged in general practice, with a particular focus on oil and gas, corporate matters, litigation and international commercial transactions involving Libyan interests. Its client base includes a number of oil and gas companies operating in Libya, in exploration, production and services, and other foreign companies involved in industrial and trading activities and in the execution of projects in various other sectors.

The three name partners of Mukhtar, Kelbash & Elgharabli and a senior associate in the same firm have all contributed to this book :

Mahmud R. Mukhtar obtained his LL.B from the University of Libya, and has also received an LL.M from Harvard Law School. He worked as an in-house legal adviser and general counsel for various oil companies in Libya (American Overseas Petroleum Ltd., Umm Al Jawaby Petroleum Ltd. and Oasis Oil Company) before entering into private practice in 1988.

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Abdudayem M. Elgharabli received his LL.B from the University of Gharyounis (Benghazi), and an M.C.L. from Dickinson School of Law (Pennsylvania). He entered private practice in 1992, becoming the third partner in the firm of Mukhtar, Kelbash & Elgharabli, after having served as senior adviser and later general counsel to the National Oil Corporation of Libya.

Tarek M. Eltumi (who contributed to the chapter on Foreign Investment), was educated in the U.K. He received his LL.B (Hons.) from the University of Essex and an LL.M from the University of London (SOAS). He then took the Legal Practice Courst at the BPP Law School, before returning to Libya, where he spent three years as an associate at the Tumi Law Firm before joining Mukhtar, Kelbash & Elgharabli in 2007.

Eversheds LLP has an international network that makes it one of the largest full-service law firms in the world, with over 4,000 people including more than 400 partners and over 2,100 legal advisers. Its Paris office, under the name of Frere Cholmeley - Eversheds, has a long history of working on matters relating to Libya, advising both Libyan and non-Libyan clients. Its clients include private companies, international financial institutions, investment funds, banks, oil and gas companies, state-owned companies, and sovereign states. Two members of the Paris office have contributed to this book:

Nanette Pilkington obtained a B.A. from the University of London and a degree in business law from the University of Paris-II, and is qualified as a French avocat. Her work has involved numerous contentious and non-contentious matters in Libya. She specialises in non-contentious oil and gas work and project financing, particularly in Africa and the Middle East, and also has wide experience in international commercial arbitration and public international law.

David Sellers holds an M.A. from Edinburgh University and is qualified as a solicitor in England and Wales and an avocat in France. He has considerable experience of Libyan matters, particularly in the petroleum sector. His main practice areas include infrastructure projects (PPP, concessions, BOT etc.), international arbitration and public international law matters, specialising in upstream and downstream oil and gas work, energy and mining projects, and public international law.

The chapters on Banking Law and Taxation, Accounts and Auditing were contributed by **Gerry Slater**, who is a UK-qualified Chartered Accountant and the Tax Director of **Ernst & Young** and Partners in Libya. He has worked in Libya for 25 years and has extensive experience in various sectors, primarily advising international companies regarding contract structure and tax strategy. In 1999 he received an MBE for services to the British Business Community in Libya.

Introduction and General Overview

Over the last century, Libya has lived through a number of profound changes, many of which have left their mark on the country and on its political and legal institutions. During this time it has experienced, in particular, the dying days of Ottoman administration, colonization by Italy, the Second World War, military administration by the Allied Forces following Italy's defeat, the proclamation of independence under the auspices of the United Nations, a period of constitutional monarchy and a socialist revolution. At the same time, it has passed from a situation of extreme poverty to one of great oil wealth but has only recently emerged from a long period of economic sanctions which have considerably hampered its development.

With the gradual lifting of those sanctions, Libya has become increasingly attractive to foreign businesses. These are now seeking to invest not only in the petroleum sector, where an intense effort is being made to attract foreign oil companies back to Libya and to increase production to its pre-sanctions level, but also in other areas which have been designated for privatization or where, as in the tourism sector, essential facilities are quite simply lacking.

Despite Libya's geographical proximity to Western Europe, political circumstances have caused it to be viewed from the outside as a rather closed and mysterious country, and there are widespread misconceptions as to what it is really like, and what its institutional and legal framework might be. This book will seek to dispel those misconceptions while highlighting aspects that will be of most relevance to foreign businesses that are seeking to invest in Libya or otherwise do business with it. This introductory chapter will provide a general overview of Libya's institutions and legal system and will be followed by more detailed chapters concerning the areas that are likely to be of particular interest to foreign businesses.

Institutions

By way of historical background, Libya was one of the first areas to which Islam spread after the death of the Prophet Mohamed. During the Middle Ages, it formed part of the territories of successive Caliphates, and in the

16th century it fell under Ottoman rule. It remained nominally under Ottoman control until the early years of the 20th century.

Italian colonizers arrived in Libya in 1911, and in 1912 Italian sovereignty was established over the provinces of Tripolitania and Cyrenaica. During the period of Italian occupation, there was no attempt by the colonizers to form a local elite, and the population remained culturally and economically backward. Following Italy's defeat in the Second World War, Libya was placed under allied military administration for several years until, on 24 December 1951, it was proclaimed independent as a constitutional monarchy under King Idris. At that time, Libya was reported to be one of the poorest countries in the world.

It was the discovery of oil in the early 1950s, and the progressive development of the country thereafter, that created the political tensions that would eventually lead to the overthrow of the monarchy. A key factor of discontent was that the urban middle class that emerged with the development of the oil industry was not fully integrated into the political process, and the monarchy failed to develop democratic institutions. This was exacerbated by political events in North Africa and the Middle East, such as Nasser's pan-Arabism, the Algerian War and the Six Days' War, as well as by the monarchy's tolerance of official corruption and its failure to distribute the oil wealth equitably.

On 1 September 1969, at a time when, in the face of this discontent, King Idris had already announced his intention to abdicate in favour of his nephew, a group of military officers seized control of the government, abolished the monarchy and completed their takeover of the country within a matter of hours. This bloodless coup was received enthusiastically by the population.

A 12-member Revolutionary Command Council was established, headed by Colonel Muammar Gaddafi. It abolished the existing constitution and parliamentary institutions (itself assuming legislative functions) and introduced various domestic reforms that were intended to steer an alternative route between what were seen as the failings of communism and the evils of imperialism. Colonel Gaddafi's vision of this alternative route (described as the 'third universal theory') was published in his three-volume *Green Book* from 1976. At the same time, during the 1970s, a number of administrative reorganizations took place which were designed to give effect to this vision, culminating in the Declaration of the Establishment of the Authority of the People, which created the Jamahiriya on 2 March 1977[1].

This is the historical background against which Libya's present institutional and legal system has evolved. As will be seen, the system comprises sometimes outmoded legislation based on foreign sources and adopted in the early years of independence, various laws of a rather revolutionary stamp and other more recent legislation of a type that should be familiar to foreign businessmen.

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[1] See below 'The Declaration on the Establishment of the Authority of the People — the Jamahiriya'.

The Constitution

Following the overthrow of the monarchy on 1 September 1969, a Constitutional Proclamation was made on 11 December 1969. The preamble of the Proclamation states that it is made 'to provide a basis for the organization of the national and democratic revolution, until a permanent constitution is prepared', and Article 37(1) provides that the Proclamation shall remain in effect until a permanent constitution is issued. However, although some of the provisions of the original Proclamation were superseded by the 1977 Declaration on the Establishment of the Authority of the People, a new constitution as such has not been issued to date, and provisions of the Proclamation of 1969 that have not been superseded therefore remain in force. These will be further discussed in the 'Overview of the Libyan Legal System' below.

The Declaration on the Establishment of the Authority of the People — the Jamahiriya

The Declaration on the Establishment of the Authority of the People of 1977 proclaimed the Socialist People's Libyan Arab Jamahiriya, which superseded the Libyan Arab Republic that had been established at the time of the revolution. The word 'Jamahiriya' was a neologism, designed to mean something approximating to 'State of the masses'. The Declaration established the Jamahiriya in a way that combined elements of revolutionary ideology (a unique form of self-government by the people through a hierarchical system of people's congresses, people's committees and trade and professional unions) as expressed in the *Green Book*, with a more traditional division of government into legislative, executive and judicial branches.

The Legislature

As a result of the constitutional changes of 1977, the legislative branch of the government came to be embodied in a pyramid of People's Congresses. Basic People's Congresses exist at the local level, delegates from which form Municipal (or *shabiyat*) Branch Congresses, which in turn send delegates to the General People's Congress. The General People's Congress is administered by a secretariat chaired by the Secretary-General of the People's Congress, which is one of the most senior positions in the state.

The official task of the General People's Congress is to set the agenda for the meetings of the Basic People's Congresses, including draft laws, which may be proposed by the Secretariat of the General People's Congress itself or by the executive branch. Legislative proposals, regarding such matters as the budget, laws and even treaties, are passed from the General People's

Congress down through the hierarchy to the Basic People's Congresses for their comments and/or approval. The General People's Congress issues laws once they have been approved by a sufficient number of Basic People's Congresses.

The Executive

The executive branch of the government is the GPC (General People's Committee). Nominations for appointments to the GPC are made by the Secretary-General of the General People's Congress and are confirmed by the annual meeting of the General People's Congress, which usually takes place in early March. The head of the government, or Prime Minister, takes the title of Secretary of the GPC, and there is currently also an Assistant Secretary, or Deputy Prime Minister. The number of ministries (referred to as secretariats, each of which is headed by a Secretary) has fluctuated considerably in recent years. As a result of a governmental reorganization in September 2000, only four secretariats remained, but their number has now been increased again to 17.

Given the importance of petroleum to the Libyan economy, it is perhaps surprising that there is not always a Secretariat of Petroleum. In the governmental reorganization that took place in 2000, this secretariat was abolished, and its attributions devolved upon NOC (the National Oil Corporation). It was subsequently reinstated in 2004, as part of a Secretariat of Energy, but in the reorganization that took place in March 2006, petroleum affairs were again removed from the hands of the GPC. Instead, it was announced in September 2006 that a new Council for Oil and Gas Affairs was to be established to handle all matters involving oil, gas and their by-products. Its membership includes the Secretary of the GPC and a number of other Secretaries from the GPC, together with the head of NOC and various experts.

On a local level, the country is divided into *shabiyats* (municipalities or provinces), which have their own budget and their own secretariats. The *shabiyats* are responsible for implementing policy in matters such as housing, education, welfare, roads, etc, and they took on increased responsibilities during the time when the central government was reduced to only a handful of secretariats. To date, however, they have not been called upon to play any significant role in areas that will be of most interest to foreign investors, such as major development projects, the oil and gas sector, the residence and employment of foreign personnel or the registration of branches of foreign companies, all of which have remained centralized at the national level.

There is also a Supreme Planning Council, comprising the GPC, the People's Committees and Planning Councils of the *shabiyats*, public corporations and authorities and associations of experts at the level of the *shabiyats*. It is responsible for drafting the development plan, which it proposes to the General People's Congress for approval, and then overseeing its implementation and reviewing its progress.

The Judiciary

The Constitutional Proclamation of 1969 provides for an independent judiciary, with judges who, in the exercise of their functions, are to be free from any authority except that of the law and their conscience[1]. It further provides that everyone has the right to resort to the courts in accordance with the law, and that the aim of judicial decisions shall be the protection of the principles of the community and the rights, dignity and freedom of individuals. Similar provisions are to be found in Law No. 20 of 1991, discussed below[2].

Overview of the Libyan Legal System

Libya is basically a civil law country, and as in other civil law countries, there is a hierarchy of legislative texts. These are, in descending order of authority, the constitution, quasi-constitutional texts, laws (including the various codes), executive regulations, executive decisions and ministerial decisions. Laws are issued by the General People's Congress, executive regulations and executive decisions by the GPC and ministerial decisions by the individual secretariats.

Constitution

As mentioned above, the provisions of the Constitutional Proclamation of 1969 that have not been superseded by the Declaration of 1977 remain in force. In some countries, constitutional provisions may be relevant to foreign investors, insofar as they lay down certain fundamental principles that may be relied upon for the protection of investments. However, the Libyan Constitutional Proclamation gives very little by way of clear guarantees and protections; on the contrary, some of its provisions might be perceived as rather unhelpful for private foreign investors, since they embody the socialist philosophy of the revolution.

For example, Article 7 provides for the state to 'endeavour to liberate the national economy from dependence and foreign influence' and to turn it into a productive national economy 'based on public ownership by the Libyan people and on private ownership by individual citizens'. Article 8 in turn lays down public ownership as 'the basis of the development of society, of its growth and of self-sufficiency in production'. Nevertheless, private ownership

[1] The court system is discussed further in Section The Court System and Arbitration below.
[2] See Section 'Human Rights Legislation'.

is protected, but on condition that it is ‘non-exploitative’, and Article 8 also provides that expropriation may take place ‘only in accordance with the law’.

While Article 9 requires the state to institute a system of national planning covering economic, social and cultural aspects, it nonetheless recognizes that cooperation between the private and public sectors will be necessary for the achievement of the goals of economic development.

Finally, Article 17 provides that no tax will be imposed, modified or cancelled, except in accordance with the law.

It will be seen, therefore, that while the Proclamation does contain a number of generally worded protections, these are always qualified, and allow for exceptions if they are in accordance with the law. Similarly, some exceptions are allowed if the right that would otherwise be protected is contrary to the public interest or the principles of the revolution. As a result, the Proclamation allows considerable leeway for its provisions to be circumvented, and the protection that it grants may therefore be more apparent than real.

Human Rights Legislation

Alongside the Constitutional Proclamation are the 1988 Charter of Human Rights and Law No. 20 of 1991 for the Enhancement of Freedom, which have quasi-constitutional value. These two texts contain similar provisions. The Charter refers to a right to undertake private activities, either as an individual or in partnership, but Law No. 20 goes somewhat further than the Charter in identifying specific rights that are protected. Many of its provisions have a rather political bias, but there are some that may be relevant to foreign investors (for example because they grant the investor protection, or because they grant private individuals certain rights that will be applicable to personnel employed in Libya). In addition, Law No. 5 of 1991 on the implementation of the Charter of Human Rights provides in its first article that all legislation in force as of the date of that Law must be reviewed and amended in accordance with the Charter, and that it is prohibited to issue legislation that is contrary to the Charter.

Law No. 20 provides in particular that ‘private ownership is sacred, if it is derived from a legitimate source and does not involve exploitation of others or cause material or moral damage to others’. Further, property must not be confiscated ‘except in the public interest and against fair compensation’. Here again, therefore, while Law No. 20 does grant some specific rights, these are qualified and subject to exceptions. For example, the exercise of certain rights is not permitted if it would be ‘against the people’s authority’, or if it would constitute a ‘violation of public order or public morals’.

As regards private individuals’ rights, Libyans are free to establish trade unions and professional associations and to be members of them, ‘for the protection of their interests and in order to achieve legitimate purposes’, and their correspondence, private life and homes are inviolable.

Codified Legislation

Like other civil law countries, Libya has a series of codes laying down the basic principles of its legislation. These codes date from the early days of independence, but after the revolution they were reviewed and revised in certain respects, in order to harmonize them with Sharia law. While these codes may be relied upon in determining the basic principles of Libyan law, it should always be borne in mind that they are half a century old and have not always been updated by the incorporation of more recent legislation. Therefore, on any specific question, it is necessary to verify whether the relevant provisions of the Code have been superseded or complemented.

The main codes are the following:

The Civil Code

The Civil Code was issued in 1953. It was based on (and was practically identical to) the Egyptian Civil Code, which in turn was based on the French Civil Code (or Code Napoleon). It is considered to be the main law for civil transactions relating to both personal and real rights. It deals with sources of obligations, such as contract, unlawful acts, unilateral undertakings, unjust enrichment, etc, as well as with specific performance, damages, the transmission and extinction of obligations and rules of evidence. Further provisions regulate specific contracts (including sale, loans, service, agency and insurance) and securities such as mortgages and pledges.

The Commercial Code

The Commercial Code also dates from 1953. It deals in general with commercial transactions. A transaction is considered to be commercial either if it is specifically identified as such in the Code or, unless it can be shown to be of an essentially civil nature, if it is carried on by a commercial entity. In particular, the Code deals with commercial contracts (such as sale, supply, lease, transportation and shipment) and also with the commercial registry and requirements for registration, bank transactions, commercial credit instruments, commercial companies and branches of foreign companies and bankruptcy.

The Civil and Commercial Procedure Code

This Code again dates from 1953. It establishes the hierarchy of the various courts that deal with civil and commercial matters, defining their respective jurisdiction and procedural rules, including the procedure for producing evidence, the procedure for enforcement of judgements and arbitration.

The Criminal Code and Criminal Procedure Code

There are also a Criminal Code and a Criminal Procedure Code, both dating from 1953.

The objective of the Criminal Code is to regulate the conduct of individuals in order to safeguard public order and protect society from the consequences of antisocial behaviour. The Code lays down the fundamental principles that a person cannot be convicted of a criminal offence unless the offence is recognized as such by the law and that, similarly, no punishment may be inflicted upon a person who has committed a criminal offence unless the punishment is provided for by law.

The Criminal Procedure Code organizes the conduct of criminal proceedings and determines the jurisdiction of the various criminal courts.

The Maritime Code

The Maritime Code was issued in 1953. Its provisions deal with vessels in general, and their registration, papers, insurance, disposal and attachment or seizure. It also lays down the rights and obligations of the owner of the vessel as well as those of the master of the vessel.

Certain contracts specific to maritime commerce are also provided for in the Maritime Code. These include in particular contracts for the chartering of a vessel either for a fixed term or for a voyage, and contracts for the carriage of goods or passengers by sea, including the obligations of the carrier.

Events relating to risks and perils encountered at sea are also covered, such as collision, aid and salvage.

Finally, the provisions of this Code deal with the organization of work at sea and marine insurance, including the conclusion of insurance policies, their validity and effect, the object of insurance, risks insured and risks excepted, limitation and payment of insurance indemnities, and claims for average losses.

Other Significant Legislation

Alongside the Codes, there is other significant (and in most cases more modern) legislation which may be relevant to foreign investors and which will be dealt with in more detail in the following chapters. This legislation includes in particular the Foreign Investment Law (Law No. 5 of 1997, dealt with in Chapter 2); the Petroleum Law and Regulations (see Chapter 11) and the Administrative Contracts Regulation (discussed in Chapter 4). Investors intending to establish a presence in Libya should also be aware of the legislation relating to real estate, as well as certain penal laws, such as the Economic Crimes Law, the Liquor Law, the Drugs Law, the Traffic Law, the Customs Law and the provisions provided for under other laws related to the fight against corruption, each of which is briefly discussed below.

Real Estate Legislation

The ownership and leasing of real estate in Libya has been subject to various legislation over the past 28 years. As will be seen, while there were previously outright prohibitions on the ownership or leasing of property by foreigners, the trend is now towards a liberalization of the regime, although certain restrictions do remain. We will explore briefly here the most relevant laws and regulations issued in this respect, as amended.

The concept of real estate in Libya covers both the land itself and also houses and other immovable erections and constructions. According to the Law of 24 May 1960, non-Libyans, be they individuals or legal entities, are prohibited from owning real estate in Libya. This prohibition was confirmed by the Executive Regulation of Law No. 4/1978 issued on 10 May 1978, which provides for Libyan citizenship as a necessary condition for owning real estate in Libya.

However, since 1997 there has been an exception to the prohibition. According to Law No. 5/1997 concerning Encouragement of Foreign Capitals Investment, as amended[1], an investor who falls within the ambit of that Law is entitled to hold freehold title to land in Libya if that land is to be used for the investment project, or alternatively may lease such land under a long-term lease[2]. In such circumstances, the investor is also entitled to construct buildings on the land and to own or lease any other property that may be required for the project.

As regards houses and other constructions that are erected for residential use, their leasing was prohibited in principle by Law No. 4/1978 issued on 10 May 1978, Law No. 11/1992 issued on 5 September 1992 and the Executive Regulation for that law, which was issued on 23 June 1993. However, that legislation provided for a significant exception to this prohibition, whereby residential property owned by legal entities (either private or public) or by individuals falling within certain restricted categories (martyrs of war, prisoners of war or orphans) could be leased.

This regime was further liberalized when Law No. 11/1992 was amended by Law No. 14/1425 (1996) issued on 13 February 1996, which allows all companies working in Libya to lease real estate for the purposes of their business, operations and activities. This includes the right for legal entities and also all individuals of Libyan nationality to lease residential property to individuals who are residing temporarily in Libya or to companies for their employees who are temporary residents.

Furthermore, despite the previous prohibitions, under the General People's Committee Decision No. 443/2006 concerning the imposition of certain rules with respect to foreign companies conducting business in Libya[3], a joint venture between a foreign company and a Libyan partner

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[1] See Chapter 2.
[2] See, however, the comment in Chapter 2 relating to the practical application of this provision.
[3] See Chapter 1, Section Introduction.

that is established in accordance with that Decision is entitled to use land on the basis of a long-term lease and to erect the necessary manufacturing plants and workshops.

In summary, foreign individuals and companies are still prohibited from holding title to real estate in Libya, unless they are qualified to do so under Law No. 5 relating to Foreign Investment. On the other hand, there are no longer any restrictions upon foreign individuals or foreign companies to prohibit them from leasing property in Libya from the state, from public or private companies or from individuals, either for housing or for other purposes required for their business, such as offices, workshops or other similar facilities, and it has now become an established practice to do so.

The parties to a lease agreement are free to negotiate the terms of their agreement, such as the duration of the lease, the conditions for renewal and termination of the lease, the amount of rent and its assessment, the respective obligations of the lessor and the lessee, provisions relating to defects in the leased property and warranties regarding the same, immediate repairs to the property, trespass of third parties and the right of the lessee to sublet the property or to assign the lease.

Finally, in view of Law No. 12/1372 (2004) concerning stamp duty, issued on 6 March 2004, a lessee should take into consideration that he is the party responsible for the payment of stamp duty on the lease agreement signed by him. This stamp duty is calculated as 1 per cent of the agreed amount of rent throughout the duration of the lease.

The Economic Crimes Law

This law was issued on 29 April 1979 and has been amended twice, in February 1980 and December 2001. Its purpose is to protect public revenues and the national economy and to prevent public employees from committing offences in this regard. According to the provisions of this law, bribery and the embezzlement of public monies, the destruction of public works and petroleum-related constructions, the smuggling of currency, gold jewellery or precious stones, interference in public bids and tenders, the spreading of animal and plant diseases, the importation of materials or goods that are not permitted for importation into Libya and the issuing of cheques without sufficient funds are prohibited.

The penalties prescribed for the above offences are very severe. For example, destroying public works and petroleum-related constructions is subject to the death penalty or life imprisonment. Other penalties range — depending on the nature of the offence committed — between imprisonment and imprisonment plus a fine, together with the confiscation of any money or any other items involved in the offence.

The Liquor Law

Law No. 4/1423 (1993) as amended by Law No. 20/1425 (1995) is known as the Liquor Law. Anybody who is thinking of establishing a business presence in Libya should be aware that according to the provisions of this law drinking, handling, processing, obtaining or manufacturing alcoholic beverages, dealing or trading in such beverages or even offering them as a gift are prohibited and considered as a crime (or felony) that is subject to trial and punishment. This law is applicable to all, irrespective of whether the offence is committed by a Libyan national or a foreigner. The drinking of alcohol, even by a non-Muslim, is considered as a serious offence when it occurs in a public or open place, or when the offender is found in a manifest state of drunkenness in such a place.

The Drugs Law

The Drugs Law in force in Libya was issued in 1990 and has been amended on three occasions, in 1993, 1995 and 2001. According to the provisions of this law and its amendments, it is prohibited to take, trade in, possess, buy, sell, export, import, produce, extract, separate, manufacture, promote, market or plant narcotic drugs or other psychotropic substances, unless for purposes and/or in circumstances permitted by law. Attached to the law is a table clarifying the items that are prohibited.

The punishments prescribed for offences relating to drugs can be very severe. For example, exporting, importing, producing, extracting, separating, manufacturing, promoting or marketing narcotic drugs or other psychotropic substances with the intention of trading in these products is subject to the death penalty or life imprisonment and a fine of between 10,000 and 50,000 Libyan dinars (approximately \$7,500—\$37,500 or £4,000—£20,000). When such acts are committed with no intention of trading, they are subject to a penalty of imprisonment for not less than 10 years and a fine of between 500 and 3000 dinars (approximately \$375—\$2,250 or £200—£1,200). Taking and/or using drugs is subject to a penalty of imprisonment and a fine of between 1,000 and 5,000 dinars (approximately \$750—\$3,750 or £400—£2,000), and the provision of premises for taking drugs, or facilitating the taking of drugs, is subject to a penalty of imprisonment for not less than six months and a fine of between 100 and 500 dinars (approximately \$75—\$375 or £40—£200).

The Traffic Law

The Traffic Law in force at present was issued in 1984 and amended in 2003 by Law No. 10/1371 (2003). According to the provisions of this law and its regulations, the owner of a vehicle must comply with various regulations regarding registration, insurance and technical inspection of the vehicle.

Various provisions of the Traffic Law relate to the transportation of cargoes by road. Thus, the law provides that explosives and other dangerous materials may not be transported without authorization from the relevant authorities. Also, if any load carried by a vehicle exceeds the fixed length, width or height of the vehicle a special authorization to carry the load should be obtained from the traffic police, and the load should be marked in a visible manner. Finally, if a trailer is attached to a lorry, the driver must be accompanied by an assistant.

For anybody wishing to drive a car in Libya, it is worth noting that foreign driving licences may be used for a maximum period of three months only, and that thereafter an application for a Libyan licence must be submitted to the authorities. In order to obtain a Libyan licence, the applicant must present various documents and must also pass a driving test. The use of a seat belt while driving is obligatory. The right-hand side of the road must always be used, and there are speed limits inside cities, on highways and on minor roads which should always be complied with. In case of a traffic accident, the driver should immediately stop the vehicle and report the accident to the nearest police station, and in case of injury the driver should take the injured person to the nearest hospital. Finally, driving while intoxicated or causing an accident that results in an injury or death are very serious crimes under the Traffic Law and are subject to severe penalties.

The Customs Law

The Customs Law was issued in 1976, replacing a previous law of 1954. Its provisions impose customs control and supervision inside the territory that is subject to the sovereignty of Libya. According to the provisions of this law, everything that is imported into Libya must be imported through the customs offices in ports or airports. The law deals also with customs duties imposed on imported goods, the classification of such goods for the purpose of estimating customs duties that are due and all the documents and procedures required when importing goods, materials or equipment[1]. It also provides, however, for cases of temporary importation when the payment of customs duties is not required.

It should be noted that importing and/or exporting any goods, materials or equipment without paying the customs duties that are due is considered as a criminal offence. In case of conviction by the criminal court, the goods, materials or equipment in question may be ordered to be confiscated and sold. In this case, priority over the proceeds of the sale is given to the customs authorities to collect the duties that are owed in this regard.

Anti-Corruption Provisions Under Libyan Laws

Among the most important issues to be aware of for anyone who is thinking of establishing a presence in Libya are those relating to crimes committed against the public administration, whether they are committed by public officials or by other individuals. In this regard various Libyan laws contain anti-corruption provisions, such as the Penal Code and other complementary

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[1] At present, however, customs duties except for duties on tobacco products have been replaced by a flat 4 per cent service and port charge, and certain imported goods are subject to a consumption tax (see Chapter 1, Section Customs and Import Regulations).

laws such as Law No. 2/1979 regarding Economic Crimes referred to above, Law No. 6/1985 regarding Incriminating Intermediaries and Favouritism, Law No. 22/1985 regarding Combating Abuse of Authority, Law No. 3/1986 regarding Incriminating Unlawful Gains, Law No. 10/1993 regarding 'Purification'[1] and Law No. 2/2005 regarding Money Laundering. These laws prohibit the offering or accepting of any form of bribery, the use of influence to attain unlawful benefits and similar acts such as embezzlement, extortion, defrauding the public interest, the use of an official position for personal benefit, divulging professional secrets, refusing to perform employment duties and money laundering.

Any violation of the provisions of these laws is subject to severe penalties such as imprisonment, fines and the confiscation of any money that has been involved in the crime.

By Law No. 10/2005 issued on 12 January 2005, Libya ratified and joined the United Nations Convention against Corruption signed in New York on 31 October 2003 and, as a result, the Convention has been incorporated into Libyan law. This Convention aims at promoting and strengthening measures to prevent and combat corruption more efficiently and effectively, facilitating international cooperation and promoting integrity, accountability and the proper management of public affairs and public property.

The Court System and Arbitration

The Court System

General

The structure of the Libyan court system will seem quite familiar to anybody who has experience of the court system in civil law countries such as France or Italy.

In Libya, courts are classified by function as either trial courts or appellate courts. Trial courts hear and decide disputes by examining the facts and applying the appropriate rules of law. The parties to a dispute argue their positions by presenting arguments on the law and evidence on the facts, which may be in the form of documents and/or testimony from witnesses. The trial court usually consists of three judges who control the entire trial in terms of facts and law and determine the outcome.

Appellate courts, where cases are usually heard by a panel of judges, have jurisdiction to review the decisions of the trial courts. There are six courts of appeal in Libya: Tripoli, Benghazi, Misurata, Zawia, Sabha and El-Jabel El-

[1] Even in Arabic, the title of this law is not very clear. Its aim is to protect public money from abuse, misuse and theft. In this connection, it requires all employees and nationals engaged in private business to provide evidence of their financial situation at the time they are first employed and when their employment ends, in order to ensure that their earnings during that time were lawful.

Akhdar. Generally, an appeal will lie only from a final decision of a lower court.

Finally, in certain cases discussed below, an appeal may be available in the Supreme Court against a court of appeal's judgement[1].

In giving their decisions, the courts will refer to the various legislative sources, in descending order of authority in accordance with the hierarchy mentioned in the section 'Overview of the Libyan Legal System' above. In the absence of any applicable legal provisions, they will refer to other sources of law and will thus apply Islamic law, prevailing custom and principles of natural law and rules of equity.

If a normal legal dispute that is not particularly complex is heard by a trial court and then by a court of appeal it may require a period of time of between 18 months and 2 years to obtain a final judgement. However, if the proceedings require the hearing of an expert or of witnesses, or if the case involves counterclaims as well as direct claims, much more time is likely to be necessary.

From experience it can be said that disputes submitted to the Libyan courts are likely to have a fair trial, including those disputes where a foreign party is involved, either as a claimant or a defendant, and it is certainly not unusual for judgements to be rendered by the Libyan courts in favour of foreign parties against national parties.

Jurisdiction

As will be seen below, jurisdiction over the subject matter of a case is generally determined by the amount and/or the nature of the claim involved in the case. Jurisdiction over the person of the defendant is determined by that person's place of residence. However, a defendant waives the right to dispute jurisdiction over his person by making a general appearance and failing to raise an objection to jurisdiction.

The judicial system in Libya comprises the following courts: summary (or small claims) courts, courts of first instance, courts of appeal and the Supreme Court.

The Summary (or Small Claims) Court

The summary court, also known as the small claims court, is a trial court. It is a single-judge court that has jurisdiction to hear and decide in the first instance civil and commercial claims for a value not exceeding 1,000 Libyan dinars (around $750 or £400). It also has jurisdiction to hear any claims, regardless of their value, relating to the rental of buildings or land, claims for compensation for damage caused to cultivated land, crops or fruits, cases relating to the use of water, cases regarding the delimitation or demarcation of boundaries and civil claims for damage resulting from the commission of petty crimes or offences.

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[1] See Section The Supreme Court below.

If the value of the claim does not exceed 100 dinars, the court's decision is final and not subject to appeal. Where the value of the claim exceeds 100 dinars, the decision is subject to appeal, not before the court of appeal itself, but before a chamber of three judges within the court of first instance.

The Court of First Instance

Courts of first instance have jurisdiction to hear and decide in the first instance civil and commercial claims that fall outside the jurisdiction of the summary court. Their jurisdiction extends to counterclaims, requests for provisional measures and indemnity claims, whatever the value of such claims or requests, provided they are filed before it during its hearing of the original claim. The court of first instance consists of a panel of three judges both when it sits to hear and decide cases in its capacity as first instance court and when it sits as a court of appeal to review judgements issued by the summary court.

Judgements issued by the court of first instance are subject to appeal before the court of appeal except those which are issued on appeal from the summary court, which are subject to appeal only before the Supreme Court.

The Court of Appeal

Courts of appeal have jurisdiction to hear and decide appeals filed against judgements rendered by the courts of first instance, other than those rendered on appeal from the summary court. They are composed of various specialized chambers for civil, commercial, labour, administrative and criminal matters, and cases are heard by a panel of three judges. The court of appeal is confined to determining whether errors have been committed by the lower court and whether the lower court's proceedings have been conducted in accordance with the law. New arguments and evidence may be presented to the court of appeal, and the court may re-examine the facts of the case and hear witnesses. However, no new claims are admissible before this court. Judgements rendered by the courts of appeal are subject to appeal before the Supreme Court.

The Supreme Court

The Libyan Supreme Court, which sits in Tripoli, consists of four chambers, for civil, criminal, administrative and family matters, respectively. Commercial matters are not dealt with by a separate chamber but are heard by the civil chamber. Each chamber consists of either three or five judges. Within the Supreme Court there is also a Department of Prosecutors, whose members represent the state or public interest.

The Supreme Court rules only on issues of law, and does not address issues of fact, with respect to which the lower courts' judgements are definitive. Therefore, the openings for appeal before this court are very limited, and appeals are admissible only if the cause of appeal arises out of a violation or misapplication of the law or an error in its interpretation, or if there is a cause of nullity of the lower court's judgement or of the proceedings of the lower court, provided that the nullity of the proceedings has had an effect upon the judgement itself. All decisions issued by the Supreme Court are binding upon all the courts and authorities in Libya.

The Criminal Courts

The jurisdiction of the criminal courts is organized by the Criminal Code and the Criminal Procedure Code and is determined, to a considerable extent, by the degree of the offence involved. This, in turn, is based on the nature and severity of the punishment in each case. Under Libyan law, there are three grades of criminal offence: serious crimes (or felonies), less serious offences (or misdemeanours) and petty offences (or contraventions)[1].

A criminal offence is defined as a felony when the prescribed punishment is the death penalty, life imprisonment or imprisonment for more than three years. The offence is a misdemeanour when it is punished by imprisonment for more than one month or a fine of more than 10 dinars (about $8 or £4). Finally, it is a contravention if the penalty is imprisonment for a period not exceeding one month or a fine not exceeding 10 dinars.

Misdemeanours and contraventions fall within the jurisdiction of the summary court. This is not the same as the summary court for civil matters but is a single-judge court within the court of first instance. Judgements of this court are subject to appeal before the appellate chamber of misdemeanours and contraventions, which is a chamber composed of three judges within the court of first instance. Felonies fall within the jurisdiction of the felonies court, which is a criminal chamber composed of three judges within the court of appeal. When a criminal offence has been committed, the case file is referred by the prosecutor for trial before the competent criminal court, following completion of information-gathering, interrogation and investigation by the judicial police and the prosecutor. However, when the offence falls into the category of felonies, before the case file is referred to the court for trial, it must be submitted to the chamber of indictment within the court of first instance. This chamber examines the evidence produced by the prosecutor and hears the defence of the accused individual. It may then either refer the file for trial or decide that there are no grounds for the institution of proceedings, depending upon the evidence presented by the prosecutor.

Judgements issued by the appellate chamber of misdemeanours and contraventions or by the felonies court are subject to appeal before the Supreme Court.

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[1] This may be compared with the French system of classification of criminal offences into *crimes*, *délits* and *contraventions*.

Arbitration

Although, as noted above, it can be said that foreign parties will usually obtain a fair trial in cases that are heard by the Libyan courts, many foreign investors or contractors will prefer to provide for arbitration in the event of a dispute.

Under Libyan law, arbitration is governed by Articles 739 *et seq*. of the Civil and Commercial Procedure Code. These provisions are applicable to all arbitrations taking place in Libya, regardless of whether they are purely internal or have an international element.

It has been recognized that the current provisions on arbitration are rather outdated in certain respects, especially as regards the existence of a systematic right of appeal (unless this has been expressly waived by the parties) and the procedures for enforcement of foreign arbitral awards. Although the need for reform has sometimes been acknowledged, there have been no changes to date. The present system is summarized below.

As a general rule, the parties to a contract have the right to agree to submit to arbitration any disputes which may arise in relation to the performance of their contract. They may provide either for institutional arbitration, for example under the auspices of the ICC (International Chamber of Commerce), or for *ad hoc* arbitration. Arbitration is, however, not permissible in certain circumstances, for example on questions concerning public order or disputes between employers and employees with respect to social security or industrial accidents. It should also be noted that under administrative contracts all disputes are subject to the jurisdiction of the Libyan courts unless one of the contracting parties is foreign and the parties have applied for and have been granted the authorization of the GPC to include in their contract a clause providing for arbitration outside Libya[1].

Local Arbitration

Libyan law provides various safeguards for parties wishing to arbitrate in Libya, including the assistance of the courts where required, and is similar — at least with respect to the rules governing the arbitral proceedings themselves — to many other more modern arbitration laws.

The agreement to arbitrate must be evidenced in writing, either in the form of an arbitration clause in a contract or in a special agreement entered into after the dispute has arisen. The subject of the dispute must be specified in the agreement or during the proceedings.

The arbitral tribunal may be composed of one or more arbitrators, who must comply with certain requirements. For example, they must have legal capacity and must not be non-rehabilitated bankrupts or criminals who have been stripped of their civil rights. The Code provides that there must always be an odd number of arbitrators, but it does not specify what happens

[1] See Chapter 3 for further discussion of administrative contracts.

if the parties' agreement provides for an even number. If a problem arises in connection with the appointment of arbitrators, an application may be made to the court to resolve the problem. Thus, for example, if a party refuses to nominate its arbitrator, the court can make an appointment on its behalf, by a decision that is not subject to appeal. If on the other hand the parties have provided for an even number of arbitrators, it is probable that the court would not view this as a problem arising in connection with the appointment of the arbitrators, and that it would instead hold the arbitration agreement to be null and void.

Once an arbitrator has been appointed and has accepted his appointment, he cannot refuse to act, and any such refusal without legitimate reason will render him liable for damages to the parties.

An arbitrator may be challenged and his appointment may be revoked, either by the arbitral tribunal if all the parties so agree, or by a court order which is not subject to appeal.

The proceedings are governed by any rules of procedure that the parties may have stipulated in their arbitration agreement or in any other agreement entered into, such as the terms of reference, before the arbitrators have begun their examination of the matter. These rules may be institutional rules, such as the Rules of Arbitration of the ICC, or non-institutional rules such as the UNCITRAL rules, which are often chosen to govern *ad hoc* proceedings, or they may be national procedural rules, or rules specifically adopted by the parties. Failing an agreement by the parties on the procedural rules, the arbitrators are themselves entitled to determine the applicable rules.

The arbitrators cannot act as conciliators (*amiables compositeurs*), if this has not been specified in writing by the parties. If they have been attributed these powers, they are not required to act in accordance with any specific procedural forms or rules of law.

During the course of the proceedings, the assistance of the courts may be sought in order to obtain conservatory measures or the appearance of a witness who has failed to appear voluntarily.

The arbitral award must be given within the agreed time limit or, in the absence of any such agreement, within three months of the arbitrators' acceptance of their appointment. The time limit may be suspended in the event of a challenge and may in certain limited circumstances be extended for a period of no more than three months, provided that all parties agree to such an extension. If the arbitrators fail to give their award within the time limit, any of the parties may submit the dispute to the courts. It is therefore advisable to agree at the outset upon a reasonable time limit so that the arbitral proceedings can run their course to the end, and so that the case cannot be submitted on its merits to the local courts.

The dispute is decided on the basis of the respective submissions and evidence produced by the parties. The award must be given in writing, and must in particular include the reasons on which the decision is based. It is pronounced by a majority vote after deliberation of the arbitrators and must be signed by the arbitrators.

If one or more of the arbitrators refuse to sign, the fact is recorded in the award, which nevertheless remains valid if it is signed by a majority of the arbitrators.

Within five days of its pronouncement, an original of the award, together with an original of the arbitration agreement, must be deposited in the registry of the court that, in the absence of an arbitration agreement, would have had jurisdiction to hear the merits of the case. Once this has been done, any of the interested parties may apply for a court order whereby the award will become enforceable in Libya.

Where Libyan law differs from many modern arbitration laws is in particular in respect of rights of recourse against the award. Thus, all Libyan awards are subject to appeal unless the parties have agreed to waive this right, and in such cases the court of appeal will rehear the merits of the case.

There is also a right to apply for nullification of a final arbitration award, and this right cannot be waived in advance by the parties. However, an application for nullification is admissible only if it is based on one or more of the following grounds (although it will be noted that these grounds are far more extensive than those which are usually to be found in modern laws on arbitration):

1. The award has been issued in the absence of an arbitration agreement or on the basis of a void or expired agreement.
2. It has been issued by arbitrators appointed in violation of the law.
3. It has been issued by an arbitrator who lacked the capacity to act as an arbitrator or was prohibited from acting so.
4. One or more of the parties lacked the necessary legal capacity.
5. The dispute concerned issues which are not arbitrable.
6. The award deals with issues not agreed upon in the arbitration agreement or goes beyond the scope of the agreement.
7. The award contains a manifest contradiction.
8. The award does not comply with formal requirements such as the inclusion of reasoning, signature by the arbitrators, etc.
9. It was issued after the time limit.
10. The arbitrators have failed to comply with their procedural rules or with any other rules which must be complied with in order for the award to be valid.

Foreign Arbitration

The parties to a contract governed by Libyan law or to be performed in Libya may include in their contract an arbitration clause whereby they refer any dispute arising under the contract to arbitration outside Libya[1]. In such cases, the proceedings themselves will of course be governed by the law of the place of arbitration and any other rules that may have been determined to apply.

Libyan law will, however, become relevant again if enforcement of the foreign award is sought in Libya. Libya has not ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the enforcement in Libya of awards issued outside the country can therefore be rather cumbersome and difficult. Libyan law contains no provisions specific to the enforcement of foreign arbitral awards, which are subjected to the same rules as foreign court judgements, contained in Articles 405 *et seq.* of the Civil and Commercial Procedure Code.

Article 405 states the principle that the enforcement of judgements issued in a foreign country is permitted under the same conditions required for a Libyan court judgement to be enforced in that same foreign country. An applicant for an enforcement order will therefore have to produce evidence as to the conditions for enforcement of a Libyan award in the country where the award was issued.

The proceedings for obtaining an enforcement order are not *ex parte*, but require service of suit on the other party, before the court of first instance within whose jurisdiction enforcement is sought.

The court may only order the enforcement of a foreign judgement or award if it satisfies the following four conditions:

1. The judgement (or award) was issued by a court or tribunal having jurisdiction according to the laws of the country where it was issued, and has become final and enforceable in that country.
2. The parties were notified to appear and were validly represented.
3. The judgement (or award) does not conflict with any judgement or order previously issued by a Libyan court.
4. It does not contain anything contrary to morality or rules of public order in Libya.

In conclusion, therefore, it may be said that while Libyan law allows for arbitration and contains a number of helpful provisions with regard to the conduct of arbitral proceedings in Libya, it is not very favourable to arbitration when the proceedings reach the appeal or enforcement stage. As a result, there is a serious risk that if a party obtains an award in its favour in a local arbitration, that award may be submitted to ordinary appeal proceedings on the merits, or at least to nullification proceedings where there are many openings for a court to nullify the award. Even if the award is given in a foreign arbitration and cannot be so easily appealed as a Libyan award, there may be serious obstacles to enforcing it against a Libyan party,

[1] Subject to the proviso relating to administrative contracts, referred to in the introduction to this Section Human Rights Legislation .

unless that party has assets outside Libya against which it can be enforced. Since this state of affairs may be detrimental to the encouragement of foreign investment in Libya, it is to be hoped that serious consideration will be given by the Libyan authorities to ratifying the New York Convention and, in general, to modernizing the arbitration law.

1

Establishing the Appropriate Corporate Entity to Conduct Business in Libya

Introduction

If a foreign company wishes to conduct business in Libya, unless it intends simply to trade in goods or services[1], it has to establish itself in the country through a legal entity. The most common way of doing this until recently has been to register a Libyan branch of the foreign company, rather than incorporating a separate Libyan company.

However, in cases where the foreign company wishes to enter into a joint venture with a Libyan partner, it may have to join that partner in establishing a Libyan company. This vehicle has recently become particularly important because on 14 November 2006, the General People's Committee issued Decision No. 443/2006 laying down certain rules regarding foreign companies or individuals conducting business in Libya. That Decision provides that if a foreign company wishes to undertake any of the projects or activities specified in the Decision, it will have to enter into joint venture arrangements with a Libyan partner or partners (either public or private) and establish a joint stock company with them.

The Decision however exempts from the joint venture requirements companies that are qualified under Law No. 5/1997 on Investment of Foreign Capital and Law No. 7/2004 on Tourism[2], and other exemptions may be granted by the General People's Committee for the execution of projects that are of a special nature due to their location, specifications or performance requirements. Foreign companies currently registered as branches which are carrying out projects will be allowed to continue operating as branches until they complete the projects, but will then be required to comply with the joint venture requirement.

This chapter will therefore examine in turn the establishment of a Libyan company and the registration of a Libyan branch of a foreign company. It will then briefly discuss the establishment of a representative office and

[1] See Chapter 3, Section on Commercial Agency Contracts.
[2] See Chapter 2, below.

certain miscellaneous issues that arise in connection with establishing a presence in Libya.

Establishing a Libyan Company

Relevant Legislation

Decision No. 443/2006

Decision No. 443/2006 of 14 November 2006 stipulates that foreigners (either individuals or corporate entities) wishing to undertake projects and activities specified in Articles 1 and 2 of the Decision may only do so in a joint venture with a Libyan partner or partners (public or private), in the form of a new type of Libyan joint stock company called a *Mushtaraka* company. The last paragraph of Article 2 states that the Decision applies to all contracts and projects to be signed or executed following the date of issuance of the Decision, but that all prior contracts and projects signed and executed prior to that date remain unaffected.

The activities to which the Decision applies, as referred to in Article 2, are the following:

- contracting and civil works activities, including construction and building work;
- activities in the field of electricity;
- oil services, specifically in the fields of catering, maintenance, transportation, supplies, well services, and the manufacture of materials for exploration and drilling work;
- activities in the fields of transportation and telecommunications; and
- activities in the fields of manufacturing, agriculture, animal and marine resources.

The language used to describe these activities is somewhat imprecise and leaves much room for interpretation. For example, it is not clear what is meant exactly by 'well services', ie for example whether it includes specialized or technical well services involving measurements, drilling fluids, mud and chemicals or only general types of well services. Furthermore, maintenance is mentioned without any further qualification. In these circumstances, it is difficult to be sure about how the law should be interpreted.

The issue was subsequently made even more complicated by an announcement from the General People's Committee for the Economy, Trade and Investment that it would be extending the application of Decision No. 443/2006 to cover the activities permitted for branch offices of foreign companies[1].

[1] See sub-section C.1(d) below.

Such activities with regard to the oil sector include geological activities, the drilling and maintenance of wells and the installation and maintenance of drilling equipment and submersible pumps. Although this announcement has no legally binding effect, it has for practical purposes extended the application of Decision No. 443/2006 to most activities in the oil sector and other sectors. In fact, the Ministry of the Economy effectively suspended the branch office system by not accepting any new applications for the registration of branch offices, and has only as recently as June 2007 resumed accepting applications for registering new branch offices and for the renewal of existing ones in areas of activities other than those listed in Article 2 of Decision No. 443/2006.

GPC Decision No. 206/2007 Amending GPC Decision No. 443/2006

GPC Decision No. 443/2006 has now been amended by GPC Decision No. 206/2007. This new Decision seems to relax the application of Decision No. 443 by allowing more flexibility in the choice of the form of corporate entity to be used for incorporating the joint venture between a foreign party and a Libyan. Thus, while GPC Decision No. 443/2006 stipulated the *Mushtaraka* company as the only corporate form for joint ventures, Decision No. 206/2007 stipulates that joint ventures may be undertaken in any corporate form provided for in the Commercial Code and the Economic Activities Law (Law No. 21/2001 as amended by Law No. 1/2004). It is not yet clear however how the authorities will seek to apply this new decision.

Corporate Forms

The Mushtaraka Company (Joint Stock Company)

The *Mushtaraka* company provided for by Decision No. 443/2006 is a type of Libyan joint stock company incorporated between a foreign party and a Libyan (who may be either individuals or corporate entities). The minimum shareholding of the Libyan partner is 35 per cent, and this minimum percentage must be retained throughout the company's lifetime. As a result, a foreigner may have a maximum shareholding of 65 per cent, and it is noteworthy that this is the first time since 1970 that foreigners have been permitted to have a majority shareholding in a Libyan company.

The minimum share capital of a *Mushtaraka* company is 1 million Libyan dinars (approximately \$750,000 or £400,000), at least one-third of which must be fully paid up upon incorporation, with the rest being paid within five years from the date of incorporation. It should be noted that as a matter of general Libyan company law, the capital of the company must be proportionate to its activities.

The board of directors may have a majority of foreign members, provided that this is proportionate to the ratio of foreign ownership of the company.

The Limited Liability Company

Foreigners may participate in Libyan limited liability companies up to a maximum of 49 per cent of the shares in the company. The minimum number of shareholders is three, with a maximum of 25. The company must have a minimum share capital of 5,000 Libyan dinars (approximately $3,750 or £2,000) and the maximum is 30,000 Libyan dinars (approximately $22,500 or £12,000). Corporate entities cannot be shareholders in a limited liability company.

Given that, as noted above, Libyan law requires the capital of a company to be proportionate to its activities, and in view of the fact that only individuals can be shareholders in a limited liability company, it is unlikely that this form of company will be of much interest to foreign entities seeking to undertake a significant level of business in Libya.

The Joint Stock Company

As is the case for limited liability companies, foreigners may own up to 49 per cent of the shares of a joint stock company, with the proviso that, when a shareholder is an individual, he cannot own more than 10 per cent of the shares. The minimum share capital of a joint stock company is 100,000 Libyan dinars (approximately $75,000 or £40,000) with no maximum, and this makes it a more appropriate vehicle than the limited liability company for foreign business investments.

Consequences of the Recent Legislation

Libyan law, practice and state policy are currently in a relative state of flux with regard to the operation of foreign companies in Libya, and this is causing foreign companies to face marked difficulties in complying with the new rules in terms of restructuring their current operations and structuring future ventures, a prime issue being the shortage of qualified and capable Libyan companies with which to enter into joint ventures.

The difficulties are further compounded by the fact that it is not very clear which sectors are concerned, due to the ambiguous wording of the new rules and the practical interpretation of these rules by authorities such as the Companies Registration Department at the Ministry of the Economy. At present it seems certain, however, that the government is attempting to move away from the branch office system and to encourage partnership with Libyans.

Nevertheless, it is clear that all contracts for in-country services that were entered into prior to the issuance of Decision No. 443/2006 may continue to be performed by existing branch offices, but that all such contracts entered into subsequently must be performed with a Libyan partner in the form of a *Mushtaraka* company. For the time being, the entry into joint venture arrangements in this form would seem to be the safest go-to-market approach.

Decision No. 206/2007 does however allow another approach, namely through the incorporation of a joint venture in one of the corporate forms stipulated in the Libyan Commercial Code and the Economic Activities Law. As mentioned above, limited liability companies and joint stock companies are the most common corporate vehicles utilized in Libya. However, the new rules governing foreign corporate activity in Libya are not very clear in this regard, and it is therefore probably unadvisable to use either of these forms as a corporate vehicle.

Finally, the Commercial Code does leave open one potentially viable option, in the shape of a *Muhassa* (joint venture) company. This is a non-incorporated company established by contractual agreement between two parties. In essence, it is a 'paper' joint venture, in that it is created by contract without incorporating a new corporate entity. The *Muhassa* company therefore has no shares, corporate identity or registered place of business. *Muhassa* companies are usually agreed for a specified project (which will be defined in the contract) and are terminated following completion of that project. The joint venture agreement will typically state the contribution of each party to the joint venture, their share in the joint venture, and the distribution of profits and losses in proportion to that share. However, it must be noted that only foreign companies with existing branch offices in Libya may form a *Muhassa* company with a Libyan individual or corporate entity, and that the Muhassa company may only be formed for the duration of the life of the foreign company's branch office.

Therefore, the *Muhassa* company seems to provide a suitable, short-term alternative approach for foreign companies that already have branches in Libya, in that, in comparison with the *Mushtaraka* company, the *Muhassa* is very easy to set up (there are no registration formalities, with the exception of registration with the tax authorities) and is considerably cheaper in the absence of such formalities and required capital. However, the reaction of the Libyan authorities to foreign companies carrying out their activities in Libya in the form of a *Muhassa* company remains unpredictable, as the practical application of the relevant legislation has been known to differ from the black letter of the law.

Participation by Libyan Public Entities

As noted above, the recent legislation allows joint ventures to be entered into between foreign parties and either public or private Libyan partners. It should be borne in mind in this respect that participation by one or more Libyan public entities (ie governmental departments, public corporations or state-owned companies) of more than 50 per cent in a Libyan company will make the company subject to a particular set of laws and regulations, such as:

1. Law No. 15 of 1982 relating to the salaries of national employees[1].
2. The Administrative Contracts Regulation laying down the contracting procedures, general terms and conditions for administrative contracts, consent and approval requirements and approval authority based on the value of the contract, etc[2].
3. Law No. 11 of 1425 on Popular Monitoring, which organizes the functions and authorities of the General People's Committee of the Popular Monitoring Department. This department acts as the external auditor for state-owned companies and has broad powers that extend to reviewing contracts and then monitoring the proper performance of such contracts. For this law to be applicable, a public corporation or state-owned company must own at least 25 per cent of the company's share capital or guarantee it a minimum profit.
4. Although Libyan-owned companies or Libyan-established companies are not required to obtain form 'B' from the Immigration Department[3], these companies are nevertheless required to follow almost the same set of procedures for the employment of foreign personnel. Therefore, in practical terms, such companies enjoy no real advantage with regard to the form 'B' issue.

The above issues are however of no significance if the Libyan entities participating in the joint venture are private individuals or companies.

Procedure for Establishing a Libyan Joint Venture Company

The incorporation of a Libyan joint venture company has to be conducted by a public notary. Once the public notary has been engaged, he must apply for a certificate of no objection with respect to the proposed name of the joint venture company and, when this has been obtained, he must arrange for a bank account to be opened with one of the Libyan commercial banks in the name of the joint venture company under incorporation.

The foreign shareholder must provide the public notary with the following set of documents:

1. A resolution from its board of directors approving its subscription to the

[1] Law No. 15 provides for a maximum salary for national employees. However, this law is at present undergoing major changes, and it is expected to become less relevant in the near future.
[2] See Chapter 4, Section on Administrative Contracts.
[3] Obtaining form 'B' is a tedious and time-consuming procedure whereby a company opens a file enabling it to obtain entry visas and residence permits for its foreign manpower.

capital of the joint venture company and stating the value of such subscription. It is also advisable to include in the same document or in a separate resolution the names of the foreign shareholder's nominees as members of the board and control committee of the joint venture company.
2. A copy of the deed of incorporation and articles of association of the shareholding company.
3. An up-to-date extract from the shareholding company's registration with the Commercial Registry.
4. A power-of-attorney for the person authorized to represent the shareholding company in the incorporation process.

All the above documents must be translated into Arabic, authenticated and legalized by the Libyan Embassy in the country where the shareholding company is incorporated.

In addition the notary will have to produce a statement from a local bank evidencing payment by the shareholders of at least 30 per cent of the subscribed and issued capital.

The cost associated with setting up a joint venture company is estimated to include the following:

Stamp duty	0.5% of the Capital
Fees payable to the Ministry of the Economy upon issuing the approval to incorporate the company.	4,000 Libyan dinars (LYD).
Fees for registering the company in the Commercial Register.	263 LYD.
Registration fees with the Chamber of Commerce.	253 LYD.
Operating licence.	5,000 LYD.
Public notary's fees calculated as follows:	1% of the first 1,000 LYD of the capital. 0.5% of the next 9,000 LYD. 0.25% of the amount in excess of 10,000 LYD up to 50,000 LYD. 0.1% of the amount in excess of 50,000 LYD.
Lawyers' fees.	Subject to agreement.

Other Registrations

Once a Libyan company has been established, it will still require some further registrations. These registrations may be either of a general or of a particular nature, such as:

(*a*) Registration with the Tax Department for all companies;
(*b*) Registration with the Immigration Department for all companies;

(*c*) Registration with the Chamber of Commerce, Industry and Agriculture for all companies;
(*d*) Registration with the National Oil Corporation for companies wishing to do business in the oil sector;
(*e*) Registration with the Public Authority of Housing for companies wishing to do business in construction and civil works; and
(*f*) Registration with the Secretariat of Planning for companies wishing to do business in the field of engineering and technical consultancy.

All these registrations are of an administrative nature, and the requirements for registration usually consist of the presentation of some of the documents already presented to the Secretariat of the Economy, Trade and Investment, so it is advisable to prepare and keep sufficient copies of these documents.

Registration of a Libyan Branch of a Foreign Company

As has been mentioned above, while there is a clear intention on the part of the government to move away from the branch office system, this system remains relevant for companies that are exempted from the joint venture requirements by the Laws on Foreign Investment or Tourism, or that benefit from specific exemptions.

General Principles for the Registration of a Branch

The Commercial Code contains a series of articles concerning companies that have been formed outside Libya but which carry out activities in Libya, or vice versa. What concerns us here of course is the first type of companies.

The most important and relevant principles in this respect are the following:

1. Companies formed outside Libya, but which have the seat of their management or the principal object of their business in Libya, are subject to all the provisions of Libyan law, including the requirements for validity of their Memorandum of Association and authorization for carrying on their activities[1].
2. Companies formed abroad, which are of a type different from those dealt with in the Commercial Code, are subject to the provisions relating to joint stock companies as regards obligations relating to the registration of documents of the company in the Commercial Register, and the liability of the Directors[2].

[1] Article 644 of the Commercial Code.
[2] Article 646 of the Commercial Code.

3. Until such time as the necessary registration formalities have been complied with, the persons who are acting in the name of the company are jointly and severally liable for the obligations of the company[1].
4. Law No. 65 of 1970 has restricted the areas of activities in which foreign companies may operate through Libyan branches. These permitted activities have been identified by General People's Committee Decision No. 13/2005 as certain specific activities in each of the following sectors:
   (*a*) construction and civil works;
   (*b*) electricity;
   (*c*) petroleum;
   (*d*) communications;
   (*e*) industry;
   (*f*) surveying and planning;
   (*g*) environmental protection;
   (*h*) information technology;
   (*i*) consultancy and technical studies; and
   (*j*) health.

The activities listed are, however, not exhaustive, since Article 22 of Law No. 65 of 1970 authorized the General People's Committee to add others to the list. This list should also be considered in the light of the manner in which GPC Decision No. 443/2006, as discussed above, will be applied.

Documentation and Procedures for Opening a Branch of a Foreign Company in Libya

A branch of a foreign company is established when the Secretariat of the Economy, Trade and Investment has approved the application submitted by the foreign company (referred to below as the 'Company') to establish the branch, and when the branch has been registered in the Commercial Register. The procedure is as follows:

1. Completion of an application form for permission to open a branch, to which the following documents must be attached:

(*a*) Certificate of incorporation of the Company;
(*b*) Memorandum and Articles of Association of the Company;
(*c*) Resolution of the Board of Directors of the Company including the following:
  - approval for opening a branch of the Company in Libya, specifying the address of the branch in Libya;
  - a brief description of the activities to be practised in Libya. Such activities must be compatible with the purposes of the Company, and

[1] Article 647 of the Commercial Code.

should be among the activities allowed for branches of foreign companies in Libya;
- ○ allocation of an amount for establishing and administering the branch in Libya, which should be not less than 150,000 Libyan dinars (approximately $115,000 or £60,000); and
- ○ appointment of the Company's Branch Manager, with an indication of his nationality (which should be either Libyan or the same nationality as that of the Company or one of its shareholders), along with his powers and authorities[1].

(*d*) Undertaking by the Board of Directors of the Company not to interfere in the political affairs of Libya;

(*e*) Undertaking by the Board of Directors of the Company to prepare a balance sheet and profit and loss account for the branch in Libya;

(*f*) Certificate from a bank operating in Libya evidencing the transfer of the amount allocated for the opening of the Company's branch;

(*g*) Certificate(s) of experience of the Company for works executed by the company abroad in the same areas of activity as those intended to be conducted in Libya. Such certificates should be issued by third parties contracting with the Company, and should be attested by the chamber of commerce in the country of the Company. (In the oil sector, these may not be required for well-known companies if the National Oil Corporation provides a letter of support); and

(*h*) an up-to-date commercial extract from the competent body (commercial register or a chamber of commerce) where the Company is registered.

All documents submitted with respect to items a), b), c), d), e), f) and g), which originate from outside Libya should be original documents attested by the Libyan People's Bureau (Embassy) in the home country of the Company. Documents in a foreign language must be translated into Arabic, and this translation should be done in Libya.

2. All documents are to be submitted to the Department of Companies and Commercial Registrations in the Secretariat of the Economy, Trade and Investment. Acting on the recommendation of this Department, the Secretary of the General People's Committee for the Economy, Trade and Investment will then issue a decision for permission to open a branch of the Company in Libya. A fee of 25,125 Libyan dinars (approximately $19,000 or £10,000) is payable to the Treasury of the Secretariat of the Economy before delivery of the decision to the Company.

The Decision will authorize the establishment of the branch for an initial period of five years, renewable for subsequent periods.

[1] As noted in Section on Management, below, in cases where a foreigner is appointed as the branch manager, a Libyan national must be appointed as his deputy. In such circumstances, documents regarding the appointment of the deputy manager must also be included in the application.

Once the decision granting authorization has been received, the Company will need to lodge that decision, together with another set of almost all of the documents listed above, with the Commercial Register for registration.

Once the Company has completed the registration with the Commercial Register, the branch acquires full legal personality and becomes formally eligible to conduct business in Libya.

Management

The management of a Libyan branch of a foreign company is fully vested in the Branch's General Manager, who is considered the Company's representative vis-à-vis the public authorities and third parties. The General Manager can delegate some of his powers and authorities to the executive staff of the branch or to advisers and lawyers.

As a result of the adoption of Resolution No. 223/2006 by the Secretariat of the General People's Committee, the authorities now require, in cases where a foreigner is appointed as the General Manager of the branch, that a Libyan national be appointed as his Deputy. The Resolution does not however specify any particular powers that are to be given to the Deputy.

Other Registrations

Once a Libyan branch of a foreign company has been established, it will still require some further registrations, similar to those required for a Libyan company[1].

Establishing a Representative Office

It is now possible for foreign companies to open representative offices. Decision No. 89/2006 of the General People's Committee states that in order to do so, foreign companies may apply to the Secretariat of the Economy, Trade and Investment for authorization. The representative office must not engage in trading or doing business in Libya, and its only permissible activities are to promote the company name, acquire market information and facilitate contacts between the company and potential contracting parties. It is required to maintain an account with a bank operating in Libya, with a minimum balance of 50,000 Libyan dinars (approximately $37,500 or £20,000) or the equivalent in a foreign currency.

[1] See Section Other Registrations, above.

Other Miscellaneous Issues

Visas and Work Permits

Branches of foreign companies and representative offices are required to comply with strict immigration and labour regulations[1]. It may be noted that foreign companies are currently finding themselves under increasing pressure to employ Libyan nationals and that, as a result, they are experiencing difficulties in processing work permits and residence visas for their foreign staff.

Customs and Import Regulations

Customs duties that were imposed by Resolution 110/2004 have now been cancelled by virtue of Secretariat of Finance Decision No. 83/2005, except for duties on tobacco products, which are still in effect.

Customs tariffs have however been replaced by a flat 4 per cent service and port charge on all imports into Libya as dictated by Resolution No. 3/2005 of the General People's Committee. It should be noted that, by circular from the Customs Department dated 24 May 2006, it was decided that the special exemptions from customs duties provided for in Petroleum Law No. 25/1955 and other special laws are deemed to include an exemption from this 4 per cent service charge.

Alongside the 4 per cent charge, General People's Committee Resolution No. 114/2005 stipulates that certain goods are subject to a production tax (for locally produced goods) or a consumption tax (for imported goods). The production tax is set at 2 per cent and the consumption tax ranges from 25 per cent to 50 per cent.

Leasing

Previously, there were restrictions on the leasing of property by foreign companies, be it for office or residential purposes. However, all such restrictions have now been lifted[2].

Use of the Arabic Language

Law No. 24 of 2002 prohibits the use of any language other than the Arabic language in transactions and documents. However, English is widely used in all business circles and for all purposes.

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[1] Since the relevant regulations are reviewed and changed frequently, it is rather impractical to provide a description of such regulations here, and specific advice should be taken at the relevant time.

[2] See Chapter 1, Section Real Estate Legislation, above.

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Foreign Investment

Foreign investment in Libya is governed by two sets of legislation: one for the oil sector and one for the other sectors.

Investment in the oil sector is governed by Petroleum Law No. 25 of 1955, as amended, and various decrees, regulations and ordinances issued under that Law, including Decree No. 10 of 1979, which reorganized NOC (National Oil Corporation of Libya).

Investment outside the oil sector is governed by the Foreign Capital Investment Encouragement Law No. 5 of 1997 (the 'Foreign Investment Law') and the related executive regulation, of which the aim is to attract foreign capital to investment projects within the framework of the general policy of the state and the objectives of economic and social development. In addition, further incentives to investment are to be found in certain legislation on specific subjects such as Law No. 7/2004 on Tourism and Law No. 9/2000 on Transit Trade and Free Zones.

Since the inception of the Foreign Investment Law, 240 investment licences have been granted by the Foreign Investment Board, 163 of which have been realized as projects under execution. To date, the total value of foreign investment under the Foreign Investment Law has been just over US $8 billion, with Libyan entities contributing approximately 20 per cent of this value. As the country progresses with its economic reforms, particularly within the banking and financial services sector, it is anticipated that foreign investment will increase in the years to come.

The Foreign Investment Law and the Tourism Law

Scope of Application

Article 8 of the Foreign Investment Law lists the sectors to which the Law is applicable. The list initially comprised the industrial, health, tourism, service and agricultural sectors and any other sector that may be determined by a decision of the General People's Committee upon a proposal by the Secretary for Planning, Economy and Commerce. The list has now been expanded by General People's Committee Decision No. 108/2005, so that it allows foreign investors to invest in the following sectors:

- agriculture, manufacture and services;
- generation of electricity;
- manufacturing and refining of oil and petrochemicals;
- telecommunications;
- real-estate investment and infrastructure projects; and
- tourism.

Although tourism is included in this list, Law No. 7 on Tourism lays down a specific regime for investments in that sector which, however, is similar to the general regime of Law No. 5 except where otherwise indicated below.

Decision No. 108/2005 also allows foreign investors to partner with Libyans in the above fields of activity under the framework of either the Foreign Investment Law or Law No. 7 on Tourism.

Article 26 of the Foreign Investment Law expressly states that it shall not apply to foreign capital invested in petroleum projects, either upstream or downstream. This is because it is believed that the oil sector already has an established regime that provides all necessary incentives. However, companies that are involved in industrial activities related to the oil sector, such as the manufacturing of drilling rigs, might be considered as belonging to the industrial sector rather than to the oil sector, and thus be eligible for the incentives provided for by Law No. 5.

Incentives

Projects coming within the ambit of the Foreign Investment Law enjoy various advantages, including customs and tax exemptions, as follows:

- exemption from customs duties, fees or taxes on the importation of everything required for the project, including machinery, instruments, materials, spare parts and raw materials;
- free export of all products involved with the project;
- exemption from stamp duty on all documents;
- a five-year exemption from income tax;

(all of the above advantages are also enjoyed with respect to any reinvested profits)

- repatriation of profits;
- ownership and/or leasing of real estate as required for the construction and operation of the project;
- repatriation of the invested capital upon expiry of the specified duration of the project, the liquidation or sale of the project, or after a lapse of at least five years from the date of granting the licence;
- repatriation of the uninvested capital after a lapse of at least six months from the date it has been transferred to Libya if the investor can prove

that it was unable to invest because it was unable to obtain a licence, or where circumstances beyond its control have prevented the investment (for example, the non-availability of water or electricity);
- if the investment involves the establishment of a company in Libya, this company is exempt from the usual requirements regarding registration with the Commercial Register and the Ministry of Economy and Commerce; and
- the investor is entitled to employ and import the foreign manpower and technical expertise necessary for the establishment and operation of the project.

Applications

Applications for investment projects falling within the ambit of the Foreign Investment Law can be submitted directly to the Foreign Investment Board or to any Libyan People's Bureau (embassy)[1]. The applications are then referred by the Foreign Investment Board, along with its recommendations, to the General People's Committee for Economy and Commerce for approval, which is required before the Foreign Investment Board can issue authorization for the investment project.

New Developments

Although the growing attractiveness of the Libyan market and the various incentives and guarantees that are offered have served to attract foreign investors, several restrictions and perceived barriers to foreign investment have developed as a result of changing attitudes in the Libyan government to foreign investment and the development of the practical interpretation and application of the investment laws by the Libyan authorities. These are briefly discussed below.

Minimum Financial Threshold

One important restriction and barrier came about as a result of General People's Committee Decision No. 117/2005 and General People's Committee Decision No. 118/2005, which amended the Executive Regulations to the Foreign Investment Law and the Tourism Law, respectively. These new decisions served to revise the minimum financial threshold for a foreign investment, increasing it from 1 million Libyan dinars (approximately $750,000) to $50 million. This marked a huge increase for foreign investors seeking qualification under the investment laws in order to enter the Libyan market, the negative impacts of which were of course hardest felt by small-to-medium sized investors. Although the decisions provided for a discretion-

[1] See Section on Investment Procedure, below, for the detailed application procedure.

ary exemption from this new threshold, foreign investment and foreign investor interest in Libya began to decline as a result, and in fact no exemptions were granted, despite several applications.

However, General People's Committee Decision No. 86/2006 has recently amended the above-mentioned decisions and has again significantly reduced the minimum financial threshold for foreign investment. This threshold now stands at 5 million Libyan dinars (approximately $3.75 million or £2 million), being further reduced to 2 million Libyan dinars (approximately $1.5 million or £800,000) where the investment is a 50/50 partnership with Libyan capital investors. Furthermore, foreign investors are now permitted to borrow up to 50 per cent of their investment capital from Libyan banks. This should prove particularly attractive as the Libyan banking sector continues its modernization and privatization reforms.

Stamp Duty and Jihad Tax

Another restriction on foreign investment has been the issue of payment of stamp duty. As a general rule, liability for stamp duty arises under two categories: i) documents and bills (ie on each page of a contract, invoices, cheques, permits etc); ii) transactions (ie on the actual value of the transaction concerned). The rate of stamp duty on documents and bills is minor, ranging from a few Dirhams to 500 Libyan dinars (ie a maximum of approximately $375 or £200) per page of each document. However, the rate of stamp duty on transactions ranges from 0.01 per cent to 2 per cent of the value of the transaction. For instance, contracts of supply, carriage, utility franchises, public works and any other contracts whose subject is to provide services or perform certain works will (subject to certain exemptions) attract a rate of 2 per cent of the value of the contract.

Although Article 10(5) of the Foreign Investment Law exempted investment projects from stamp duty on documents and bills used, the Libyan tax authorities have interpreted this provision as implying that investment projects are not exempted from stamp duty on transactions. However, it must be noted that General People's Committee Decision No. 89/2006 specifically exempted foreign investments in the tourism sector from all types of stamp duty, resulting in a dual tax regime with respect to stamp duty on transactions, depending on the sector in which the investment is made.

This has proven to be an obstacle to foreign investment in Libya. Moreover, although liability for payment of stamp duty will in many instances fall on a contractor or service provider rather than on the investment project itself, the contractor will then offset this increased cost on the investment project, thus entailing higher costs for the foreign investor. This applies even to foreign investments in the tourism sector which, although fully exempted from stamp duty, will still be indirectly affected by it when liability for the duty falls on their contractors or service providers.

Furthermore, the tax department is now taking the position that businesses operating under the Foreign Investment Law are subject to a 4 per cent Jihad tax[1] on profit.

Land Ownership

Article 15 of Law No. 5 provides that foreign investors are entitled to own freehold title to land to be used in investment projects, as well as having the right to own leasehold title. However, the practical situation has been that the relevant Libyan authorities have been reluctant to grant freehold title to foreigners. Currently, only Egyptian, Tunisian and Maltese nationals and their wholly owned companies may own freehold title to land in Libya, in accordance with bilateral treaties signed between their respective countries and Libya.

Although all foreign investors may take leasehold (or usufruct) title to land in Libya, this right has been enhanced by the General People's Committee with regard to investments in the tourism sector. Thus, General People's Committee Decision No. 158/2006 stipulates that all tourism investments to be made on land owned by the Government must be effected through a lease contract. In this way, the General People's Committee has allocated the ownership and use of prime real estate exclusively to the tourism sector, in order to give investors the best possible locations for their projects. The Decision also stipulates the annual rental under such lease contracts, ranging from 2.5 Libyan dinars (approximately \$1.90 or £1 per square metre) to 20 Libyan dinars (approximately \$15 or £8) per square metre.

Furthermore, investors may use lease contracts as collateral for loans obtained from local or foreign banks. However, the consent of the land owner is an express requirement for such collateralization.

Restructuring of Foreign Investment Support Services

General People's Committee Decision No. 87/2007 has established a new General Authority for Tourism and Traditional Crafts, thereby replacing the General People's Committee for Tourism and the Tourism Investment Board. The new Authority will propose and execute national strategies for tourism investment, as well as a new concentration on the development and promotion of traditional crafts. Most notably, it seems that this new body does not have the authority to issue investment licences, and that this authority has been transferred to the Foreign Investment Board, the regulatory body for investments under Law No. 5.

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[1] See Chapter 10.

General People's Committee Decision No. 150/2007 on the Reorganization of the Foreign Investment Board has reaffirmed this restructuring by giving the Foreign Investment Board authority over all tourism investment matters. By virtue of this restructuring, the Foreign Investment Board is now the only foreign investment regulator in Libya. It follows that applications for investment licences in the tourism sector must now be submitted to the Foreign Investment Board, which will review such applications, make the necessary recommendations and issue a licence if the application is successful. However, successful applicants must still register on the Tourism Investment Register at the General Authority for Tourism and Traditional Crafts.

Investment Procedure

The procedure for obtaining an investment licence and the subsequent steps have remained relatively unchanged despite the restructuring. The following is a brief summary of the procedure that must be followed:

Stage I: Procedures and documents required to obtain an investment licence for the establishment of an investment project:

1. Appointment and authorization of a representative to fulfil and follow up the procedures with the Foreign Investment Board.
2. Completion of standard Foreign Investment Board application forms.
3. Preparation of a memorandum explaining the project, with specific regard to the following:
   (*a*) value and nature of the capital invested in Libya valued against a hard currency and indicating its equivalent in Libyan dinars at the time of application;
   (*b*) imported and local materials (if any) to be used by the project;
   (*c*) technical specification of the project;
   (*d*) timetable for execution of the project; and
   (*e*) estimates of national and expatriate manpower required for project operation.
4. A recent official extract of the investment company's registration in the commercial registry of its country of origin. This extract must be translated into Arabic and authenticated by the Libyan Embassy in that country.
5. It is recommended that a feasibility study of the project be attached to the application.

In the event that there is a local partner, that partner should provide the following documents:

1. Registration certificate from the Commercial Registry.
2. A copy of its Memorandum and Articles of Association.
3. Corporate approval for the entry into partnership with the foreign partner.

If the national partner is a public sector entity then, in addition to the above, it must obtain the prior approval of the General People's Committee and a decision by the same to establish the legal form of the new project company.

Stage II: Documents required from the investor to obtain an execution licence:

Following successful completion of Stage I and obtaining an investment licence, the foreign investor must obtain an execution licence in order to be legally allowed to implement the investment project. To obtain this licence, the investor must produce the following:

1. Decision of the Board of Directors of the investing company to establish the project and incorporate a legal entity in Libya. The decision should indicate the field and place of investment, the manager of the legal entity, his authorities and the term of such authorities.
2. Evidence provided by one of the banks operating in Libya of the transfer of 10 per cent of the project value (this amount is required by the Foreign Investment Board to evidence the foreign investor's seriousness). The investor may dispose of this amount after obtaining an operation licence (see below).
3. Title deeds to the land where the project is located, if the investor has purchased or leased that land.
4. A statement from the competent authorities indicating that the use of the project land is compliant with official zoning plans and will not cause any damage to the environment or natural, agricultural or tourism resources.
5. Any other documents that may be requested by the Foreign Investment Board according to the nature of the project.

Following issuance of the execution licence, an investor must obtain all other approvals related to the physical operation of the investment project, such as demolition and construction permits, from the competent administrative authorities.

The licences mentioned in both Stages I and II usually take around 30 to 50 days to be issued, as the Administration Committee of Foreign Investment Board meets only once a month. Some investors have been subject to longer delays, as the Administration Committee postpones its sessions due to cabinet meetings, parliamentary meetings and public holidays.

Once the above licences have been obtained and the investment project has been implemented, the investor must obtain an operation licence from the Foreign Investment Board in order to begin operation of the project. The income tax exemption and certain other exemptions relating to the operation of the project will begin from the date of issuance of the operation licence.

The Transit Trade and Free Zones Law

Law No. 9 of 2000 for the Transit Trade and Free Zones provides that free zones are established by a decision of the GPC and are managed by the Administration for Free Zones.

According to Law No. 9, the following activities may be exercised in free zones:

1. storing of transit goods and goods ready for export;
2. sorting, cleaning, mixing and repackaging of goods as required for trading;
3. any manufacturing, assembly and commissioning of goods as required by free zone operations; and
4. such professions as are required by activities and services in free zones. These include banking, insurance and other services. In addition, terminals and airports may be established.

All licensed activities and investments within a free zone enjoy the same benefits and exemptions as provided for by the Foreign Investment Law except that such benefits are not limited to a certain period of time but will extend for the life of the licensed project or activity. A first free zone has been created adjacent to Misurata port, 220 kilometres east of Tripoli, and procedures for establishing companies in this zone have now been issued by the Misurata Free Zone Authority. Another such zone is planned for Zuwarah, some 100 kilometres to the west of Tripoli.

3

The Law of Contracts

The first section of this chapter will review the principles of Libyan Contract Law that are generally applicable to both civil and commercial contracts. In the following section the law that is specifically applicable to commercial contracts will be examined. This will be followed by a discussion of two specific types of contract under Libyan law, which are frequently of relevance to foreign businesses: contracts for commercial agencies and administrative contracts, respectively.

General Principles

Before examining the provisions that govern contracts in Libya, it will be recalled that, like French and Italian law, the law in Libya is a written law based mainly on the Civil Law system. As in other countries, its purpose is to regulate society in a way that secures the public interest and public welfare, with a view to protecting the freedom, rights and interests of private individuals and entities and harmonizing private interests among themselves and with the public interest.

The legal rules that govern civil and commercial contracts may be either written rules, such as those contained in the Codes or other laws, or unwritten rules, originating for example from custom or commercial usages. They may be either substantive rules, specifying rights and obligations, or procedural rules, laying down procedures and formalities that must be complied with for a contract to be valid. Finally, depending upon their importance, legal rules are divided into imperative rules, which cannot be derogated from by contract, and complementary or explanatory rules, which come into play only if the parties have not made specific provision for their subject matter in the contract or if such specific provision is incomplete or requires interpretation.

The Formation of Contracts

Contracts under Libyan law are governed by Articles 89 to 163 of the Civil Code. According to these provisions, the basis of a contract is the intention, or consent, of the contracting parties to achieve a legitimate object in exchange for legitimate consideration.

Consent

A contract is created, subject to any special formalities that may be required by law, from the moment that two persons having the necessary legal capacity have exchanged two concordant intentions. An intention may be declared either orally, in writing, by signs that are established and accepted in general use, or by such conduct as, in the circumstances of the case, leaves no doubt as to its true meaning. A declaration of intention may also be simply implied, unless the law or the parties require it to be made expressly.

Offer and Acceptance

A declaration of intention is effective from the time when it comes to the knowledge of the person for whom it is intended. When the first person's declaration of intention, or offer, is accepted by the other person, the contract is created. If, however, and unless there is an agreement or a provision of law to the contrary, the two parties are not together in the same place when the offer is accepted, the contract is deemed to have been concluded at the place where and at the time when the offeror has become aware of the acceptance.

When a time limit is fixed for acceptance of an offer, the offeror is bound to maintain his offer until expiry of the time limit. If on the other hand no time limit is fixed (unless it is implied by the circumstances or the nature of the transaction), the offeror is released from his offer if it is not immediately accepted.

If an acceptance goes beyond the original offer, or if it is accompanied by any restrictions or modifications, it is deemed to be a rejection comprising a new offer, which the original offeror is then free to accept or not accept.

An acceptance may also be implied, and a contract may thus be created implicitly, in cases where, by reason of the nature of the transaction, in accordance with commercial usage, or on account of the circumstances, the offeror could not have anticipated a formal acceptance, and where the offer is not refused within a reasonable time. Similarly, a failure to reply to an offer is deemed to be an acceptance when the offer relates to dealings already existing between the parties, or when the offer is solely in the interests of the offeree.

A contract may be entered into by an authorized representative, in which case the rights and obligations resulting from the contract will be in favour of and binding upon the principal, provided that the representative has acted within the limits of his authority and in the name of the principal.

Incomplete or Future Contracts

In practice the parties usually agree at the outset on all the details of a contract. However, even if they agree to leave some details to be finalized at a later stage, the contract is deemed to have been concluded and, in the event of a dispute, the points of detail will be decided by the Court in accordance with the nature of the transaction, the provisions of law, custom and equity.

Similarly, an agreement promising to enter into a contract in the future is binding upon the party or parties who have so agreed, on condition that all essential points of the contract and the time when the contract is to be concluded are specified.

Withdrawal

In the absence of a clause to the contrary in the contract, the payment of a deposit (or 'earnest money') at the time when the contract is concluded indicates that either party may withdraw from the contract. In such a case, if the party who has paid the deposit then withdraws, he forfeits the deposit; if on the other hand it is the party who has received the deposit who withdraws from the contract, then he must repay double the amount of the deposit, even if his withdrawal does not cause the other party any damage.

Vitiation of Consent

A consent may be vitiated, and the contract may consequently be nullified, if the party giving the consent has been the victim of a fundamental error, fraudulent misrepresentation or duress.

Thus, when a party commits a fundamental error, either of fact or of law, he may apply for nullification of the contract provided that the other party committed the same error, was cognizant of it, or could easily have discovered it. An error is defined as a fundamental error when its gravity is of such a degree that, had it not been committed, the party who was mistaken would not have concluded the contract. In particular, an error is deemed to be fundamental when it has a bearing on the quality of the thing which the parties have considered essential for the contract or which must be deemed to be essential, taking into consideration the circumstances of the contract and the principle of good faith, or when it has a bearing on the identity or one of the qualities of the other contracting party, if this identity or quality was the principal factor in the conclusion of the contract.

A contract may also be declared void on grounds of fraudulent misrepresentation or intentional silence when the misrepresentation or silence is of such gravity that, but for it, the other party would not have concluded the contract.

Similarly, it is voidable as a result of duress if one of the parties has contracted under the stress of fear unlawfully instilled in him by the other party. In this connection, fear is deemed to be justified when the party who invokes it has been led to believe, in view of the circumstances, that a serious and imminent danger to life, limb, honour or property threatened him or others.

Finally, a contract is void or voidable if a party lacked the necessary legal capacity to give his consent. For example, a contract entered into by a minor is void when it is entirely to his disadvantage, or may be voided if it is partly to his disadvantage.

Object

In order to be valid, a contract must have a valid object. Thus, a contract will be void if its object is contrary to public policy or morality or is impossible to achieve. On the other hand, it is not necessary for the object to exist at the time of contracting, and things that may happen in the future may therefore validly be the object of an obligation.

Consideration

A contract is void if an obligation is assumed for unlawful consideration.

Nullity and Nullification

It should be noted that in certain cases mentioned above (contracts that are partially detrimental and partially favourable to a person lacking capacity; or cases where consent has been vitiated by error, fraudulent misrepresentation or duress), the contract is not automatically void, but is voidable. This means that the party who lacks capacity or who is the victim of the vitiated consent is the only person who can apply for nullification of the contract. The same party can also ratify the contract once he has acquired the necessary legal capacity or once the cause of vitiation of consent has been discovered or has ceased, as the case may be. Any such ratification extinguishes the right to apply for nullification. This right is also extinguished by the expiry of a limitation period of three years, which starts running as of the date of cessation of the incapacity, discovery of the fundamental error or fraudulent misrepresentation or cessation of the duress.

In cases where the contract is void and not merely voidable, such as contracts where the object or consideration is unlawful, any person having an interest in the contract may invoke its nullity, or a court may do so of its own motion. Ratification in such cases is impossible, and nullity proceedings may be commenced until the expiry of a 15-year limitation period running from the date of conclusion of the contract.

When a contract is declared void or is nullified, the parties are reinstated in their positions prior to the contract. If however such reinstatement is impossible, damages equivalent to any loss that has been suffered may be awarded.

Effects of a Contract

Article 147 of the Civil Code lays down the fundamental principle that the contract makes the law of the parties, and that it cannot be revoked or amended unless by mutual consent of the parties or for reasons provided for by law. However, the same article adds that when, as a result of exceptional and unpredictable events of a general character, the performance of a contractual obligation becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the court may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits the obligation that has become excessive.

A contract must be performed in accordance with its contents and with the requirement of good faith. It is important to note, however, that it binds the contracting parties not only as regards its express provisions, but also as regards whatever is considered, according to law, usage and equity, and in view of the nature of the obligation, as a necessary sequel to the contract.

When the terms of a contract are clear, they cannot be deviated from for the purpose of interpreting the intention of the parties. However, if the contract is not clear and thus requires interpretation, then it is necessary to ascertain the common intention of the parties and to go beyond the literal meaning of the words, taking into account the nature of the transaction and the loyalty and confidence that should exist between the parties in accordance with commercial usage. In case of any doubt, the contract is to be interpreted in favour of the debtor of the obligation in question.

A contract cannot create obligations that are binding upon third parties. As a result, if a person binds himself to procure the performance of a third party, and if the third party then refuses to perform the obligation, the contracting party who bound himself to obtain such performance will be liable to indemnify the other contracting party by himself performing the obligation in question.

On the other hand, a contract can create rights in favour of third parties. Typically, such contracts include life assurance policies or accident insurance policies entered into by an employer for the benefit of his employees. As a result of the creation of such rights, the third party beneficiary acquires a direct right against the person who has undertaken to perform the obligation, and the latter may invoke against the third party beneficiary any defences arising out of the contract.

Non-Performance of a Contract

Libyan law provides for various remedies in the event of non-performance by a party of its contractual obligations. These remedies will not be available, however, if the non-performance is excused by an event of *force majeure* or if changed circumstances have made performance excessively onerous.

Remedies for Non-Performance

If the contract contains reciprocal obligations, and if one of the parties fails to perform his obligation, the other party, after serving a formal demand on the debtor of the obligation to require its performance, may apply to the court for an order for performance of the contract or its rescission, with any damages that may be due. If the parties have agreed that in the event of non-performance the contract will be deemed to have been rescinded, it is not necessary to obtain a court order to that effect, although a formal demand is still required to be served on the debtor. The contract may also be rescinded *ipso facto* when an obligation is extinguished by reason of impossibility of performance.

When a contract is rescinded the parties are reinstated in their former positions. If this is not possible, the court may award damages.

In addition to the right to rescission, when correlative obligations are due for performance, a party may refrain from the performance of his obligation if the other party does not perform his own obligation.

All obligations, whether they result from contract or from other sources of obligations such as unilateral undertakings, unlawful acts or enrichment without just cause, are enforceable against their debtor. Under a contract, a party is obliged to perform his obligation specifically as agreed upon with the other party as long as such specific performance is possible, and may be compelled to do so after service of a formal demand for performance. When, however, there are legitimate reasons that make specific performance too onerous for that party, he may limit performance to the payment of a sum of money as an indemnity, provided that this method of performance does not seriously prejudice the creditor.

In most cases, however, the creditor of the unperformed obligation will take the matter to court. In such an event, the dispute will usually be resolved by the payment of damages, unless the debtor of the obligation establishes that the impossibility of performance arises from *force majeure*. This provision is also applicable if the party is late in performing his obligation.

Force Majeure and Changed Circumstances

The concept of *force majeure* is provided for in the Civil Code under Article 360, which stipulates that an obligation is extinguished if the debtor establishes that its performance has become impossible by reason of causes beyond its control. The courts in Libya have developed this concept further and, as a result of their case law, an event must have the three following characteristics in order for it to qualify as *force majeure* and thus to constitute a valid reason for non-performance of an obligation: 1) as specified in Article 360, the event must be beyond the control of the party claiming *force majeure*; 2) the event must be unforeseeable at the time of contracting; 3) it must render performance objectively impossible, ie not only for the party invoking *force majeure* but for any person who might be put in the position of that party.

The Civil Code also recognizes the concept of 'changed circumstances', where performance remains possible, though extremely cumbersome. This concept does not lead to termination of the contract, but the remedy is adjustment of the economic terms of the contract. Thus, paragraph 2 of Article 147 of the Civil Code provides that when, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits the obligation that has become excessive. The same article provides that any agreement to the contrary is void.

It should be noted that, just as for *force majeure* situations, the courts have held that in order for events to constitute changed circumstances, they must be unforeseeable and beyond the control of the party relying on them.

Assessment of Damages

The Civil Code lays down a series of provisions for the assessment of damages in the event of a breach of contract. The parties to a contract may however agree to derogate from these provisions, to the extent that they are not imperative.

Court-Assessed Damages

If the amount of damages payable has not been fixed in the contract, the court will determine the amount. The damages so determined should cover the actual damage and losses suffered by the creditor, together with profits of which he has been deprived.

Almost all writers and case law are in agreement that in order for compensation to be payable for a damage resulting from a contractual default, such damage must be direct and, in principle, foreseeable[1]. Thus, while indirect damages are never compensated for, a defaulting party may be ordered to compensate for an unforeseeable damage provided, first, that it is a direct damage and, second, that the defaulting party is guilty of fraud or serious fault.

Direct damages are defined as being 'all damages which are the normal result of the breach by the defaulting party'. A damage will be considered as a normal result of the breach if it cannot be avoided by the non-defaulting party making a reasonable effort.

Foreseeable damages are such damages which could be foreseen at the time of entering into the contract by the party in breach. The foreseeability of the damage is an objective matter and not a subjective one peculiar to the defaulting party. Thus, foreseeable damage is damage which could have been foreseen by an ordinary person in the same circumstances, and not

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[1] In cases of tort, on the other hand, where the liability arises out of unlawful acts and not out of a contractual default, monetary compensation includes direct damages whether they are foreseeable or not.

damage which was foreseeable by the debtor personally. Consequently, if the debtor neglects to consider certain circumstances which should have led him to foresee a particular damage, this damage will still be considered as a foreseeable damage, because an ordinary person in the position of the debtor would not have neglected to consider the relevant circumstances.

The Civil Code clearly envisages situations where a debtor may be required to compensate for unforeseeable direct damage if he has been found guilty of fraud or serious fault. Serious fault (*culpa lata*) is defined as a fault which would not be committed even by a careless person. It is almost a wilful act and is treated in the same way. As for fraud, some writers consider that it simply means bad faith, and that a party who wilfully breaches his contract is guilty of fraud. Thus, it appears that there is a tendency towards holding the defaulting party liable for unforeseeable damages whenever he has wilfully breached his obligation or demonstrated bad faith in his dealings with his counterparty.

In addition to the material damage (actual losses and lost profits) referred to above, moral damage may also be compensated for. This includes moral prejudice which causes bodily pain, jeopardises reputation, dignity or honour or causes emotional distress.

In order to establish a party's contractual liability for damages, the creditor is obliged to prove the existence and content of the contract that is the basis of the obligation, the fault of the debtor, the existence and extent of the damage suffered and a causal link between the debtor's breach of contract and the damage.

There is however an obligation on the creditor to mitigate his damages to the extent possible, and any damage that the creditor could have avoided by making a reasonable effort will therefore not be compensable. Moreover, if the court finds that the creditor, by his own fault, has contributed to the cause of the damage or has increased the damage, the amount of compensation may be reduced or damages may be refused altogether.

Finally, when the object of an obligation is the payment of a sum of money, the amount of which is known at the time when the claim is made, the debtor is obliged, in case of delay in payment and as damages for that delay, to pay interest to the creditor at the rate of 4 per cent in civil matters and 5 per cent in commercial matters. This interest runs from the date of the claim in court unless the contract or commercial usage fixes another date. The creditor may also claim damages in addition to interest, if he can establish that he has incurred a loss in excess of the interest, as a result of bad faith on the part of the debtor. Subject to any commercial rules or practice to the contrary, the interest will not be compounded, and in no event may the total interest exceed the principal amount due.

Agreements on Damages

If the parties have agreed on how damages should be assessed, this agreement should in principle be respected by the courts, and the above rules will not necessarily apply.

Thus, the parties may accept greater liability than is provided by the law, by agreeing to be liable for damage caused by unforeseen events and even by *force majeure*. Or, on the contrary, they may agree to a complete discharge from any liability other than liability arising from a party's fraud or serious fault, or from unlawful acts, which cannot be excluded by agreement.

When the contract provides for liquidated damages, these are not due if the party who has failed to perform an obligation can demonstrate that the other party has not suffered any loss. Alternatively, the court may reduce the amount of liquidated damages if the debtor can establish that their amount is grossly excessive, or that the principal obligation has been partially performed. These provisions cannot be overridden by any agreement between the parties.

Liquidated damages can however not be increased, irrespective of the extent to which the actual damage exceeds the agreed amount, unless the creditor can prove that the debtor has been guilty of fraud or serious fault.

As regards interest, the parties may agree upon a rate other than the rates specified in the Civil Code, provided that it does not exceed 10 per cent.

Commercial Contracts

The general principles of contract law outlined above are applicable to both civil and commercial contracts, and any contract provided for under the Civil Code can be used in the field of commerce. However, the Commercial Code lays down some specific rules for contracts that are commercial by nature, and identifies a number of criteria for determining whether a contract falls into this category.

First, a contract is considered as a commercial contract if it falls within the rather extensive list of different types of contracts contained in Article 5 of the Commercial Code. This list includes, in particular, the purchase of produce and goods for re-sale either in their natural state or as finished or semi-finished products; the purchase or sale of real property for commercial purposes; lease; the sale or purchase of shares in a commercial company; banking transactions such as current accounts and credit arrangements; negotiable instruments; carriage by land, sea or air; contracts relating to marine commerce and risk insurance. The Commercial Code contains detailed provisions regulating these types of commercial contracts.

Second, according to the commercial acts theory, a contract is considered commercial if it is concluded by a commercial entity for its commercial purposes. This means that a contract which would be governed by civil law rules if it were entered into between two non-commercial entities will be governed by certain specific commercial law rules if it is entered into between two commercial entities for their commercial purposes. It should be noted that contracts are regarded as 'mixed' contracts when they are entered into between a commercial entity for its commercial purposes, on the one hand, and a non-commercial entity on the other hand. In this case commercial law rules, such as those regarding evidence, will apply only against the commercial entity and not against the non-commercial entity.

Commercial contracts have three specific general characteristics. They are consensual contracts where the mere consent of the concerned parties is sufficient without any need to conclude them in writing, unless the law provides otherwise. They are commutative contracts where each party receives consideration in return for what he offers to the other party, and finally they usually relate to movables, as real estate and immovable property are excluded from the scope of the Commercial Code unless they are purchased and/or sold for commercial purposes.

In view of the considerations of promptness and trust that should prevail in the field of commerce, commercial contracts are subject to a series of specific provisions that differ from those that are applicable to civil contracts. In particular, their conclusion is subject to the freedom of contract (*autonomie de la volonté*) principle; they are subject to freedom of proof (ie they can be proven by all means and are not subject to the stricter rules of proof that apply to civil contracts); there is a presumed joint and several liability of debtors, unlike in contracts governed only by the Civil Code, where joint and several liability can only be by the agreement of the parties or by provision of law; and they are subject to the commercial rate of interest.

The limitation periods for bringing claims under some commercial contracts are generally shorter than the periods provided for under the Civil Code. For example, in a civil sale contract, an action on a warranty is subject to a limitation period of one year from the date of delivery of the thing that is sold, whereas under a commercial sale contract the purchaser must notify the vendor of any defect within 30 days from its discovery and file his claim within six months from the date of such notice. Similarly, under contracts for construction work, while a 10-year period of liability for total or partial demolition of the works or for any defects in the works is provided for by both the Civil and the Commercial Codes, the limitation period for bringing a claim is shorter if the contract is a commercial contract. Thus, under a commercial contract a defect must be notified within one year of its discovery and a claim must be filed within one year from the date of notification, whereas under a civil contract the limitation period is three years from the date of discovery of the defect.

Finally, when a court case is filed, the Code of Civil and Commercial Procedure provides that the term for appearance before the court is at least eight days if the claim is a civil claim, but only three days if the claim is commercial.

Commercial Agency

The law on commercial agency is of particular relevance to businesses intending to undertake a commercial activity in Libya without themselves being established in the country. In such circumstances, they are obliged to enter into a commercial agency arrangement with a Libyan individual or corporate entity, who will represent them in Libya.

In the framework of promoting and improving the Libyan economy and entering into a new era of opening up the Libyan market to more advanced and developed products and high-quality services, Law No. 6/1372 (2004) with respect to the organization of the activities of commercial agencies was issued on 6 March 2004, replacing Law No. 33/1971, as amended, and its Executive Regulation was issued on 8 August 2004.

The term 'commercial agency' used in the title of the law actually covers not only commercial agency in the usual sense of the term, but also any other types of similar arrangements, such as authorized trader, commission agency, commercial representation, distribution agency and mediation and brokerage[1], without making any distinction between such types of arrangements, all of which are referred to under the law as 'commercial agencies' or simply 'agencies'.

According to the provisions of the Executive Regulation, 'commercial agency' means the performance of commercial activities by an agent on behalf and in the name of a principal in return for a fee. It includes only such activities as are specified explicitly in the commercial agency agreement.

The activities of the commercial agent are defined as the introduction of specific products or services, the importation and distribution of products or services either directly or through distributors contracted for that purpose, the provision of after-sales services, and the assumption of liability for commercial misrepresentation or defects affecting the goods or services provided.

The commercial agent must be an individual or a corporate entity who is permitted or licensed to practise one or more of the activities of a commercial agency. Foreigners are prohibited from exercising these activities, which may therefore be carried out only by Libyan nationals. Also, it is prohibited to perform activities or carry out work as a commercial agent, without having obtained permission from the relevant authority and having been

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[1] An 'authorized trader' means a person entrusted with the task of performing the activities of a merchant/trader in the place where the latter performs such activities or in any other place. 'Commission agency' means an agency for sale or purchase for the account of a principal and in his name. 'Commercial representation' means a contract under which one party undertakes to conclude commercial contracts on an ongoing basis for the account of another party in a specific area in return for a fee. 'Distribution agent' means a person who distributes goods on behalf of a principal under agreed terms and conditions and within an agreed geographical area. 'Mediation and brokerage' means mediation between two or more persons in order to conclude a deal, provided that the mediator or broker has no employment relationship with any of such persons and is not under the control of any of them, in exchange for a commission in accordance with the parties' agreement, general practice, or an official tariff.

registered in the Register of Commercial Agencies held by the Secretariat of the Economy, Trade and Investment.

All commercial agents must conclude a contract or agreement with their foreign principals, covering the type of the commercial agency, its duration, its scope and field and the financial consideration due to the agent for his work. The Secretariat of the Economy may require the commercial agent to formulate the agency contract in a specific form, indicating the nature of the relationship between the parties and specifying the responsibilities of the agent towards any third parties dealing with him.

The types of work and activities for which there may be a commercial agency are divided into two categories: goods and services. In principle, each category is to be homogeneous, and permission to perform agency activities is generally granted for only one of the two categories. However, a commercial agent may carry out agency activities in more than one area within either of the two categories. Moreover, the Secretariat of the Economy, Trade and Investment may, if necessary, permit certain legal entities (but not individuals) to carry out agency activities in both of the categories.

If commercial agency activities are practised without the required permission having been obtained, if there is a failure to register with the Secretariat of the Economy, Trade and Investment, or if a contract is concluded with a foreigner for the supply of goods or services directly, without using an authorized commercial agent, these acts are considered violations of the law and are subject to criminal penalties.

The Executive Regulation of Law No. 6/1372 (2004) contains detailed provisions for the application of the Law, such as the conditions and procedures for obtaining permission to carry out agency activities; a definition of the categories of services and goods for which permission to carry out agency activities may be granted; a determination of the fees for registering and renewing the registration of a commercial agency; the minimum warranty period for durable goods; obligations with respect to the repair of damaged or defective goods, their replacement and the granting of warranties in this regard; the percentage of spare parts to be imported by the principal; the maximum number of commercial agencies that legal entities are allowed to undertake; cases of termination and suspension of the commercial agency and the conditions and procedures for the transfer or assignment of the commercial agency to a third party.

The Executive Regulation requires a commercial agent to sign agency agreements only with principals enjoying a good reputation and whose products or services are distinguished by their high quality. He must grant a warranty for any durable goods for which he performs his commercial agency activity for a period of not less than six months, must provide the necessary spare parts, equipment and tools to a value of not less than 2 per cent of the value of the durable goods and must establish workshops for maintenance and provide the necessary technicians.

The maximum number of commercial agencies that a commercial agent may undertake, either within the same group or in all groups of goods or services is three for individuals, five for partnerships and ten for private or public corporate entities.

Any applicant for registration in the Register of Commercial Agencies must be a Libyan national with full legal capacity, and must not be a public employee or a person who has been convicted of a crime under Chapter 8 of the Criminal Code, regarding crimes against the public economy, industry, commerce and freedom to work, or under the Economic Crimes Law, unless he has since been rehabilitated. If the applicant for registration is a company it must be properly established; its purposes must include the performance of any or all commercial agency activities, and its capital must be wholly owned by Libyans and remain so during the term of the company.

The competent department within the Secretariat of the Economy must notify the applicant for registration if his application is rejected. The applicant has the right to contest and/or appeal any such rejection before a committee presided over by a judge.

A commercial agency must be cancelled and its registration deleted in the event of a declaration of bankruptcy of the commercial agent; his conviction of an economic crime or any other crime involving immorality or dishonesty, unless he is rehabilitated; his conviction of any offence against the provisions of the legislation organizing commercial agency activities; suspension of his work as a commercial agent or his failure to commence performing commercial agency activity within a period of one year from the date of registration; his loss, after registration, of a condition required by the legislation on commercial agencies; a determination that the registration was contrary to the law or was made on the basis of incorrect data; or failure by the agent to deposit his contracts and agreements within the specified period.

On 17 April 2006, the General People's Committee issued its Decision No. 83/1374 (2006), identifying certain goods, such as earth moving equipment, heavy transportation trucks, buses, agricultural machinery and medical equipment, where commercial agency is restricted to state-owned companies or private joint stock companies of which at least 40 per cent of the capital has been subscribed through a public offering. Such state-owned companies or joint stock companies can act as commercial agents only for one manufacturer of such goods. The same Decision also identifies certain other goods where commercial agents must be private joint-stock companies or *tasharukiat* (partnerships).

Administrative Contracts

A further type of contract that may well be relevant to a foreigner doing business in Libya is the administrative contract. These contracts are not governed by the provisions of the Civil or Commercial Codes, but by those of the Administrative Contracts Regulation, which was issued on 1 January 2004, replacing the previous regulation of 2000.

The Administrative Contracts Regulation applies to all contracts concluded by public corporations, public organizations, administrative units and public authorities, as well as any contracts concluded for performing the projects covered by the country's Development Plan, regardless of whether they are concluded by one of these bodies or not. They are contracts which are concluded for the purpose of performing a project that has been approved in the Plan and Budget or supervising its performance, providing technical advice or managing a public utility to provide a continuous and regular public service. They are characterized by extraordinary terms and conditions that are not usual in civil and commercial contracts, and which are generally weighted in favour of the public authority, with a view to serving the public interest.

The following are considered to be Administrative Contracts if they meet the above criteria: contracts for public works; contracts for supply or for supply and installation; contracts for the maintenance and operation of public projects and utilities; contracts for the administration of public utilities and industrial or tourist establishments; contracts for selling things that become obsolete and contracts for consulting and engineering services.

The terms and conditions of Administrative Contracts are drafted unilaterally by the Libyan Public Party, and follow a standard form. Any amendment to the standard form of these contracts requires the approval of the General People's Committee. They are usually concluded through a process of general or limited tender, negotiation, direct order or public auction.

Foreign contractors who are not familiar with the system of Administrative Contracts should note in particular the following stringent requirements laid down by the Administrative Contracts Regulation and the standard form of Administrative Contract attached to the Regulation:

- Administrative Contracts are subject to the prior review, monitoring and follow-up of the relevant authorities, ie the Financial Audit Authority and the General People's Committee for Inspection and Control;
- an applicant for this type of contract is obliged to undertake to observe the provisions of the Boycott of Israel law and regulations;
- the contract and its annexes must be made in the Arabic language, although if the contractor is a foreign company it may be made in a foreign language in addition to Arabic, provided that the Arabic language will be deemed to be the original language and will prevail for purposes of interpretation and conflict;
- if the contractor wishes to sub-contract, he is obliged to do so with local companies for not less than 10 per cent of the contract price;
- the contractor is not entitled to any increase in the contract price if there is an increase in market prices during the contract period;
- the contracting authority has the right to modify the object of the contract by increasing or decreasing the contract scope of work by up to 15 per

cent, applying the same unit price, without the contractor being entitled to claim any compensation;

- payments due to the contractor will not be effected unless approved by the Financial Audit Authority;
- the contractor is obliged to comply with all the laws and regulations in force in Libya, including those relating to employment, social security, insurance, taxes, customs and archaeology;
- the contractor is obliged to use local materials and products of national origin as well as locally manufactured or semi-manufactured materials;
- the contractor is obliged to pay stamp duty upon registration of the contract with the Tax Department and will be subject to income tax and other additional taxes due on his profits such as Jihad Tax, as well as customs duties and other fees and levies;
- assignment of the contract is prohibited, and sub-contracting with specialized and experienced bodies for certain works is acceptable only if approved by the administrative contracting authority;
- if the contractor breaches his contractual obligations he will be subject to delay penalties, the confiscation of the deposit which he is required to pay at the outset and/or the withdrawal of the work and its performance at his own expense, together with rescission or termination of the contract; and
- all disputes under the contract are subject to the jurisdiction of the Libyan Courts, except that if necessary, and only with the approval of the General People's Committee, a contract with a foreign company may provide for arbitration.

As mentioned above, any amendment to these standard terms must be approved by the General People's Committee, and such approvals are not very usual.

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Employment Law

This chapter will deal first with the Libyan Labour Law, which governs the employment of both national and foreign personnel in Libya. It will then discuss the relevant provisions of the Social Security Law, and finally the issue of health and safety regulations.

The Labour Law

The Labour Law in force in Libya is Law No. 58 of 1970, issued on 1 May 1970, together with its amendments and regulations.

General Provisions

The Labour Law is applicable to all employees working under an employment contract in Libya. Any term or condition of the employment contract which violates the provisions of the Labour Law is null and void, unless it is more advantageous to the employee than the provisions of the law. The Labour Law contains the following general provisions.

Employment Contracts

An employment contract is defined as an agreement concluded between an employer and an employee whereby the employee undertakes to work under the management and supervision of the employer in return for remuneration. It must be confirmed in writing and drawn up in Arabic in two original copies. It is imperative that the employment contract contain all fundamental information and the terms and conditions of employment, so that each party is properly informed of them. These imperative details include the name of the employer and the place of work; the name, qualifications, position and address of the employee; the type of job to be performed; the agreed salary and the manner and frequency of its payment and any other benefits in cash or in kind that may have been agreed upon. In the absence of a written contract the employee, but not the employer, may establish his rights by all means of evidence.

A probation period may be fixed in the contract, which should not exceed one month. During the probation period either party may terminate the contract without notice and without any compensation being due.

An employment contract may be concluded for a particular assignment or for a definite or indefinite term. Employment contracts for a definite term may not be for a period in excess of five years and are renewable only once; thereafter the contract is deemed to be for an indefinite term.

Payment of Salaries

It is imperative that salaries be paid in Libyan currency at the work place and on a working day. The salary includes all consideration paid to the employee for his work, whether in cash or in kind, plus any additional allowances and benefits. In this regard, it may be noted that on 8 January 2007, the General People's Committee issued Decision No. 2/2007, which fixes the amount of 250 Libyan dinars (approximately $190 or £100) as the minimum monthly salary for employees working in joint stock companies, public companies, public projects, public institutions and foreign companies.

Internal Regulations

Employers with more than 10 employees must establish internal regulations for maintaining basic order in the work place, with penalties for failure to comply. A draft of these regulations must be approved by the labour authorities prior to its application.

Working Hours

An employee may not be engaged in actual work for more than eight hours per day. If daily hours of work are in excess of six hours, an interval of one hour for rest and meals must be allowed during working hours, and any breaks must be organized in a manner that does not require the employee to work for more than six consecutive hours.

The employer may however request an employee to work overtime in addition to the legally required hours, but the employee can refuse to do so. Overtime may not exceed four hours per day and the employee must receive additional pay of not less than 50% more than his usual pay per hour.

Every employee is entitled to a regular weekly day of rest. If he works during that day of rest, he must be given another day of rest within the three following days or be paid, in addition to his usual pay, the equivalent of twice his usual pay for each hour worked during his day of rest.

Employment of Women

Women may not engage in hard or hazardous work, be employed for more than 48 hours per week including overtime, or work between 8:00 p.m. and 7:00 a.m.

Vacation Entitlements

An employee who has completed one full year in the service of his employer is entitled to an annual vacation of 16 days with full pay, increased to 24 days for minors under 18 years of age and for employees who have completed five consecutive years in the service of the employer or who hold key positions. Weekly rest days and official holidays falling during the annual vacation are not counted as vacation days. In addition, an employee who has spent three consecutive years in the service of the same employer is entitled to a special vacation with full pay, not exceeding 25 days, to perform the pilgrimage to Mecca, but this vacation may be taken by the employee only once in his or her lifetime.

Sick Leave and Maternity Leave

An employee who has a proven sickness or disability is entitled to sick leave during which he receives a percentage of his salary in accordance with the provisions of the Labour Law and the Social Security Law. This leave is granted on the basis of a certificate issued by the appropriate competent physician in the area of the work place.

A female employee who has spent six consecutive months of work in the service of the same employer is entitled to maternity leave with full pay for a period not exceeding three months. During the 18 months following childbirth, she is entitled to two additional daily intervals, of not less than 30 minutes each, to feed and care for her baby.

Remote Work Sites

In locations that are remote from urban centres, the employer is obliged to provide his employees with suitable housing, and to offer them three daily meals and potable water. In locations that are not served by ordinary means of transportation, employers are obliged to provide their employees with proper means of transportation and must also bear travelling expenses for employees from their points of origin to their work locations and their return to such places during their annual vacations or any accumulated weekly holidays.

Termination

If the work being performed by the employee is suspended in whole or in part, either finally or for a period of two consecutive months, or if the work is of a temporary nature, the employer may terminate the contract provided that he notifies the employee and the competent labour office at least two months prior to exercising his right of termination.

If the term of the employment contract is fixed, the contract terminates upon its expiry date, unless renewed, without any penalties or compensation being payable by the employer. When there is no specified term, the employer may terminate the contract only for valid, true and acceptable reasons relating either to the employee's performance of his work or his behaviour towards his colleagues during work. In such cases, the employer must serve the employee with 30 days' notice prior to the termination. Termination of an employment contract during any type of vacation or sick leave is a violation of the law.

If an employer fails to comply with the rules laid down for terminating an indefinite-term contract, he may be sued by the employee and the court may order the reinstatement of the employee and/or may award him compensation for any damages that he may have suffered as a result of arbitrary termination.

The Labour Law refers to an end of service indemnity, but this has been cancelled by Law No. 7/1983, issued in March 1983. While this indemnity is therefore no longer mandatory, employers may still offer an end of service indemnity or scheme, either as a matter of internal company policy or by contract.

Employment of National Personnel

As a general rule, it is not permitted to employ or engage any national employee other than through a Labour Office, unless the employee holds a certificate of registration issued by a Labour Office. It should be noted that, as a result, employers are not permitted to engage employees through private employment agencies. Thus, any contract whereby one party undertakes, in return for consideration, to supply personnel for employment by the other contracting party is null and void.

Any individual who is able and desires to work has to apply for registration with the relevant Labour Office in his place of residence, indicating his age, occupation, qualifications and experience. Similarly, every employer is obliged to notify the Labour Office in the place where his business is located, of any positions that have become vacant or have been newly created. The notification must be made in writing, and must indicate the type of position, the qualifications required of candidates, the salary offered and the date scheduled for filling the vacancy. Within seven days from the date of filling a vacancy, the employer must notify the relevant Labour Office of the name of the employee who has been employed, the date of taking up employment, the salary payable to the employee and the type of job to be performed.

Employment of Foreign Personnel

Foreign employees are not permitted to work in Libya unless they obtain a permit to do so from the Secretariat of Manpower, Training and Employment.

Foreign-owned companies that employ foreign personnel are also required to obtain the so-called 'form "B"' from the Immigration Department[1].

In this respect, the term 'work' includes any industrial, commercial, agricultural or financial work as well as any profession, including household services. In application of the Labour Law and its regulations, foreign employers are authorized to employ non-Libyans in specialized technical or key management positions only if locals are not available, and the authorities insist upon foreign companies employing a high percentage of Libyans on their total staff.

Certain positions are restricted only to Libyans. The previous practice was to have quite a long list of such positions, laid down by the Manpower Department, which mainly relate to administrative, financial and secondary or ancillary technical jobs and professions. Decision No. 6 of 1375 (2007), issued by the Secretariat of Manpower, Training and Employment on 12 February 2007, has now reversed this practice by issuing a list of the positions to which foreigners may be admitted.

Training Contracts

Except in the oil sector, where employers are subject to different provisions under the EPSA terms and conditions[2], the issue of training is dealt with in the Labour Law and its Regulations. These provide that an employee may join the service of an employer in order to be trained in a particular craft or position. The number of trainees employed cannot however exceed 20 per cent of the employer's total workforce.

It should be noted that industrial and commercial entities whose activities are deemed to warrant the training of Libyan employees may be compelled to accept a certain number of employees for training.

Training contracts must be written in Arabic and must specify the duration and phases of training as well as the pay or allowances due to the trainee. An employer has the right to terminate a training contract if it is established that the trainee is not appropriate for the training in question, and a trainee may likewise terminate the contract. In either case, the party seeking termination must give the other party at least five days' prior notice of termination.

The Social Security Law

The Social Security Law was issued for the first time in Libya in 1973, as Law No.72/1973, and has subsequently been partially amended in 1975,

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[1] Obtaining form 'B' is a tedious and time-consuming procedure whereby a company opens a file enabling it to obtain entry visas and residence permits for its foreign manpower. While Libyan-owned companies are not required to obtain form 'B', they are nevertheless required to follow almost the same set of procedures for the employment of foreign personnel.

[2] See Chapter 11.

1976 and 1978. In addition, through Law No. 37/1975, Libya adhered to the International Conventions on Social Security, issued by the International Labour Organization, and also ratified the Arab Convention on Social Security Insurance under Law No. 65/1974.

On 14 April 1980, Law No. 13/1980 was issued, which replaces the previous laws. The aim of this Social Security Law is to encourage all individuals in society to perform their duty and carry out their work, with the incentive of knowing that they are protected by the social security umbrella wherever they are. Thus, at the end of each person's working life, whether upon attaining the age of retirement or, prior to that, in the event of disability, society will provide for his needs.

The Social Security Law is comprehensive and covers all categories of persons entitled to social security, irrespective of whether they are employees or self-employed or disabled persons who are prevented from working by their disability. It provides for all benefits and privileges generally acknowledged and affirmed in the International Conventions as benefits and privileges pertinent to social security. There is no discrimination in social security between nationals and foreigners residing in Libya, in accordance with international conventions, particularly Convention No. 118 on equal treatment between nationals and non-nationals in social security matters, as ratified by Libya under Law No. 37/1975.

The Social Security Law contains six chapters dealing with social security benefits either in cash or in kind, the definition of categories of secured individuals and contributors covered by the social security system, revenues of the social security system, including provisions related to its financing and financial statements, accounts and investment, the calculation of work and service periods, assessment of pensions, guarantees as to the collection of contributions and all credits due to the social security fund and guarantees as to secured persons receiving their due benefits.

The Social Security Law is accompanied by a number of executive regulations, including regulations relating to registration, contribution and inspection, social security pensions, assessment of disability, childbirth grants and burial aid, short-term benefits for self-employed contributors, basic pensions, tax exemption, customs duty exemption, household service and chronic diseases.

Benefits are exempted from taxes and fees in order to protect each person's social security rights. This exemption extends to all secured contributors and their eligible heirs. Similarly, the social security fund enjoys exemption from taxes and fees in relation both to its reserves and to its investment proceeds.

Where there is an employment contract, and also in the case of national public employees working for public authorities, liability for social security contributions is divided between the employee and the employer. The employee bears 25 per cent and the employer bears 75 per cent of the total contribution. This total contribution corresponds to 15 per cent of the actual gross salary of the employee. Contributions are to be paid monthly to the relevant social security authority and are withheld by the employer from the employee's salary.

Health and Safety

The issue of health and safety is dealt with under various legislation, such as Law No. 93/1976, concerning Industrial Security and Labour Safety and the Labour Law. Under Law No. 93, which was issued in November 1976, an employer is obliged to take all necessary precautions for protecting his employees and others at the work site from all danger, risk, harm and disease that may arise out of the work performed at that site.

An employer whose activity requires the use of machines or instruments that may inflict an injury upon employees who use or approach them must take all precautions to avert any danger, whether such precautions are directed at securing the personal safety of the employee or the safety of the work site, through preventive means that are determined on a technical basis and in accordance with technical specifications. Similarly, employers whose employees handle dangerous materials are obliged to take measures to prevent the harmful effects of such materials and to keep persons who are unrelated to the work away from any sources or causes of danger. In all cases, employers are obliged to provide facilities for medical treatment, immediate first aid and a means of swift ambulance transport to the nearest hospital.

Employers with more than 10 employees using machines or instruments that may cause injury or using materials that are detrimental to health must issue regulations and policies clarifying all aspects of the work and the proper use of the tools, instruments and materials utilized, as well as the appropriate means of protection. In these regulations, they must also indicate the safety facilities and their location inside the work site, the means of first aid and the nearest treatment centres. In establishments where the number of employees exceeds 200, the employer must appoint a specialized employee to be in charge of labour safety and the application of Law No. 93. Employees must not bear any costs, fees or other expenses for providing the protection or safety facilities referred to in Law No. 93.

Any person selling, renting or dealing in any manner with machines, instruments or materials which, when used or handled, may involve a risk of inflicting harm or injury either to the user or to third parties, is obliged to take all necessary measures to ensure their being sealed or encased in accordance with technical principles, to avert any risk or danger.

Any violation of the provisions of Law No. 93 is subject to criminal punishment and the employer is liable, together with his industrial safety specialists and/or his administrative officials, for any such offence.

The Labour Law contains provisions that complement and overlap with those of Law No. 93. Under the provisions of the Labour Law, employers are required to provide their employees with first-aid facilities and are liable for all expenses and costs of treatment, medicines and transportation of employees to hospital, if required. Employers are also obliged to take all necessary precautions for the protection of employees during their work against danger to health and the hazards of work and machinery, and must familiarize employees with the industrial hazards and methods of protection against such hazards.

According to the Labour Law, employees are required to use the protective means assigned to each operation and to look after them. They must also comply with the instructions laid down for the protection of their health and safety against injuries. Moreover, they must refrain from committing any negligence or act leading to non-compliance with the instructions or the misuse or damage of the facilities intended for the protection of their health and the safety of their fellow employees.

Finally, the Labour Law provides that employers are responsible for notifying the competent Labour Office in writing of any accident occurring at the place of work and resulting in the death or disabling injury of an employee, within 48 hours from the date of such occurrence.

5

Environmental Regulations

The protection and enhancement of the environment in Libya is organized as a general matter under Law No. 15/1371 (2003) issued on 13 June 2003, which replaced Law No. 7/1982 of 6 July 1982. In addition, there is specific legislation dealing with the prevention of pollution of the sea by oil; public cleanliness; the utilization of water resources; petroleum-related activities and the protection of archaeological and historical sites.

General

The aim of Law No. 15/1371-2003 and its Executive Regulation is to achieve control of the environment for the purpose of its protection and enhancement, and to protect all living creatures, water, soil and food against pollution. In particular, this legislation seeks to determine appropriate ways of measuring the volume of pollution, maintaining the environmental balance of the natural world and protecting against pollution and the various types of damage that it causes. Alongside these aims, it seeks to achieve sustainable development and the optimal utilization of natural resources.

Law No. 15 thus contains various chapters dealing with the protection of the atmosphere, the protection of the sea and marine resources, the protection of water resources, the protection of foodstuffs, the enhancement of the environment, protection from infectious and contagious diseases, the protection of soil and plants, the protection of wildlife and the safety of agricultural products so that they are fit for human consumption.

According to the Law, all local public authorities and companies (whether they are Libyan or foreign) are obliged to make every possible effort to prevent pollution and the various causes of pollution, and to contribute effectively towards restricting and curbing the spread of pollution, by co-operating with the relevant competent authorities and complying with their instructions in this respect.

Public authorities and companies carrying out activities that may result in environmental pollution are required in general to take all necessary measures and comply with all conditions and procedures provided for in Law No. 15 and other laws related to environmental matters. They are also obliged to inform the competent authorities of any incidents that occur in the performance of their activities if such incidents cause environmental pollution, and they must provide equipment and devices for preventing and protecting against pollution. The local public authorities and companies that are subject to this law are obliged to allow the relevant competent authority to visit and inspect their facilities, projects and sites and to supervise their activities, gather samples and measure the volume of pollution.

Atmospheric Pollutants

Establishments, factories or laboratories from which atmospheric pollutants emanate or are produced are obliged to comply with approved scientific rules and criteria in relation to their activities. They must also keep a register for recording the quality, quantity and components of any discharged pollutants and must submit it to the local competent authorities, who have the right to issue instructions to change the method of operation or of disposal of the atmospheric pollutants.

Protection of the Sea and Marine Resources

It is not permitted for marine vessels to discharge in the ports or territorial waters of Libya any stones, sand, refuse, waste, oil residues or chemicals. In particular, oil tankers are not allowed to discharge oil or oil mixtures, or to wash out their tanks in the ports or territorial waters of Libya. The captains of all ships, whether carrying the flag of Libya or of any other country, and pilots and employees on board aircraft belonging to Libyan airlines must immediately, upon arrival at a Libyan port or airport, provide the port or airport management with a report of any discharge of oil or oil mixtures from ships into the territorial waters of Libya of which they have become aware.

The Law also prohibits the disposal of waste or toxic materials on the shores and in the territorial waters of Libya, and the discharge of polluted water into the sea directly or through drainage pipes.

Finally, fishery resources are protected. In particular, fishing by means of explosives and toxic or narcotic materials is prohibited.

Food Hygiene

It is not permitted to sell, display, circulate, import or distribute foodstuffs and agricultural products that are unfit for human consumption. In this connection, the local competent authorities are not allowed to approve customs clearance, the circulation or the offer for sale of imported foodstuffs, before having referred to the competent sanitary authorities and ensured that the foodstuffs are free from disease.

All public authorities are obliged to comply with any instructions that are issued regarding programmes necessary to provide services for a healthy environment for the citizens, and they must take the necessary measures to protect animals from epidemics and infectious diseases and to prevent the transmission of diseases to human beings.

Any seeds or livestock breeds that have been genetically modified and have been subject to genetic engineering are considered as sources of danger to the environment and its natural resources. It is therefore prohibited to import or sell genetically modified organisms or to use them as food or fodder without permission from the relevant authorities. In all circumstances, all available means, technologies and equipment must be used in order to minimize consumption of and pollution by such organisms.

Protection of Nature

It is not permitted to use public forests as areas for disposing of oil, chemical or rubber waste, refuse or debris from buildings or civil works or scrap metal.

Wild animals and birds must be preserved and protected from extinction by way of hunting and therefore it is not permitted to hunt without having first obtained a licence or authorization to do so from the relevant authorities.

Penalties

Anyone violating the provisions of Law No. 15 is subject to a fine of between 1,000 and 100,000 Libyan dinars (approximately $750–75,000 or £400–40,000). In addition, any equipment or other items that may have been involved in the violation may be confiscated and compensation for the damage caused by the violation may also be ordered.

Prevention of Pollution of the Sea by Oil

In addition to the provisions on this subject that are contained in Law No. 15, Law No. 8/1973 deals specifically with the prevention of pollution of the sea by oil. The main purpose of this law is to provide for the application of the International Convention for the Prevention of Pollution of the Sea by Oil, concluded in London in 1954 and amended in 1962.

According to Law No. 8, all ships must keep an oil record book and must, on calling at a Libyan port, notify the port authorities of any disposal of oil or oil mixtures from the ship in the territorial waters of Libya. Any leakage of oil or oil mixtures out of the ship as a result of unavoidable causes must also be reported.

Holders of licences to build and use terminals for shipping crude oil are obliged to equip their terminals with appropriate facilities for receiving the waste and oil mixtures to be discharged.

The penalties prescribed for violation of this law are applicable to ships regardless of their nationality. Such violations are subject to a penalty not exceeding one month's imprisonment and a fine not exceeding 100 dinars (approximately $75 or £40).

Public Cleanliness

Public cleanliness is dealt with by Law No. 13/1984, issued in April 1984, and its Executive Regulation. According to this law, public cleanliness is the responsibility of all residents in Libya. Thus, all individuals, public corporations, public organizations and companies, whether they are national or foreign, are prohibited from depositing and/or disposing of rubbish, waste and refuse in places that are not specially designated for this purpose, and occupants of buildings are obliged to provide containers or bags for everyday refuse.

Companies and industrial installations whose activities may produce dangerous waste or waste that may be harmful to public health such as industrial waste and chemicals are obliged to collect, transport and discharge such waste in accordance with the technical means established and approved by the relevant public authorities. Industrial and chemical establishments, hospitals, research centres and other similar establishments that may produce poisonous or radioactive wastes that are harmful to health must collect, transport and discharge such waste by technically appropriate means that are specified by the General People's Committee of Utilities in each municipality. It is not permitted to dispose of these types of substances with refuse or household waste.

Anyone violating the provisions of this law is subject to a fine of up to 500 dinars (approximately $375 or £200).

Protection of Water Resources

The protection of water resources is dealt with by Law No. 3/1982, issued in March 1982, and its Executive Regulation. According to this law it is prohibited to evacuate either solid or liquid wastes into water resources.

Any drilling to explore for or exploit water resources requires that prior permission be obtained from the relevant public authorities. Licences for exploiting water resources are usually given on the basis of priority of use, where the first priority is human use, the second is use for agricultural purposes and the third is for mining and industrial purposes. Whoever is granted the right to utilize water resources must refrain from using them in a way that is harmful either to the water resources themselves or to third parties.

Petroleum-Related Operations

In the context of environmental regulations with respect to oil operations, it must be borne in mind that companies working in the oil sector, in addition to complying with the relevant provisions of the legislation discussed above, are obliged to comply with the environmental provisions provided for under the Petroleum Law, the Regulations issued thereunder and the terms of their relevant contracts.

According to Article 3 of Petroleum Regulation No. 8, a concession holder is obliged in general to take every reasonable precaution to prevent damage or hazard, as a result of its operations, to human life, property, natural resources, coasts, cemeteries or places of archaeological, religious or tourist interest[1].

More specifically, Article 39 of the same Regulation lays down procedures for the disposal of all brine or salt water produced along with oil, and Article 40 obliges the concession holder to prevent spillage of oil at the surface, to dispose safely of any oil produced during drilling and completion tests that cannot be recovered, by burning it in open pits, and to take all other necessary steps to avoid soil or water contamination. If any such contamination occurs, the Regulation requires its elimination and cleaning.

In addition, under the EPSA[2], the operator is obliged to conduct petroleum operations in the contract area in a manner consistent with good oilfield practice. The new EPSA IV terms require the operator to conduct an environmental impact assessment in the relevant part of the contract area and to submit to the management committee prior to the commencement of its petroleum operations a detailed assessment report containing the measures required to be taken to ensure that the conduct of the petroleum operations does not cause damage to the environment. Throughout the term of the EPSA, the operator is obliged to conduct the petroleum operations diligently and continuously, and is expressly governed by the applicable provisions of the Petroleum Law and other applicable laws and regulations of Libya, in particular laws and regulations concerning the protection of health, safety and the environment. The EPSA also provides for an arrangement to fund the 'abandonment' (ie the clearing) of assets and facilities at the end of the agreement, whether upon expiry or in the event of withdrawal of the operator.

In July 1980 the Secretary of Oil issued Decision No. 69/1980. According to this decision oil companies are prohibited from using potable water in any

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[1] While drafted with holders of oil concessions in mind, this provision is also applicable to the Second Party under the EPSAs (see Chapter 11).

[2] See Chapter 11.

project of water injection into oil reservoirs and are required to use only salt water for this purpose.

This Decision is complemented by Law No. 3/1982 concerning the utilization of water resources, referred to above, and its Executive Regulation, according to which the injection of potable water into oil wells is permitted only in case of necessity, and then only for a temporary period of time. In addition, under General People's Committee Decision No. 791/1982, issued on 20 December 1982, concerning the division of Libya into water areas, the use of potable water for injection into oil wells is prohibited, unless it is pursuant to an agreement between the National Oil Corporation and the Soil and Water Department.

Protection of Archaeological Sites

Given Libya's rich and ancient history – as well as its renowned Roman and Greek ruins, it has important prehistoric and early Islamic antiquities – the protection of its archaeological heritage is an important environmental issue in Libya, particularly when oil-related work or construction work is to be performed. This issue is dealt with by Law No. 3/1424 (1995), replacing Law No. 2/1983, regarding the Protection of Archaeological Sites, Museums, Old Cities and Historical Buildings, issued in August 1995, and its Executive Regulation issued in June 1996.

According to this law, it is prohibited to damage any movable or immovable archaeological sites or items by any means. It is also prohibited to erect constructions or manufacturing facilities or to quarry in locations less than 500 metres from immovable archaeological sites, and it is further prohibited to carry out works such as the construction of roads or storage facilities or the demolition of buildings in the vicinity of registered immovable archaeological sites, unless agreed with the concerned authorities. According to the Executive Regulation, licences for constructions and works which require drilling operations in areas of archaeological interest may be obtained upon the approval of the concerned authorities and after carrying out an archaeological survey.

Any person who discovers any movable or immovable archaeological items or sites or is aware of any such discovery that occurs during any work or operation must notify the nearest proper authorities. According to the Law, moving archaeological items requires a licence from the relevant authorities, and searching for archaeological sites or items is also reserved to individuals and entities who have obtained a licence. It is prohibited to take photographs of archaeological sites or items for commercial purposes without the approval of the authorities.

Violations of the provisions of Law No. 3/1424 (1995) are subject to imprisonment or a fine of between 10,000 and 20,000 dinars (approximately $7,500–15,000 or £4,000–8,000), together with the obligation to repair any damage that has been caused, and the confiscation of any items or equipment that may have been seized at the site of the violation.

6

Intellectual Property

This chapter will look in turn at the Libyan law on trademarks, the rights of authors and patents. As will be seen, the existing laws on these subjects are rather outdated. However, Libya is now making efforts to improve the situation with regard to the registration of trademarks, and has also ratified certain international conventions, most recently, in 2005, the Patent Cooperation Treaty.

Trademarks

Throughout the 1960s and until the end of the 1970s, the system of trademark registration in Libya was very active and dynamic. During that period, Libyan private companies and individuals were running most of the business activities in the country, under franchise and licensing agreements, without any state involvement. The situation then changed and the State took a much greater degree of control over economic activities. This led to dormancy of the registration system and a lack of any real development in the field of trademark law. However, in recent years the relevant public authorities have decided to reactivate the system, and the responsible department has started restoring it and registering new trademarks. This department has now received many applications and has decided to act on all these applications, provided that they are in line with the applicable law and provided all the requisite documents are submitted.

Trademark registration in Libya is currently organized under Law No. 40/1956 issued in August 1956, as amended, and its Executive Regulation issued in December 1956. The Law and its Regulation have not been amended or supplemented since 1962 and are thus still in effect more or less in their original form. Under their provisions, the following may be registered as trademarks – names which have a distinctive shape, signatures, letters, numbers, sketches, symbols, stamps, pictures or inscriptions. Also considered as trademarks that can be registered are any other marks that are used or intended to be used either in distinguishing products of industrial work, agricultural or forestry exploitation, products extracted from the land, or any commodities, or marks that are used in indicating the origin of goods or products, their character or the method of their preparation.

According to Law No. 40, trademarks have to be registered in a special register in the Secretariat of the Economy, Trade and Investment. Only the following individuals and corporate entities are entitled to register trademarks – owners of manufacturing plants or commercial entities or individuals of Libyan nationality; owners of manufacturing plants or commercial entities or individuals who are resident in Libya or have a real place of business in Libya; owners of manufacturing plants or commercial entities or individuals who belong to, are resident in, or have a real place of business in, a country which applies reciprocity in its dealings with Libya; societies or groupings of such persons established in Libya or in one of the above countries if they have legal capacity; and public departments. Any person who has registered a trademark is considered as the lawful owner of the trademark and has an exclusive right to use and benefit from it.

The Law and Regulation provide detailed rules regarding procedure, objections, appeals, renewals and cancellations, transfer and pledge of ownership, changes and amendments to registrations, categories, extracts etc.

Briefly summarized, the procedure of registration starts with the submission of an application, supported by documents, to the Trademark Registration Office in the Secretariat of the Economy, Trade and Investment. This Office will consider the application and, if it is acceptable, will issue a certificate to the applicant. The registration will then be published in the Official Gazette and the protection will be valid for an initial period of 10 years, retroactive to the date of application and renewable for further periods of 10 years each. Thus, the owner of a registered trademark will be guaranteed continued protection if he submits an application for renewal for a new period of 10 years during the last year of the current period. Otherwise, the registration will lapse three months after the end of the 10-year period and a new procedure for registration will be required.

It should be noted that whoever violates the provisions of the Law or intentionally counterfeits a registered trademark, uses a trademark owned by others on his products, sells or offers for sale a counterfeit trademark, or enters Libya for the purpose of dealing in a counterfeit or false trademark, is subject to criminal penalties, ranging from the payment of a fine to imprisonment. In addition, these penalties are without prejudice to the right of the victim to claim compensation for any further damage that may have been incurred.

Rights of Authors

Law No. 9/1968, issued on 16 March 1968, deals with the protection of the rights of authors. According to this Law, the rights of authors of new and original literary or technical works or compilations, of whatever nature and regardless of their means of expression, are protected.

For instance, the Law gives the author alone the right to publish his intellectual production of whatever kind, and to choose the method of publication. It gives the author the right to exploit and utilize his production financially, by all means of legitimate exploitation, as well as the right to amend, change and translate such production. Third parties are prohibited from exploiting the author's intellectual production without his prior approval, and newspapers and periodicals are prohibited from publishing scientific, literary and technical articles, novels, stories and other works without the permission of their authors, although publishing a summary, a brief report or a citation from such intellectual production is permissible. The author enjoys the right to defend his production against any wrongdoing or offence.

Attachment or garnishee orders on the author's rights are prohibited (although they may be granted on the physical copies of the author's published work, in accordance with the legal provisions applicable in this respect).

Any violation of the provisions of the Law is subject to criminal punishment ranging from fines to imprisonment, in addition to any compensation that may be payable for any damage that can be shown to have been caused by the infringement of the author's rights.

Patents

Law No. 8/1959, issued on 30 March 1959, protects inventions and industrial designs and marks. According to this law any new creation or idea that is capable of being exploited industrially, whether relating to new industrial products, innovative industrial means or a new application of known industrial means, is considered as an invention that can be protected by means of a patent.

A creation or idea is however not considered to be new if it has been used publicly or has been previously issued in Libya during the 50 years preceding submission of the application for the patent. Nor can protection be granted for creations or ideas that violate morality or public order, or for chemical inventions relating to foodstuffs, medical drugs or pharmaceutical formulas unless they are produced through special chemical processes, in which case a patent will be granted for such special processes.

According to Law No. 8, applications for patents may be made only by nationals; foreigners residing in Libya; nationals of other countries dealing with Libya on a basis of reciprocity; companies, associations and establishments having a legal personality and fulfilling the same requirements of nationality etc; or public corporations.

The owner of a protected invention has the exclusive right to use it by any means. The duration of protection is limited to only 15 years starting from the date of filing the application, and it can be renewed only once, for a period not exceeding five years. However, the owner of the invention may apply for a new patent if he has introduced improvements or changes to the original invention.

Applications for patents are to be filed with the Office for the Protection of Industrial Property in the Secretariat of the Economy, Trade and Investment, together with a detailed description of the creation or idea and its methods of use. Third-parties may object to the application, in which case the dispute is settled by a committee presided over by the Director of the Legal Department in the Secretariat of Justice. The decisions of this committee are subject to appeal before the Supreme Court.

Any patent that has been granted may be cancelled if it is not used in Libya or in the country of origin; if the protection period has expired; if it has been invalidated by a final court decision; or if the due duties have not been paid.

The Criminal Code provides for criminal penalties for whoever falsifies or counterfeits distinctive marks or signs of patents or industrial products, patent licences, designs or industrial models, whether the guilty party is Libyan or foreign. It also provides for penalties for whoever uses falsified or counterfeit distinctive marks or signs of patents or industrial products, again whether the guilty party is Libyan or foreign. In addition, it provides for penalties, ranging from fines to imprisonment, for fraud in exercising commercial or industrial activities in Libya, and for the sale of products under a false name, and compensation may also be payable for any damage that can be proven to have been caused by the infringement.

Membership of International Conventions

Libya is a party to a number of international conventions on intellectual property. Thus, since 28 September 1976, it has been among those countries that have signed and ratified the Paris Convention for the Protection of Industrial Property. This Convention creates a Union for the protection of industrial property, and deals with patents, marks (trade and service marks), utility models, industrial designs, the protection of geographical indications (indications of source and appellations of origin) and the repression of unfair competition.

Libya is also a member of the Berne Convention for the Protection of Literary and Artistic Works, which it ratified on the same date as the Paris Convention. The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works. Under the Convention, such works include every production in the literary, scientific and artistic domain, such as books, pamphlets and other writings; lectures and addresses; choreographic works; musical compositions; cinematographic works; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works; works of applied art; and illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. All such works enjoy protection in all countries of the Union, and the protection operates for the benefit of the author and his successors in title.

Finally, Libya is a member of the PCT (Patent Cooperation Treaty), which was signed in Washington on 19 June 1970, amended in 1979 and further modified in 1984 and 2001. Libya ratified this Treaty on 15 September 2005. Here again, the States party to the Treaty constitute a Union, known as the International Patent Cooperation Union, for cooperation in the filing, searching and examination of applications for the protection of inventions and for rendering special technical services.

7

Insurance Law

Insurance law in Libya has recently been updated, with the issuance on 12 January 2005 of Law No. 3/2005 on Supervision and Control over Insurance Activities, which became effective on the same date. The Executive Regulation laying down detailed rules and forms to be used in connection with operations governed by this Law was issued on 3 January 2006 by General People's Committee Resolution No. 4/2006.

Until this new legislation was issued, insurance activity in Libya had been subject to severe restrictions for many years. Indeed, from 1971 only two companies were allowed to offer insurance, and in 1981 these two companies were merged as the state-owned Libya Insurance Company, which until 1999 was alone permitted to operate in the sector. Some deregulation began to be introduced in 1999, and the new legislation has now further opened the market. As a result, four private insurance companies are now licensed and operating in Libya. However, a certain degree of supervision and control has been retained, together with some restrictions on foreign participation etc. In particular, as will be seen below, the Law and the Executive Regulation lay down various corporate requirements for entities intending to operate in the insurance sector, and they also define the insurance activities that are authorized in Libya, together with the requirements for obtaining a licence in order to be able to operate. In addition, the new legislation provides for the minimum funds and assets to be maintained by insurance and reinsurance companies in order to ensure that they remain financially capable to meet all their obligations under the law and under their issued policies, and also contains extensive details, which will not be dealt with here, regarding disclosures, filings, reporting, audits, forms, agents and intermediaries and the revocation of insurance licences.

Corporate Requirements

According to the new legislation, insurance activities, whatever the type, can only be carried out by insurance entities that have been duly established and registered under Law No. 3/2005. In this connection, it should be noted that no insurance or reinsurance entity can be established without specific authorization having first been obtained from the Secretariat of the Economy, Trade and Investment.

An insurance or reinsurance company must be a joint stock company, in which the level of foreign shareholdings must not exceed 49 per cent. The minimum subscribed capital for an insurance company is set at 10 million Libyan dinars (approximately \$7.5 million or £4 million), at least one-third of which must be paid up as of the date of registering the company. The minimum subscribed and paid-up capital for reinsurance companies is 30 million dinars (approximately \$22.5 million or £12 million).

Article 18 of Law No. 3/2005 stipulates that an insurance company registered in accordance with that law cannot be a shareholder in another insurance company operating in Libya. Although the law does not specify this expressly, it must be assumed that the same provision also applies to reinsurance companies.

Insurance activities can be carried out by the following types of organization in addition to insurance and reinsurance companies:

- co-operative insurance societies;
- private insurance funds;
- general insurance funds; and
- general unions and institutions.

However, the Law only really refers to insurance and reinsurance companies, and all other types of entities are in any event local entities, which should not be of great interest to foreign companies. Therefore, the remainder of this chapter will deal only with companies and not with the other types of entities.

Authorized Insurance Activities

The new legislation lays down the following types of activity that may be undertaken in the insurance sector, provided that a licence is obtained to do so.

1. Insurance of persons and operations for the creation of funds, including the following branches of insurance:
   (*a*) life insurance of all kinds;
   (*b*) operations for the creation of funds;
   (*c*) medical liability insurance; and
   (*d*) insurance for personal injuries, accidents and medical treatment.
2. Insurance of property and liabilities, including the following:
   (*e*) insurance against fire risks;
   (*f*) insurance against land, sea and air transport risks and related liabilities;
   (*g*) insurance of ship hulls, machinery and equipment and related liabilities;

(*h*) insurance of aeroplane fuselages, machinery and equipment and related liabilities;
(*i*) car insurance and insurance against related liabilities;
(*j*) engineering insurance and insurance against related liabilities;
(*k*) oil insurance and insurance against related liabilities; and
(*l*) insurance against miscellaneous accident risks and liabilities.

Licensing

Once an insurance or reinsurance company has been established, it requires a licence in order to be registered and to operate as an insurance company. Documents that must be provided to the Secretariat of the Economy, Trade and Investment along with an application for an insurance licence are as follows:

1. A document evidencing the establishment of the company (extract from the Commercial Register);
2. documents for fulfilling the conditions specified in the Law (although it is not clear what else would be required under the Law in addition to the other documents specified here);
3. a certified copy of the Memorandum of Association of the company;
4. a certified copy of the Articles of Association of the company;
5. a certificate from a bank registered with the Central Bank of Libya, stating that the company has deposited the amounts specified in the Regulation for each relevant branch of insurance as listed above;
6. a receipt evidencing payment of the registration fees specified for each insurance branch; and
7. forms of the insurance policies to be issued by the company for each branch of insurance that it intends to offer.

8

Banking Law

Law No. 1/2005 (the 'Banking Law') and Law No. 2/2005 ('On Combating Money Laundering') provide the legal framework within which banking activities may be conducted in Libya. They were introduced as part of a package of measures aimed at the reform and development of the Financial and Banking sectors. Other measures introduced have included the liberalization of deposit rates and the replacement of multiple lending rates.

The Banking Sector is under the day-to-day control of the CBL (Central Bank of Libya). The CBL has partial independence in the implementation of monetary policy, is in control of the currency and manages and regulates foreign exchange. In addition, the CBL both regulates and owns the state-owned commercial banks and the Libyan regional banks and is responsible for overseeing private and foreign banks.

Operations in the Banking Sector

Both state-owned and privately owned (either national or foreign) banks operate in the banking sector in Libya. At present, foreign banks are not authorized to offer retail services.

Libyan Banks

There are five state-owned commercial banks – Gumhouria Bank, NCB (National Commercial Bank), Sahara Bank, Umma Bank and Wahda Bank. There was a partial privatization of the Sahara Bank in 2005, and the privatization of the Wahda Bank is underway. In addition, the state-owned LFB (Libyan Foreign Bank), which until recently was named LAFB (Libyan Arab Foreign Bank), has offshore status and provides support for trading for Libya. Forty-eight small regional banks, providing banking services to Libyan nationals across Libya and in remote areas, are in the process of being merged under the umbrella of the newly created National Banking Corporation.

The activities of the commercial banks have historically been limited in the range of services provided (eg deposits and withdrawals, loans and documentary credit management) and despite some progress, a variety of issues remain to be addressed relating to the acquisition of expertise, governance, supervision and the application of international standards.

The restriction of the banking sector to the nationalized banks mentioned above has been lifted within the past five years, and a number of Libyan privately owned banks have been granted licences to offer a range of retail banking services and to compete with the nationalized banks. Their primary market comprises international branches and Libyan private businesses.

Foreign Banks

The CBL has also issued a number of licences to international banks to open representative offices but under the terms of the law (Libyan banks must be in the form of Libyan joint stock companies) these banks are not allowed to conduct retail business. They include the BACB (British Arab Commercial Bank), in which LFB is a major shareholder, the Arab Banking Corporation (ABC), in which the CBL is a major shareholder, BAWAG (Bank für Arbeit und Wirtschaft) and, most recently, HSBC.

It is clear that the market for these banks is major project finance and they, and other foreign banks, have recognized that change is occurring in Libya. It is expected that in due course they will offer retail services, possibly in alliance with the national banks.

Currency and Exchange Control

The Libyan currency is the Libyan dinar (LD), comprising 1,000 dirhams. The dinar is pegged to the SDR (Special Drawing Rights; basket of currencies) and since the devaluation of December 2002 has floated in a narrow range. Daily rates are issued by the CBL and the consensus of opinion is that the rate is appropriate and the dinar is fairly valued at approximately LD 1 = US $0.75.

The dinar is not freely convertible but the authorities have gradually relaxed currency restrictions during the past two to three years. The black market in currency that existed in previous years has therefore been abolished.

It is a legal requirement that foreign currency brought into Libya by foreigners should be declared at entry point and currency forms should be completed and stamped by immigration officials. This requires a positive action by the visiting foreigner. Foreigners may then convert that foreign currency into Libyan dinars and vice versa, upon presentation of the appropriate documentation and identification, up to a maximum of LD 5,000 (approximately US $3,700 or £2,000) per day.

Customs officials rarely check, but foreigners travelling to Libya on anything other than a work permit should arrive with at least US $500, or the equivalent in foreign currency, and all Libyan nationals and foreigners leaving Libya should be able to account for any foreign currency in their possession. Foreign currency should be exchanged at a recognized bureau (bank or major hotel).

There are few ATMs in Libya and the use of overseas credit cards is limited. It is therefore a practical requirement to carry cash.

Libyan nationals may freely remit the Libyan dinar equivalent of US $10,000 per year for expenditure incurred when overseas.

Foreign Currency and Libyan Dinar Accounts

Under Libyan law, both Libyan dinar and foreign currency payments should be made through accounts held in Libya. However, by concession and as a matter of practice, oil companies, both national and international, may freely make payments from offshore foreign currency accounts.

Service companies may similarly hold both Libyan dinar and foreign currency accounts in Libya and offshore foreign currency accounts. A foreign company may hold only one Libyan dinar account.

International oil companies may sign contracts payable 100 per cent in foreign currency, and payment will be made either from a foreign currency account held at a Libyan bank or from offshore. National oil companies will demand that a proportion (usually 25 or 30 per cent) of all contracts must be payable in Libyan dinars. Amounts paid in Libyan dinars are not remittable.

Customary practice is for foreign companies either to transfer foreign currency directly to Libyan dinar accounts from abroad or to transfer foreign currency to a foreign currency account in Libya and 'feed' their dinar account as required. Foreign currency may be freely remitted abroad and Libyan dinars may be transferred back into foreign currency up to the amount previously converted.

In sectors other than the oil sector, a foreign company signing a contract with a public entity or for certain projects is likely to be required to sign under the terms of the Administrative Contracts Regulation[1]. Contracts signed under this Regulation usually require that a major part of the contract should be payable in Libyan dinars, but the proportion is negotiable.

Money Laundering

Law No. 2/2005 ("On Combating Money Laundering") makes money laundering a criminal offence and determines that property is 'illegal' if it has been obtained as a result of a crime.

Crimes include those defined in international legislation to which Libya is a party, including the International Agreement to Combat Organized Crime and the International Agreement to Combat Corruption. Property

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[1] See Chapter 3, Section on Administrative Contracts, above.

obtained from a crime is subject to confiscation, and offenders are subject to fines and imprisonment. The CBL has established a unit to combat money laundering, and each commercial bank is required to set up a similar unit.

9

Taxation, Accounts and Auditing

Taxation

The principal taxes and duties relevant to a foreign company in Libya are company income taxes and personal taxes, and stamp duty, paid and payable in accordance with Income Tax Law No. 11/2004 and its Executive Regulation, and Stamp Duty Law No. 12/2004 and its Executive Regulations, respectively.

These Laws replaced Income Tax Law No. 64/1973 and Stamp Duty Law No. 65/1973 and were introduced in 2004 as part of the programme to encourage business in Libya by reducing the burden of taxation on both national and foreign companies. Their implementation was the first major change to the Libyan taxation regime for over 30 years.

Company Income Tax (Tax on Profits)

All national and foreign companies registered in Libya are subject to company income tax on profits, assessed under Law No. 11/2004 (the Income Tax Law), subject to the following two exceptions: 1) Entities registered under Law No. 5/1997 (the Investment Law) or Law No. 7/2004 (the Tourism Law) are exempt from company income tax on profits for between 5 and 10 years; 2) Companies contracting directly with the Great Man-Made River Authority are exempt from company income tax on profits under Law No. 11/1983.

Additional provisions apply to the taxation of oil company profits under the terms of Petroleum Law No. 25/1955, as amended, and under the terms of EPSAs (Exploration and Production Sharing Agreements), but these nevertheless remain subject to the Income Tax Law.

Libyan statute tax law is straightforward, and resembles tax law in many countries with regard to the basis of determination of taxable income, the assessment and payment of tax, and the appeal process, set out in the Income Tax Law. However, practice differs from theory.

Assessment Process

The assessment of company income tax under the Income Tax Law is in two stages.

Preliminary Assessment

All foreign entities must file a tax return annually with the Libyan Tax Department within one month of the date of approval of the annual branch accounts (effectively the date of the audit report), and not later than seven months from their year end. This return should be accompanied by a balance sheet and profit and loss account.

Companies that are exempt from company income tax must submit a return but should note their exemption within it.

It used to be common practice that 'estimated accounts' (a 'four-line estimate' of income, salaries, other expenses and profit or loss) would initially suffice, pending submission of final figures as soon as was possible thereafter, but the Tax Department is becoming increasingly reluctant to accept these submissions and it is expected that this practice will be stopped during 2007.

Head office accounts should be submitted with the annual tax return. Based on the return and associated submission in whichever form, the Tax Department will raise a preliminary tax assessment, levying tax on declared profit at scale rates set by the Law, plus Jihad Tax[1]. No tax is payable at this time if a loss is declared.

As this is, in effect, 'self assessment', there is no right of appeal against the preliminary assessment.

Final assessment

At the request of either the company itself or the Tax Department, a 'tax audit' of the company's books and records will be performed in order to determine the final liability to company income tax for a particular year. It is current practice for the Tax Department to conduct an audit every other year.

Final accounts, together with a final tax return, must be submitted to the Tax Department at the commencement of a tax audit if they have not already been submitted. The five-year statute of limitations is extended to perpetuity for the assessment of company taxes. The audit by the Tax Department inspectors is based on the Arabic statutory records of the branch[2]. If a loss is declared in the preliminary tax return, and a profit in the final, a penalty of 25 per cent of the tax payable is assessed.

Basis of Assessment

Although company income tax is based on the usual 'add-back' basis, whereby disallowed expenditure is added back to declared net profits or losses, current practice is that the Tax Department raises assessments based on a percentage of turnover – the 'deemed profit' basis of assessment,

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[1] See Section on Jihad Tax below.
[2] See Section on Statutory Books below.

which right is set out in Article 76 of the Income Tax Law. Tax is therefore payable even when losses are declared. Only in exceptional circumstances, where detailed Arabic records have been maintained, will the add-back basis be applied.

The level of deemed profit applied to turnover varies according to the nature of the branch's business activity. It ranges from between 12 per cent and 15 per cent for turnkey civil works and contracting, between 15 per cent and 25 per cent for oil services and between 25 per cent and 35 per cent in the case of design or consulting engineers. Within these broad ranges, each case is reviewed individually. A 'preliminary' final assessment will be issued after audit, and taxpayers have a period of 45 days in which to negotiate and agree the final assessment, or to appeal. Thereafter, an appeal process exists through First and Second Appeal Committees and the Court of Appeal (on matters of substance and law) and thence to the Supreme Court (on matters of law only). Except for turnkey projects, or in the most exceptional of circumstances, the minimum percentage negotiable is 15 per cent.

The ranges noted above could be exceeded if it is found that the branch's records or declarations are lacking or false, and up to 10 per cent may be added to turnover for 'doubt'. Above all, the deemed profit percentage applied to any year will be higher than the profit percentage declared in the annual tax return.

Company income tax is payable in four quarterly instalments commencing on the first Libyan quarter day after the collection of an assessment (10 March, 10 June, 10 September and 10 December). The Law allows a 15-day grace period.

It is possible for foreign companies to limit their branch tax liability by agreement with their employing party to pay or to reimburse taxes.

Increasingly, the Tax Department is attempting to assess direct offshore supply.

Tax Rates

Annual rates of company income tax are as follows:

	Libyan dinars	%
On profits up to	200,000	15
On next	300,000	20
On next	500,000	25
On next	500,000	30
On next	500,000	35
On balance		40

In addition, a further 4 per cent on profits is payable for Jihad Tax under Law No. 44/1970.

Taxation of Unregistered Foreign Companies

Despite the requirement that all foreign companies must register a body corporate in Libya in order to conduct work in the country, occasionally, a registered national or foreign entity may sign a contract with an unregistered foreign company for work to be performed in Libya.

In such a case, the contract will be assessed to tax prior to contract registration and the associated payment of stamp duty. The assessment will be made on the deemed profit basis at a rate of (usually) 35 per cent, in order to account not only for corporate income tax on profits, but also for personal income tax that would be due by expatriates and Libyan nationals conducting work under the contract[1]. Taxes assessed must be paid in full before the contract may be registered.

Taxation of International Oil Companies

In the past, foreign IOCs (international oil companies) signed 'concession agreements' in accordance with the provisions of Petroleum Law No. 25/1955, under which they were entitled to export all oil found within their concession area, against the payment of income tax and royalties, up to a maximum of 65 per cent of their net income. Only a few such agreements remain extant, and the fiscal regime laid down by the Petroleum Law has been replaced by a complex formula called 'tax-paid cost', which results in the foreign company receiving a guaranteed margin ranging between 5 per cent and 6.5 per cent of the market value of crude oil as profit, after deduction of income and other taxes.

Since 1974, the Libyan oil authorities (currently NOC (the National Oil Corporation)) have entered into EPSAs under which foreign oil companies take a negotiable share of oil production. Any liability to income taxes is deemed to have been settled by NOC within its share. The latest version of the EPSA (EPSA IV) provides for the issue of a tax receipt by the Secretariat of Finance, computed on the net profit share received by the IOC. On 17 May 2007 the Libyan authorities consented to the IOCs' long-standing request for this computation to be made on a 'grossed-up' basis, when the GPC issued its Decision No. 394/2007 approving the issuance of a tax receipt on the basis of the grossing-up concept and identifying the procedural steps to be followed in this respect.

Double Taxation Agreements

To date, Libya has signed few double taxation agreements (with other Arab countries, India, Pakistan and Malta) but it has recently signed an agreement with France, and is in the process of negotiating with a number of other European countries.

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[1] See Section on Personal Taxes below.

Where no double taxation agreement is in place, European countries tend to grant one-to-one relief for company income taxes paid, subject to the provision of full supporting documentation. Other taxes paid are usually allowed as a deduction, as expense.

Personal Taxes

All Libyan nationals and resident expatriate employees are subject to personal income tax. It is also best practice for expatriates working in Libya under a 'business visa' to pay personal income tax pending the issue of a work and residence permit. Expatriates are subject to tax from the date of their arrival.

Monthly salary declarations must be filed with the Tax Department. All salaries, wages and benefits-in-kind, which accrue as a result of working in Libya, are liable to Libyan income tax. Taxes are payable within 60 days of the relevant month end, with a 15-day grace period.

At the same time as carrying out a tax audit for company income tax purposes as mentioned in the previous sub-section, the tax inspector will review the branch's records to determine whether there are any salaries or benefits-in-kind paid locally, or which could be deemed to have been paid locally, which have not previously been subjected to personal taxes – a payroll tax audit. A wide range of benefits-in-kind are usually assessed. The additional payroll taxes due on such undeclared salaries and benefits will be assessed on the company, in addition to the company income tax assessment, at a rate of 15 per cent (the highest rate of personal tax) plus 3 per cent Jihad tax. These assessments can be material.

Payroll tax audits of oil and income tax-exempt companies are also conducted at regular intervals. Payroll tax assessments are payable within 60 days of receipt, but are subject to negotiation for a 45-day period from the issue of the preliminary assessment (as company income tax above).

Annual rates of personal tax are as follows:

Income (Libyan dinars)	%
First 4,800	8
Next 4,800	10
Balance	15

All individuals are granted a personal allowance: 1,200 dinars for a single person, 1,800 dinars for a married man without children and 2,400 dinars for a married man with children. It is understood that a married woman with taxable income is entitled to the single person's allowance without prejudice to the married allowance granted to the husband. Allowances are apportioned for a period of less than one year. Foreign income of foreign employees and of their wives and dependants is exempt from Libyan personal tax.

Jihad Tax

Jihad Tax is payable under Law No. 44/1970 and is imposed on taxable salaries, wages and so forth. Taxable incomes are subject to Jihad Tax as follows:

- 1 per cent if income does not exceed 50 dinars per month;
- 2 per cent if income does not exceed 100 dinars per month; and
- 3 per cent on incomes over 100 dinars per month.

Jihad Tax is also imposed on taxable corporate profits at a rate of 4 per cent.

INAS (Social security contributions)

INAS (social security contributions) are payable in accordance with Law No. 13/1980 and pertinent regulations as amended. Social security contributions are payable by all persons working in Libya, unless exempt under international agreements (eg diplomats). The contributions are computed as a percentage of gross income, either weekly or monthly, and are as follows:

	Foreign Branch %	Libyan-defined Entity %
Employee's contribution	3.75	3.75
Employer's contribution	11.25	10.5
Contribution from Public Treasury		0.75
Total	15	15

The social security authorities insist that an expatriate declaration must include an amount in addition to salary to take account of the cost of housing and subsistence, whether such amount is paid to the employee or not. A minimum of 50 dinars is acceptable.

INAS is payable on the 10th day of the month following the payment of salary. A fine of 5 per cent per annum is made for late payment.

The INAS authorities conduct audits in the same way as the Tax Department, but at longer intervals of, perhaps, five years. The additional INAS due on undeclared salaries and benefits identified will be assessed on the company at the standard 15 per cent rate plus a late payment penalty of 5 per cent per annum. Again, these assessments can be material.

Stamp Duty

Stamp duty is assessed under Law No. 12/2004. Article 2 of this Law states that any document to be 'used' in Libya must be registered and duty paid thereon, within 60 days of the effective date of the contract. This is usually taken to be the date of signature.

The definition of 'used' is a matter of legal interpretation but is broad, to the extent that a case can be made for requiring that a contract should be registered and duty paid if costs arising under it are to be charged in local accounts.

There are 45 payment schedules appended to the Stamp Duty Law, with duty payable on both documents and actions. The rate most relevant to foreign companies is that arising under Schedule 28A – on contracts for the provision of goods and services – at the rate of 2 per cent of the total value of the contract (the rate payable on the registration of a subcontract is 0.1 per cent of the subcontract value).

Any invoice rendered under a registered contract should be stamped by the Tax Department, signifying that duty has been paid on the contract to which the invoice relates. Employing parties should refuse to pay invoices not so registered, and may become jointly liable with the contractor if they do.

Registration of contracts and invoices can only be effected using an Arabic version, which may be an abridged summary. Stamp duty of 0.5 per cent is withheld from payments made by government bodies. Stamp duty of 0.5 per cent is also payable on any official receipt including receipts for contract registration duties, corporate and personal taxes paid, and suchlike. Foreign companies registered under the Investment Law are exempt from some minor stamp duties.

Customs Duties

Customs Duties were abolished in June 2005 on all commodities but tobacco. In lieu of customs duties, a flat 4 per cent service charge is levied on all imports in order to cover Customs Department costs, with the exception of oilfield equipment imported by IOCs and their contractors, which is exempt.

Temporary importation of equipment is exempt, subject to the payment of a customs deposit, but the requirements surrounding the exemption are stringent, and a breach of temporary import conditions may lead to substantial fines and penalties.

Books, Records and Accounts

Statutory Books

Legal Requirements

All national and foreign companies operating in Libya are required by law (the Commercial Code and Income Tax Law No. 11/2004) to maintain a detailed general ledger, a general journal and an inventory ledger (the 'statutory books'), which should contain every individual transaction entered into, on a daily basis.

Before use, the statutory books must be stamped by the Tax Department and duty paid thereon, in order to legalize them, and by the Commercial Court. It should be noted that a ledger or journal will not be registered if it already contains accounting entries – in other words, one cannot register existing books of account. Similarly, transactions pre-dating the date that the books are registered will be disallowed.

Practical Implications

It is difficult to maintain the detailed records required in Arabic, but in an effort to comply with the law, foreign companies generally write up their statutory records on the basis of monthly transaction summaries extracted from their subsidiary books and records.

In addition to compliance with the law, the maintenance of statutory books assumes importance as a result of the audit of the branch's records by the Tax Department. At the commencement of an audit, the inspector will request production of the statutory books. If these are not available, a perfunctory audit of the English (or other language) books of account will be made and it is likely that a punitive assessment will be raised.

If statutory books have been maintained, even in summary form, the inspector will issue assessments at a more reasonable level. In this connection, it should be stressed that in all instances, adequate documentation of expenditure, cross-referenced to summary journals and hence to the statutory books, should be maintained.

Accounting

Oil companies are subject to the accounting requirements of Petroleum Law No. 25/1955, as amended, and the terms of their EPSAs. The Petroleum Law and EPSAs require the application of 'sound and consistent accounting practices usual in the (modern) petroleum industry'. Other entities normally prepare financial statements on the accruals basis of accounting, but there are no Libyan standards as such and there is no standard-setting body.

Financial Statements

All entities must submit accounts to the Tax Department within seven months of their year end and within one month of the approval of the accounts by the directors. Final accounts should be submitted as soon as is possible if estimated accounts were submitted initially, though as noted in a previous sub-section, the Tax Authorities are expected to refuse to accept this practice, during 2007. In addition, accounts should be submitted annually to the Secretariat of the Economy, Trade and Investment and to other relevant authorities, in accordance with the terms of the company's business licence. The manager and accountant are legally responsible for the veracity of the accounts and supporting books and records.

Accounts must be in Arabic and must include a balance sheet, a profit and loss account, notes to the accounts and a report signed by a Libyan public accountant. Pro-forma accounts are set out in the Executive Regulations to the Income Tax Law.

There is no requirement to submit a cash flow statement and the accounts need not show comparative information. The notes to the accounts are usually perfunctory.

Accounts are usually prepared on a calendar year basis, the accounting period of the state, but the choice of year-end may be changed, subject to the approval of the local authorities. An initial accounting period must not exceed 18 months.

Audit Requirements

All foreign companies are subject to audit by the Tax Department and INAS (Social Security) Department, and may be audited by the Public Control Board (National Audit Office).

Branches of IOCs are also subject to audit either by the Dewan of Audit or by the NOC (National Oil Corporation) of Libya.

Foreign companies registered under Law No. 5/1997 (the Investment Law) are subject to audit by the Investment Board.

Accounting Profession

The accounting and audit profession is governed by the Libyan Union of Accountants and Auditors. Membership of the Union is restricted to Libyan nationals and members are designated 'Libyan Public Accountant'. Only a Libyan public accountant may sign an audit report for use in Libya. Admittance to membership requires the holding of a bachelor's degree in accounting or a related discipline, and the undertaking of practical experience. Accounting positions in all companies, national and foreign, are limited to Libyan nationals with the exception, in practice, of one senior position in foreign entities.

10

The Legal and Contractual Framework of the Libyan Oil Sector

Administrative structure of the oil sector

Following the enactment of the Petroleum Law in 1955 and up to the 1980s, the Ministry of Petroleum was the dominant body in the oil sector, acting both as the regulatory authority and as the contracting party on behalf of the Libyan government.

In the early 1970s, however, the National Oil Corporation (NOC) began to replace the Ministry of Petroleum as a contracting party, and it later also assumed the major role as a regulatory authority when, in the governmental reorganization that took place in 2000, the Ministry of Petroleum was abolished and its attributions devolved upon NOC.

The Ministry of Petroleum was subsequently reinstated in 2004, as part of a Secretariat of Energy, but in the reorganization that took place in March 2006, the Secretariat of Energy was itself abolished. Instead, it was announced in September 2006 that a new Council of Oil and Gas Affairs was to be established, to act as the highest executive authority in this field, with NOC remaining as the regulatory authority and contracting party.

A brief description of the main functions and authorities of the bodies currently involved in the administrative structure of the oil sector follows.

The General People's Committee (Council of Ministers)

Unlike in other countries where the ratification of hydrocarbon exploitation agreements is usually entrusted to the legislative branch, parliament or national assembly, in Libya, the General People's Committee, as the highest organ of the executive branch, is the ultimate authority with respect to the ratification and approval of oil exploitation agreements such as concessions, joint ventures or exploration and production-sharing agreements (EPSAs), and their amendment, assignment or cancellation. Thus, when the Ministry of Petroleum was abolished, the General People's Committee assumed the sovereign functions that had formerly been discharged by the Ministry of Petroleum, such as

- the enactment of petroleum regulations;
- the determination of criteria for pricing crude oil and gas and granting preferential prices;
- the ratification of exploitation licences, concession agreements and the like, their amendment and cancellation, and the submission to arbitration of disputes arising under such licences and agreements; and
- the approval of incentives granted to oil companies pursuant to Petroleum Law No. 3/1983, which empowers the Minister of Petroleum to grant concession holders certain incentives (such as accelerated depreciation) on a temporary basis.

The Supreme Council for Oil and Gas

This body was established in September 2006 as the Council of Oil and Gas Affairs, by the General People's Committee Decision No. 211/2006. It was reorganized in November of the same year by the General People's Committee Decision No. 250/2006 and was renamed as the Supreme Council for Oil and Gas (SCOG).

The SCOG is chaired by the Secretary of the General People's Committee (Prime Minister), and its other members include the Secretaries (Ministers) of the Economy, Trade and Investment; Finance; Planning; Manpower; and Industry, Electricity and Mining; the Governor of the Central Bank; the Chairman of NOC's Management Committee; and other independent experts.

The SCOG is charged with drawing up strategies and proposing and evaluating policies pertaining to oil, gas and other hydrocarbons in Libya. In particular, the SCOG is to propose the basis and parameters of plans and programmes for executing these policies, in accordance with presentations made by NOC. The SCOG must also act on matters and issues referred to it by the Secretariat or the Secretary of the General People's Committee, including the following:

(*a*) Review of the principles and rules concerning the fixing of production rates and the setting of pricing plans for crude oil and by-products; determination of the best methods for preserving oil wealth and optimum exploitation; and the review and evaluation of exploration and investment programmes for oil, gas and other hydrocarbons in Libya, by means that will serve the national interests and general policies of the state.

(*b*) Review and evaluation of instruments for the investment of oil wealth, with a view to developing them and optimizing the revenues derived from them.

(*c*) Ratification of the terms and conditions for granting incentives to oil companies pursuant to Law No. 3/1983.

(*d*) The approval of contractual concepts and methods of contracting proposed by NOC, for investment in oil wealth with foreign companies.

(*e*) The approval of joint venture agreements with foreign companies as well as development agreements and other investment contracts concluded by NOC with foreign companies in preparation for their ratification in accordance with the law; the cancellation of such agreements, the granting of consent to their assignment and decisions on the submission to arbitration of disputes related to such agreements.
(*f*) Decisions on applications for the renewal, relinquishment or assignment of concession agreements, and recommendations in that regard.
(*g*) The endorsement of investments relating to the manufacturing of oil and gas products, including refineries and petrochemical plants, and the issuing of approvals in that regard.
(*h*) Review and advice on drafts of international agreements relating to oil, gas and other hydrocarbons.
(*i*) Review and advice on draft legislation related to the exploration and exploitation of oil wealth and related industries, and petroleum regulations concerning safety precautions and the preservation of oil wealth.
(*j*) Approval of the annual general budget/balance sheet and closing accounts of NOC.
(*k*) Review and approval of investment budgets for NOC concerning development, manufacturing and infrastructure projects.
(*l*) The establishment of environmental protection policies and programmes related to the oil and gas industry within the framework of the laws in force.

When the authorities previously given to the SCOG under Decision No. 211/2006 are analysed and compared with the authorities given under Decision No. 250/2006 as outlined above, the conclusion cannot be avoided that the reorganization of the SCOG was intended to reduce its role from that of a decision-making body to an advisory body that simply acts on proposals and initiatives made by NOC and recommends their approval or rejection by the General People's Committee.

The National Oil Corporation

NOC was initially established as the 'Libyan Public Petroleum Corporation' by Law No. 13 of 1968. Law No. 24 of 1970 amended its statute and changed its name to the 'Libyan National Oil Corporation'. In the early 1970s, the General People's Committee granted the NOC the exclusive rights for the exploration and exploitation of hydrocarbons in all areas that were not then subject to oil exploitation contracts, calling them 'open areas'. Subsequently, Decree No. 10 of 1979 of the Secretariat of the General People's Congress (equivalent to Parliament) reorganized the Corporation and gave it its current name.

By virtue of these successive pieces of legislation, and subject to the approval of the Council of Ministers, NOC became empowered to enter into new forms of petroleum exploitation agreements other than the form of concession that had been introduced by the Petroleum Law.

Article 5 of the Law No. 24 of 1970 authorized NOC to exploit the areas granted to it, either directly or through contractors or joint ventures. However, that law imposed a major restriction on NOC in concluding any joint venture agreement, as it dictated that the rights, benefits and privileges inuring to NOC under such agreements must be greater than those inuring to the government under the Petroleum Law. This condition was not always achievable, especially if the NOC was to pay royalties and taxes on its income from the sale of its share of hydrocarbons, valued at the posted price in accordance with the Petroleum Law.

Decree No. 10 of 1979 widened the scope of authority granted to NOC and added more flexibility to enable NOC to keep up with the changes in the international oil industry. Article 1 of that Decree states that NOC shall be active in the exploration for, and production and marketing of, oil and gas inside and outside Libya, through wholly owned subsidiaries or through participation with others by way of work contracts or any other form of investment contracts concerning oil. The general guideline set in this respect is for NOC to 'comply with the best methods of maintaining oil wealth and to exploit it in the best way possible'.

The tendency for more flexibility was further emphasized by Articles 5 and 6 of the Decree, which read, respectively: "NOC shall be the First Party in all Participation Agreements and Exploration and Production Sharing Agreements or any other agreements for the investment of oil wealth in accordance with the terms and conditions of said contracts and agreements and The General People's Committee is the authority for the approval of the contracts and agreements concluded between NOC and the foreign oil companies as well as amendments of the said contracts and agreements, without adhering to the provisions of the laws in force".

Article 6 of the Decree thus empowers the General People's Committee to approve agreements, and amendments to agreements, concluded by NOC that may include terms that are inconsistent with the laws in force or that require exemptions from the application of those laws.

Armed with the powers and authorities granted to it by the above legislation, NOC has embarked on various phases of different contracting campaigns. These resulted first in the conclusion of a number of joint venture agreements, followed by evolving models of EPSAs, the most recent of which, known as EPSA IV, was launched in 2004 at the time of the first open bidding round.[1]

The General People's Committee Decision No. 82/2006 added to NOC's attributions certain regulatory functions that had previously been discharged by the Secretariat of Energy until it was abolished. Among such functions are the supervision of production and export operations to ensure

[1] Please see the sections on joint venture agreements and exploration and production-sharing agreements below.

compliance with the rules governing such operations; follow-up and inspection of the measurement of production and the measurement of exports of oil, gas and hydrocarbon products; fixing the daily production rates of oil and gas; and the development of programmes for environmental protection, health and professional safety, and the follow-up of their implementation. Furthermore, the Decision granted the Chairman of NOC the functions and authorities that had previously been granted to the Minister of Petroleum under the applicable laws and regulations.

It is notable that the exercise by NOC of these regulatory functions can put its contracting partners in a rather awkward situation, in that they have to deal with the NOC in its dual capacity as both their contractual partner and the regulatory authority.

The Legal Framework

The legal framework of the Libyan petroleum industry consists of both legislative and contractual sources. The main and most important legislative sources are the Petroleum Law No. 25 of 1955, the Petroleum Regulations issued thereunder, and Decree No. 10 of 1979 reorganizing NOC and amending Law No. 24 of 1970. The relevant provisions of Decree No. 10 and Law No. 24 have been addressed above, and this section will therefore deal only with the Petroleum Law and Petroleum Regulations.

The Petroleum Law

The Petroleum Law No. 25 of 1955 remains today the most comprehensive piece of legislation regulating the petroleum industry in Libya. It was issued in April 1955, when Libya's oil potential was unknown. Since its promulgation, it has undergone several changes and amendments, the last of which was enacted in 1983.

The main characteristics of the Petroleum Law can be summarized as follows:

(*a*) Although the Petroleum Law included as Schedule 1 a form of 'Preliminary Reconnaissance Permit for Petroleum', the provisions of the Petroleum Law and the practice that followed its enactment were to prove that the Deed of Concession, which was attached to the Petroleum Law as Schedule 2, was the main, if not the only, contractual form for the exploitation of petroleum resources under the Petroleum Law.

(*b*) It is a widely held perception that the Petroleum Law is actually of a contractual nature, as it was the product of negotiations between the Libyan government and the then prospective oil companies, which helped shape the Petroleum Law in its final form. This explains why Clause 16 of the Deed of Concession provides for what is known as a 'stabilization clause', reading: "The government of Libya will take all steps necessary to ensure that the company enjoys all the rights conferred by this concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties".

Further evidence of the contractual nature of the Petroleum Law can be found in the arbitration clause and the applicable law clause of the Deed of Concession, as will be seen below.

(*a*) The Deed of Concession allowed the foreign company contracting with the state (the 'concession holder') considerable freedom in conducting all phases of petroleum operations. Except for certain technical and financial restrictions that were later introduced by Petroleum Regulations 8 and 9, issued in 1968 and 1973, respectively, governmental intervention was limited to the collection of surface rents, royalties and taxes.

(*b*) Unlike the early concession agreements that were concluded in the Gulf region and other Middle Eastern countries, such as Iran, the Libyan version of the concession included what were then characterized as revolutionary provisions, such as:
  - Duration: The concession was awarded for an initial term of 50 years, which could be extended for a further period, provided that the total period did not exceed 60 years.
  - Relinquishment: Article 3 of the Petroleum Law divided the country into four petroleum zones. Article 9 set the maximum number of concessions and the total areas that could be held by one concession holder at one time, ie three concessions in each of the first and second zones and four in each of the third and fourth zones. Article 10 then laid down an elaborate scheme for compulsory relinquishment. Within a period of five years from the date of grant of the concession, the concession holder was required to reduce the concession area to 75 per cent of its original size. Within eight years from the same date, it was required further to reduce the concession area to 50 per cent of its original size, and within 10 years from that date, the concession area was to be reduced again, either to 33 per cent of its original size for areas located in the first and second petroleum zones, or to 25 per cent of its original size for areas located in the third and fourth zones.
  - Fiscal regime: The fiscal regime established by the Petroleum Law is built on the principle of the concession holder contributing 100 per cent of the investment covering all phases of petroleum operations, and freely taking and disposing of all production of oil or gas. In return, the government charges the concession holder with the following:

    (*a*) Annual surface rental fees calculated on the basis of each 100 square kilometres, at fixed rates depending upon the petroleum zone in which the concession is located;

   (*b*) a royalty, which was progressively increased by successive amendments of the law and which currently stands at 16.67 per cent of the value of the total field production, calculated on the basis of the posted price; and
   (*c*) a tax that is calculated in such a way as to ensure that the government will collect not less than 65 per cent of the profit made by the concession holder.

(*c*) Other important provisions of the Petroleum Law include the following:
   - Article 1 establishes the principle that all petroleum in Libya in its natural state in strata is the property of the Libyan state, and that no person shall explore or prospect for, mine or produce petroleum in any part of the country unless so authorized according to the law.
   - Article 16 provides for exemption from customs duties on the import of plant, tools, machinery, equipment and materials used for petroleum operations. This exemption is granted not only to concession holders, but also extends to the benefit of contractors employed by them.
   - The use of surplus pipeline capacity is regulated by Article 12 of the Petroleum Law, which requires the owner of such surplus capacity to make it available for use by any other oil producer on terms agreed by them and approved by the Secretariat of Petroleum. Petroleum Regulation 9 stipulates detailed provisions in this respect, including a formula for the calculation of pipeline tariffs and loading and terminal tariffs.
   - The Deed of Concession provides that disputes between the concession holder and the government will be settled through ad hoc arbitration. The arbitration clause contained in the Deed of Concession requires the formation of an arbitration board of three members, one to be appointed by each party and the third by the two arbitrators so appointed. Failing such an appointment either party may request the President or the Vice-President of the International Court of Justice (ICJ) to appoint the umpire. Similarly, if a party fails to appoint its arbitrator, the President or Vice-President of the ICJ may be called upon to appoint a sole arbitrator. The clause provides for the place of arbitration to be decided by the parties or, in case of disagreement, by the arbitrators. The concession agreement further states that it shall be governed and interpreted in accordance with the 'principles of law of Libya common to the principles of International Law, and in the absence of such common principles then by and in accordance with the general principles of law including such of these principles as may have been applied by International Tribunals'. This internationalization of the arbitration clause and the applicable law is further evidence of the great influence and strong bargaining position enjoyed by the oil companies at the time the Petroleum Law was promulgated.

The Petroleum Regulations

Under the authority granted to him by Article 24 of the Petroleum Law to issue the regulations necessary for the implementation of the Petroleum Law, the Minister of Petroleum issued nine Petroleum Regulations. Some of these Petroleum Regulations have now been incorporated into the Law through various amendments, and there are currently only three Petroleum Regulations in force, namely Petroleum Regulations 1, 8 and 9.

Petroleum Regulation 1

Part 1 of this Petroleum Regulation, which was published in August 1955, consists of a detailed description of the official map of Libya for the purpose of the application of the Petroleum Law and the division of the country into four petroleum zones, the exact coordinates of each zone and the technical specifications required to be observed when defining the limits of the concessions. Two application forms are attached to the Petroleum Regulation, one for a reconnaissance permit and the other for a concession.

Petroleum Regulation 8

This Petroleum Regulation, relating to the conduct of petroleum operations, was issued by Decision No. 99 of 1968 by the Minister of Petroleum Resources.

Article 2 of the Petroleum Regulation requires that 'all petroleum operations within the territory of [Libya] and its continental shelf shall be carried out in compliance with the rules set out in this Petroleum Regulation and in conformity with efficient and rational methods'.

Article 3 requires the concession holder to take every reasonable precaution to prevent damage or hazard, as a result of its operations, to human life, property, natural resources, coasts, cemeteries or places of archaeological, religious or tourist interest or public installations.

Article 4 provides that 'the machinery, equipment and materials used in the course of the Concession Holder's operations shall meet the standards of safety and efficiency recognized in the oil industry'.

In addition to these general requirements, the provisions of the Petroleum Regulation set out in detail other specific requirements for reporting and for prior approvals and consents by the technical departments of the Ministry of Petroleum with respect to every step of each phase of the petroleum operations. This covers exploration, drilling, production, storage and transportation and the safety of employees.

Article 45 of the Petroleum Regulation sets a rather important principle in establishing that 'any violation of the provisions of this Petroleum Regulation shall be considered as a violation of oil industry practice, according to Article 11 of the Petroleum Law'. Article 11 of the Petroleum Law in turn requires that the concession holder should diligently perform all operations under the concession agreement in a workmanlike manner in accordance with oil industry practice based on appropriate scientific methods.

Attached to the Petroleum Regulation are three forms of permits and reports: a form of drilling permit for exploration, exploitation and water wells; a form of interim drilling report; and a form of final completion report.

Attached also as Annex 3 to the Petroleum Regulation is a general definition of oil and gas reserves.

Petroleum Regulation 9

Issued in July 1973, this Petroleum Regulation contains a comprehensive set of rules for the financial, administrative and technical control for the preservation of oil wealth. The most important of these rules are as follows:

1. Provisions regulating the use of surplus pipeline and terminal capacity by producers other than the concession holder owning such facilities. These provisions include a detailed formula for the calculation of pipeline tariffs and loading and terminal tariffs. All operations pertaining to the use of surplus capacity are to be governed by these provisions, although the Petroleum Regulation also provides that special rules may be issued by the Ministry of Petroleum for individual cases as necessary.
2. A definition of what constitutes a 'commercial discovery'.
3. A procedure for the calculation and payment of rents and royalties, and the use of oil by the concession holder.
4. A detailed description of items to be considered as part of the operating expenses and overheads.
5. A detailed description of what are to be considered as 'physical assets and capital expenditure' under the Petroleum Law, and procedures for the re-export of equipment and data.
6. The use of posted prices for the calculation of the concession holder's income, exchange controls and rules for the collection of the financial dues of the concession holder.
7. Certain provisions relevant to the treatment of gas utilization projects from an accounting and financial point of view, as activities independent from the concession holder's normal activities.
8. The treatment of any local exchange or sale of oil, and procedures for the measurement or the assessment of crude oil gravity.

Contracting models and contractual terms

The contract models used in Libya are Deeds of Concession, participation agreements, joint venture agreements and the successive generations of EPSAs.

The Deed of Concession

Over 130 Deeds of Concession were entered into after the enactment of the Petroleum Law. It can safely be said that these concessions have allowed major onshore oil reserves to be discovered and developed. However, only a few concessions remain in existence today. Some will expire as early as 2011, although some have already been renewed beyond that date.

Although the model Deed of Concession attached to the Petroleum Law laid down the main general features of this type of oil exploitation contract, variations were introduced into some individual concessions in order to accommodate specific circumstances. Nevertheless, the main characteristics of the concession agreement remain the same, and can be summarized as follows:

Financing of operations

The concession holder is required to provide 100 per cent financing of all petroleum operations with no participation from the government.

Management

The concession holder enjoys full control of the management of its affairs and the running of operations.

Rights

The concession holder is granted the exclusive right during the period of the concession to explore for and produce petroleum from the concession area, and the right to take away such petroleum from the concession area and to use, process, store, export and dispose of it.

Obligations

1. The concession holder is obliged to commence exploration operations in the concession area within eight months from the date of grant of the concession, and to continue to pursue all activities arising from the contract in a workmanlike manner and by appropriate scientific methods.
2. The concession holder is required to comply with a minimum expenditure commitment as set out in Article 11 of the Petroleum Law.
3. The concession holder must carry on all operations in accordance with good oilfield practice.
4. The minimum number of Libyan nationals employed by the company after 10 years from commencement of operations should be at least 75 per cent of the total number of the company's employees in Libya. From the date of commencement of regular exports of crude oil, the company

must also pay an annual amount (with a maximum of 5,000 Libyan dinars (LD)) which is to be applied towards training the Libyan nationals.

Financial charges

In return for the rights granted to it under the concession, the concession holder must pay the following financial charges:

Surface rents

The following rent is charged for the concession area held by the concession holder:

- An initial fee of LD 100 for each 100 square kilometres.
- Annual surface fees for each 100 square kilometres; the value of these fees depends on the location of the area (LD 10 per 100 square kilometres for areas in the first and second zones, and LD 5 per 100 square kilometres for areas in the third and fourth zones). These fees are doubled after eight years.
- The annual surface rent increases to LD 2,500 for the production area within the first 15 years, to LD 3,500 for the period after the 15th year and up to the 20th year, and to LD 5,000 per year after the 20th year.

Royalties

Royalties are payable in the amount of 16.67 per cent of the value of the recovered natural gasoline and produced petroleum excluding natural gas. The value of the oil produced is determined on the basis of the posted price, but the value of gasoline is calculated on the basis of prices agreed between the authorities and the producing company. The royalty on natural gas is 16.67 per cent of the value at the well head, which is the selling price less any cost incurred by the company but not recovered from the purchaser.

Royalties may be paid in cash or in kind, provided that, for payments in kind, the company is advised three months in advance of the state's desire to receive the royalty in kind.

The company is entitled to reduce the royalty due by the amounts paid as surface rent, provided that the amount paid is not less than LD 2,500 per 1,000 square kilometres per year. The company is also entitled to expense the royalty when calculating the tax due, ie to consider it as a deductible item just like any other operating expense.

Taxes and profit sharing

In addition to royalties and surface rentals, the concession holder is required to pay taxes.

The tax rate is calculated as 65 per cent of the company's net profit (Article 14 of the Petroleum Law and Clause 8 of the Deed of Concession). Net profit in turn is defined as the total value of the crude oil disposed of (valued at the posted price) less:

- The operating and administrative expenses as defined in detail by Petroleum Regulation 9.
- The depreciation of physical assets at the rate of 10 per cent per annum and of capital expenditure at the rate of 5 per cent per annum. (Law No. 3 of 1983 amended the Petroleum Law in this respect and gave the Minister of Petroleum the right to grant incentives to the concession holder, such as accelerating the depreciation period, provided that the period determined for the depreciation of physical assets and capital expenditure is not less than two years.)
- The expensed royalty on the crude oil disposed of (ie the actual value of the royalty on that crude oil).
- Any exploration and prospecting expenditure incurred post-production period.

Surtax

If in respect of any complete year, the total amount of fees, rents and royalties that is payable under the Petroleum Law, with the exception of the 16.67 per cent imposed upon the value of crude oil exported, together with income tax and other direct taxes for which the company is liable in respect of its operations and income therefrom under all petroleum concessions held by it in Libya, falls short of 65 per cent of the company's profits as defined by the law for that complete year, then the company must pay to the government such sum by way of surtax as will make the total of its payments equal to 65 per cent of those profits.

If however the same payments exceed 65 per cent of the profits of the company during that complete year, the company is entitled to deduct the excess from the income tax, surtax and other direct taxes payable in that year or the following years.

Environmental protection

The company is obliged to provide an adequate system for the disposal of water and waste oil, and it must securely plug all bore holes and wells made by it before they are abandoned, in accordance with good oilfield practice.

The Participation Agreement

Participation agreements in Libya were the direct result of the nationalization laws that were enacted in the early 1970s, which transferred to the state more than 50 per cent of the foreign companies' interests under the existing concession agreements. Concluding a participation agreement represented a manifestation of the concession holder's acceptance of the nationalization of a part of its interest in the concession and the acceptance of the state or its agency as its new partner.

The purpose of the participation agreements was thus to regulate the relationship between the new partners in the concession deed, ie the concession holder and NOC as the agent for the state.

In addition to containing an agreement on the amount of compensation to be paid for the nationalized interest, the participation agreements introduced the following changes to the Deed of Concession.

Management

A Management Committee was established and entrusted with the running of the affairs of the operating company and acting as that company's legal representative. The Management Committee consists of three members, two of whom represent NOC (one in the role of Chairman of the Committee), with the third member representing the concession holder(s).

Sharing of burdens and benefits

The parties to the participation agreement share the funding of operations and the petroleum produced in proportion to their respective participation shares. No changes were introduced with regard to the fiscal arrangements vis-à-vis the state, except that NOC was to share in the payment of the financial charges applicable to the concession holder.

Sole risk clause

A simple sole risk clause was introduced as a solution to the potential problems that could arise due to the different objectives that might guide the investment decisions considered by the Management Committee. According to this clause, if either NOC or the company is in favour of a programme or a project to which the other party is opposed, the party in favour of the programme or project can proceed with it at its sole risk and expense. The party who chooses not to proceed with the project then has no right of re-entry.

Stabilization clause

The participation agreement preserves for the concession holder all 'rights, privileges and immunities provided for in the Petroleum Law, the Concessions and other agreements between the government and the company unless amended by the Participation Agreement'.

Technical assistance

The company, its parent company and its affiliates are obliged to provide to the operating company, upon request from the Management Committee, the services they previously rendered to the operator. These services include technical, financial, economic, advisory and legal services, in addition to know-how and training in general.

Settlement of disputes

A simple arbitration clause was introduced, referring all disputes relating to the agreement to a board of three arbitrators sitting in Paris and subject to the rules of the International Chamber of Commerce (ICC).

Joint Venture Agreements

Joint venture agreements represented the early attempts made by NOC to enter into direct investment in the oil industry. However, very few of these agreements were concluded and they were later transformed into EPSAs following the adoption of the EPSA I model or have now expired with no success.

Certain joint venture agreements could be characterized as a kind of 'negotiated nationalization'. Under these agreements, NOC became a 50 per cent partner in an existing concession, or entered into a joint venture agreement covering new areas where it shared the financial burdens and the benefits in equal proportions with a partner. NOC would participate in management through an equal number of members of the Management Committee. Decisions were taken by special majority vote requiring a majority of up to 70 per cent with a quorum of at least 70 per cent of the joint venture interest being duly represented at the meeting.

The joint venture agreements subjected their parties to the fiscal regime established by the Petroleum Law and the Deed of Concession.

A buyback clause was introduced to assist the NOC in the marketing of its share of crude oil on the international market. In consideration of this service, the foreign partner was entitled to receive a marketing commission.

Exploration and production-sharing agreements

The ESPAs represented the first serious engagement of NOC in oil exploitation contracts, combining direct NOC involvement in management and financing with a shift of the exploration risk to the foreign partner. Four successive generations of EPSAs have now been developed. The first, known as EPSA I, was introduced in 1974; EPSA II dates from the early 1980s; and EPSA III was introduced in the late 1980s. These three types of EPSA were concluded on the basis of direct negotiations between NOC and the interested companies. In 2004, however, when NOC introduced the EPSA IV model, it also launched a bidding system.

EPSA I

A few of the original EPSAs are still in existence. The Eni Bouri off-shore field and the off-shore gas fields developed as part of the West Libya Gas Project were discovered under EPSA I, and Oxy and Total are still producing from fields discovered under their EPSA I.

The EPSA I model was based on the following principles:

Term

The term ranged between 30 and 35 years, including an exploration period that was usually set at around five years, at the end of which the agreement would terminate if no exploitable petroleum reserves had been discovered. The company was allowed to withdraw from the agreement at any time provided it had fulfilled its minimum exploration expenditure commitment or discharged any other financial commitments to NOC if such commitments had fallen due.

Distribution of costs and expenses

- One-hundred per cent of the exploration expenditure, covering the drilling of the initial appraisal well(s), was to be borne by the foreign company. The exploration programme was generally stated in an annex attached to the EPSA, indicating the number of seismic crews and drilling rigs to be mobilized and the number of wells to be drilled, but the minimum exploration commitment was expressed as a total amount of expenditure rather than as a specific work programme to be carried out.
- Other costs and expenses, including development, exploitation and operating expenses and overheads beyond the exploration period were shared between the parties in proportion to their respective shares in the crude oil produced.
- NOC's share of the development expenditures was considered as an interest-bearing loan to be repaid by the company, either when the total production reached an agreed quantity or upon a specific anniversary of export production. Repayments were to be made in annual instalments over a period of up to 20 years.
- A default by either party in advancing its share of the relevant costs entitled the non-defaulting party to advance the same on that party's behalf and to charge interest for the delay. Additional delay exceeding 90 days entitled the non-defaulting party to off-take the defaulting party's share of production in order to settle the advances and the interest. For this purpose, crude oil was to be valued at the prevailing market price.

Sharing of production

The production of crude oil was shared between the parties on the basis of a percentage fixed in the agreement. Given the economic factors prevailing in the early 1970s and the upward direction of oil prices after the so-called first oil shock following the 1973 oil export embargo by Arab countries, the sharing was heavily in favour of NOC, in most cases exceeding 80 per cent of production.

Taxation

The company's share of production was exempted from income tax, royalties and any other governmental charges.

Management

The company was required to act as operator on a no-loss no-profit basis. It was to conduct petroleum operations under the control and supervision of a Management Committee composed of three representatives, two of whom, including the Chairman, were appointed by NOC and the third by the company. The Management Committee had to decide on all important matters relating to petroleum operations, including work programmes and budgets. Its decisions were taken by simple majority vote, and were final and binding on the parties.

Sole risk

The company was given the right not to join in any project decided by the Management Committee if that project was uneconomic for the company. Consequently, NOC could proceed with the project at its own cost and be entitled to all benefits, although EPSA I recognized the right of the company to re-enter the project upon terms to be agreed. Unlike NOC, the company itself could not take up a project on a sole risk basis, due to the fact that under the EPSA the company was exempt from taxes and royalties.

Title to equipment

This clause introduced a new principle, giving NOC title to all equipment purchased by the operator pursuant to the work programme as soon as such equipment landed at the Libyan ports. The rationale for this clause can be found in the various litigation that followed the nationalization laws and the arguments over the basis of compensation for the nationalized assets.

Buyback provision

The buyback provision that had been introduced in the joint venture agreement was reduced to simply granting the company a first option to buy NOC's share of crude oil, subject to advance agreement on the price.

Settlement of disputes

The EPSA contained an arbitration clause whereby disputes were to be referred to arbitration to be held in Paris according to the ICC rules. The EPSA was stated to be governed by the laws and regulations of Libya including the Petroleum Law, as amended, and the Petroleum Regulations issued thereunder.

EPSA II

Taking advantage of the impact on the international oil market of the second oil shock that followed the Iranian revolution, and the eagerness of the international oil companies as well as the state-owned oil companies of certain countries to secure sources of supply, NOC started a new exploration campaign at the beginning of the 1980s that resulted in the conclusion of EPSA II agreements. During 1980 and 1981, NOC concluded 10 such agreements with a total investment commitment of about 1.3 billion dollars. The companies that participated in this campaign included AGIP, Occidental, Deminex, Shell, Sun Oil, Elf Aquitaine, Braspetro, Coastal States, Rompetrol and the Bulgarian Oil Company.

Main contractual terms

The EPSA II model improved upon the contractual terms of EPSA I in favour of NOC. The whole burden of financing for the exploration, appraisal and development operations was put on the shoulders of the foreign companies, and no reimbursement mechanism for any such expenditures was contemplated.

The sharing of production was done by way of a simple fixed percentage that increased NOC's share over the percentage used in EPSA I. In some cases, NOC's share reached 90 per cent of the production, leaving the foreign partner with only 10 per cent from which it had to recover its costs and make a return on its investment.

Results of EPSA II

The performance of EPSA II agreements was affected by two major developments: first, the collapse of the OPEC pricing system and the sharp decline of oil prices to below US $10 per barrel; and second, the rapid deterioration of the relationship between Libya and the United States. As a result, certain agreements were terminated through the various mechanisms embodied in them, ie withdrawal, amicable termination or arbitration. Of those companies who fulfilled their obligations, only Rompetrol succeeded in making a major discovery in the Murzuk basin (which is now being produced by a consortium led by Repsol), while small to marginal discoveries were made by the Bulgarian Oil Company, AGIP and Deminex.

EPSA III

In response to the changes on the international oil market, and in an attempt to attract more participants to its new exploration effort, in the late 1980s, NOC launched a new EPSA model known as EPSA III. In this model, NOC adopted flexible contractual terms, and recognized the right of the foreign company to recover its costs and to achieve a reasonable return on its investment. Several agreements were concluded using this model.

The major features of EPSA III are the following:

Allocation of costs and expenses

The foreign company is required to undertake all exploration expenditures at its own risk. On the other hand, NOC and the foreign company bear the development costs in equal shares, and the operating expenditure in accordance with the initial share of production. To enable it to recover the expenditure incurred by it during the exploration, development and production phases, the foreign company is guaranteed an initial share of production.

Taxation

No income taxes are levied on the foreign company's share of production.

Allocation of production

The contract area covered by the agreement may consist of a single area or several areas each of which is considered as a separate economic unit. An initial allocation of production is agreed, giving the foreign company a share ranging between 25 per cent and 35 per cent.

By way of illustration, and assuming an initial allocation of 30 per cent to the foreign company and 70 per cent to NOC, production from each area of the contract area is allocated to the parties as follows:

1. Thirty per cent is allocated to the foreign company until the cumulative value of crude oil produced from such area equals the cumulative petroleum operations expenditures (for exploration, development and production) incurred by the company in respect of that area.
2. The remaining seventy per cent of production from such area is allocated to NOC.
3. The amount of crude oil produced from the area that remains after distribution under 1) and 2) above, if any, is referred to as 'net crude oil' and is also to be shared between NOC and the foreign company. The foreign company's allocation of the net crude oil is determined according to the following formula:

$$\text{base factor} \times \text{A factor} \times \text{net crude oil}$$

The ‘base factor’ is a negotiated figure set in accordance with the indicated levels of average daily production from the area during the relevant calendar year, eg:

Portion of Average Daily Production from the Area (b/l)	Base Factor	
1–10,000	0.95	Example
10,001–25,000	0.65	
25,001–50,000	0.40	
50,001–75,000	0.20	
More than 75,000	0.15	

The ‘*A* factor’ is also a negotiated figure, set on the basis of the indicated ratios of the cumulative value of crude oil received by the investor from production in the area over the cumulative petroleum operations expenditures incurred by the investor in respect of the same area, eg:

Ratio	*A* Factor	
Less than or equal to 1.5:1	0.85	Example
More than 1.5 but less than or equal to 3:1	0.60	
More than 3:1 but less than or equal to 4:1	0.40	
More than 4:1	0.20	

For purposes of determining the ‘*A* factor’, the ratio applied to each calendar year is the ratio prevailing as of 31 December of the immediately preceding calendar year.

The ratio is equal to:

- cumulative value of crude oil received by the investor;
- cumulative expenditures.

By incorporating the above production-sharing formula, the model offers the flexibility for the agreement continuously to reflect market conditions without the need to review and adjust the initial terms. At the same time it can deal with all sizes of exploration projects. Small discoveries will still secure an acceptable return for the foreign partner, but on the contrary, the formula will not allow windfall profits to be made from unexpectedly major or giant discoveries.

For the purpose of determining the value of crude oil received by the company, the official selling price (OSP) applied by Libya during the month of production of that crude oil is used. If the OSP over a period of at least three months differs from prices of similar crude oil on the international market (for arm’s length transactions) by more than 5 per cent of the OSP, the parties are to agree on an appropriate adjustment.

Management

The Management Committee scheme adopted under EPSA I and EPSA II was further developed in EPSA III. While the foreign company is still required to act as operator, under EPSA III it has to conduct the petroleum operations under the supervision and control of an Owner's Management Committee (OMC). The OMC is composed of three members, of whom two, including the Chairman, are appointed by NOC and the third is appointed by the company. The OMC decides by a simple majority vote upon the major issues relevant to petroleum operations, including the approval of budgets and work programmes as well as the approval of the list of contractors and contracts above a certain value. Once a commercial discovery has been declared, NOC has the option to shift the operatorship either to a joint operating company or to one of its affiliated companies. The operator (whether or not it has been changed) will then be managed by an Operator's Management Committee, which acts as the board of management, entrusted with day-to-day business under the supervision of the OMC, which acts as the board of directors. The Operator's Management Committee is composed of three members in the same format as the OMC. Decisions are taken by simple majority vote.

Sole risk clause

Compared to the earlier simple schemes for sole risk, the sole risk clause in EPSA III provides for a much more elaborate scheme. Under this clause, the company's right to exercise the sole risk option became restricted to development projects. The exercise of the option also has to be based on a reasonable economic evaluation of the project viewed on its own merits, and can no longer be based on a comparison with other projects that might be more profitable to the company. If it chooses not to participate in the first development plan, the company forfeits its right to participate in any subsequent development plan. As regards sole risk for any subsequent development plan, the option for the company not to participate is limited to situations where it can demonstrate to the OMC that the development plan is unjustifiable from a technical and economic standpoint. The OMC's decision in this respect is final and binding, and the company stands to lose the benefits from all development plans related to such field, including prior development plans.

EPSA IV and the bidding system

In 2003, acting under instructions from the General People's Committee, NOC stopped all direct negotiations for concluding EPSAs that were underway with international oil companies on the basis of the EPSA III modified model, and began preparing procedures for the organization of public bidding rounds and a revised model agreement, called EPSA IV.

Bidding procedures

In June 2004 NOC Management Committee issued a resolution approving the procedure for contracting through public bidding (the 'Procedure'). The Procedure is applicable to exploration agreements (EPSAs), development agreements (DEPSAs) and agreements for seismic operations. The Procedure identifies the following steps that have to be followed for each bidding round:

- Based on the technical and economic evaluation of the hydrocarbon potential of the open acreage or the fields selected for enhanced oil recovery (EOR)/improved oil recovery (IOR) projects, the NOC Management Committee will issue a resolution to organize a bidding round. The resolution must include
  - identification of the blocks or fields offered;
  - the model contract to be used in the bidding round;
  - parameters and requirements for qualifying bidders;
  - parameters for the evaluation and selection of the winning bids, being either one or a combination of the following: percentage of production sharing; work programme; signature bonus amount; or other benefits offered by the bidder;
  - a time schedule for all the steps of the bidding round from its announcement to the signature of contracts;
  - determination of the fees for participating in the data room; and
  - terms of the announcement of the bidding round.
- The bidding round officially starts with an announcement made by NOC in selected local and international publications and websites. The announcement identifies the number, names, areas and locations of the blocks or fields being offered; the date and place of the technical presentation by NOC of the technical data on the blocks or fields as well as the general contractual terms; the date for receipt of applications; the dates of opening and closing of the data room; and the time schedule for the events that will follow, including clarification meetings up to the date of submitting and opening bids.
- Companies wishing to participate in the bidding round are required to complete and submit an application form supported by the following documents: annual reports for the preceding three years covering oil and gas activities; balance sheets and profit and loss statements for the preceding three years audited by an external auditor; and a certificate of the company's registration in the commercial/companies register in its country of incorporation, along with its articles of association.
- Applicants undergo a qualification process to ascertain that they possess the necessary experience and technical and financial capabilities to perform the contractual obligations. In verifying the technical and financial capabilities of the applicants, NOC will examine certain financial ratios as well as tangible assets, such as reserves of oil and gas and daily production rate, and intangible assets, such as years of experience in the

exploration and production of oil and gas and the number of professionals specialized in exploration and production. Subsidiaries and affiliates will be qualified based on the capabilities of their parent companies; and consortiums will qualify if the leader of the consortium is qualified. Companies already operating in Libya are deemed to be already qualified, and do not have to go through this process.

- Qualified companies who pay the data room fees and sign a confidentiality agreement are allowed to visit the data room to examine part of the geological and geophysical data, and receive copies of such data in electronic form, together with copies of the model contract, the commitment letter and the bank guarantee.
- Participant companies are given the opportunity to comment on the model contract either in writing or by attending a clarification meeting. At the closing of the data room, NOC collects all comments, studies them and, if it decides to accept any such comments, will introduce changes to the model contract and send the final contract to all participants.
- In submitting their bids, bidders should observe the following rules:
  - A company or a consortium may not submit more than one bid for the same block or field.
  - A company may not be a member of more than one consortium bidding for the same block or field.
  - A bid should not be qualified or conditional.
  - A separate bid must be submitted for each block or field.
  - The bid must consist of the model contract initialled by the bidder; the offer letter stating the bidder's offer with respect to the selected evaluation parameter(s) (production sharing/work programme or bonus or a combination of these); and a bank guarantee in an amount equivalent to 10 per cent of the cost of the exploration commitment, valid from the date of submitting the offer until the date of signature of the contract.
  - The bid must be submitted in a sealed envelope to the bidding committee on the day fixed for the opening of bids.
  - The bidding committee will verify compliance by bidders with the bidding requirements and procedures, and will disqualify any non-compliant bids.
- Qualified bidders will be called upon to open their offer letters and to announce their offer in a public session, and the winning bidder will be declared on the spot. In the event of a tie between bids, the bidders will be requested to re-submit their offers until one of them is declared the winner. If there is only one bid, it will be referred to the Management Committee of NOC who will decide whether to accept the bid or reject it. If it is accepted, the bid is considered as the winning bid; otherwise, the bid process for the relevant block or field will be declared void.
- Winning bidders will be called upon to sign their contracts on the pre-designated signature date or a mutually agreed date. Bank guarantees

will be returned to the unsuccessful bidders immediately after the bid opening date.

Contract terms

The EPSA IV contractual terms were developed to improve on the EPSA III terms by incorporating the experience gained through negotiating such terms with a view to producing a model that will be generally acceptable to the industry under the current market conditions and is suitable for use in a public bidding process. The EPSA IV model was initially drafted by a working group appointed by NOC that included NOC executives and experts as well as outside professionals. Early drafts were submitted for review and comments to a wider group that included local executives of the oil sector, and local and foreign experts and consultants. The NOC Management Committee then approved the final model and presented it to the General People's Committee for approval. The General People's Committee formally approved the model and authorized NOC to launch the first bidding round that took place in August 2005.

Following are the major variations introduced by the EPSA IV model contract as compared to EPSA III:

- Technical definitions: Certain important definitions were changed with a view to simplifying them and ensuring their compatibility with the new concepts adopted in the new model. Among such changed definitions are the following:
  - 'Discovery' is no longer linked to the production of certain quantities of hydrocarbon at certain depths using a certain diameter of control choke size. Instead, under EPSA IV a 'Discovery' is made when petroleum has been found as a result of the drilling, completing and testing of a new-field wildcat well.
  - The definitions of 'appraisal well', 'field' and 'new-field wildcat' are no longer linked to their definitions given in the Lahee Classification. Instead, they are given clear and simple definitions.
  - New definitions have been introduced to deal with new concepts incorporated in the new model such as 'abandonment', 'good oilfield practices', 'liquid hydrocarbon by-products', 'liquefied natural gas' and 'commercial production start date'.
- Term: The term of EPSA IV is no longer fixed to a number of years commencing from the effective date of the agreement. It is now composed of the Exploration Period and the Exploitation Period. The Exploration Period is initially five contract years commencing on the effective date and can be extended, in certain circumstances listed in Article 3.2 of the model, for up to another five years. The Exploitation Period is 25 years commencing from the end of the Exploration Period or any extension thereof. The term can be further extended for a reasonable period of time upon the request of the company if commercial production continues

during the last three years before the end of the term. Approval of such a request, however, is left to the sole discretion of NOC, subject to terms and conditions to be agreed upon between the parties.

- Management and operation: The Management Committee under EPSA IV is composed of four members. Two members, including the Chairman, are appointed by NOC and the other two members are appointed by the company. A notable departure from a long-standing practice is that decisions of the Management Committee are no longer made by a simple majority vote but by unanimous vote of its members. In case of deadlock, the matter is referred to the senior management of the parties.

The foreign company, acting through a locally incorporated branch, will be appointed as the operator to conduct petroleum operations during the exploration period. The operator at this stage will be managed by a general manager appointed by the foreign company, under the control and supervision of the Management Committee. However, after the declaration of the first commercial discovery, a Joint Operating Company will be established in an agreed jurisdiction with a 51 per cent shareholding by NOC and a 49 per cent shareholding by the foreign company. The Management Committee then acts as the board of directors of the Joint Operating Company, while the day-to-day management is entrusted to an Operator's Management Committee under the overall guidance and direction of the Management Committee. The Operator's Management Committee is established in the same format as the OMC under EPSA III. Decisions of the Operator's Management Committee are taken by simple majority vote of its members.
A model shareholding agreement and a model operating agreement were developed and are attached as annexes to EPSA IV.

- Commercial discovery: The criteria for commercial viability of a discovery of oil or gas are no longer left to the discretion of the Management Committee or the subjective assessment of either party. Under EPSA IV, a discovery is considered commercial, if it meets the objective pre-determined criteria. Thus, if it can be established through the final appraisal report prepared by the operator or through an opinion of an independent third party expert that: i) the proceeds from the sale of the quantities of crude oil or natural gas, as the case may be, forecast to be produced are sufficient to recover the petroleum operations expenditures, royalty and taxes and to allow for a reasonable return on investment; and ii) the gas utilization scheme for the associated gas, if any, is in conformity with the laws and regulations, then the discovery or cluster of discoveries is considered commercial. The Management Committee is then bound to declare a commercial discovery and adopt a development plan with respect to the field or fields, and immediately to notify the parties thereof. It should be noted that this is the first time that NOC has contractually agreed to combine a group of discoveries and to consider them as a single economic unit for the purpose of determining their commercial viability according to the above criteria.

- Production sharing: While preserving the same formula as is used in EPSA III for the sharing of hydrocarbons between NOC and the company, EPSA IV has made a remarkable departure from the long-standing practice of valuing crude oil according to the OSP determined by the Libyan authorities, in favour of the market price realized by NOC. Accordingly, the company's share of crude oil is valued, for purposes of cost recovery and applying the sharing formula, at the monthly weighted arithmetic average of the market price realized by NOC on the world market (in arm's length trading between non-affiliates) for the same or similar crude oil. Where the crude oil produced from a contract area is in an insufficient quantity and therefore is blended with other crude oil(s) to comprise blended stocks that have a market price, then the market price of that blended stock is applied. Liquid hydrocarbon by-products are valued in the same way as crude oil. Finally, natural gas received by the company is valued at the actual selling price according to the gas sales agreement.
- Gas clause: Another remarkable development of EPSA IV over EPSA III is the incorporation of an elaborate gas clause. This clause deals with the commercialization of excess associated gas as well as non-associated gas. Recognizing the increasing importance of gas in the current and future energy market and the special requirements and conditions for the development and marketing of gas, the gas clause provides for a set of incentives to enable the parties jointly to develop a discovery of natural gas. Among such incentives are the following:
  - To allow the company to develop and produce a discovery of crude oil containing excess associated gas where no appropriate gas utilization scheme can be implemented, NOC may offer to take and dispose of such excess associated gas free of charge at an agreed delivery point and at no extra cost to the company. If NOC does not exercise this option then the parties must meet to discuss an appropriate alternative.
  - If at the end of the exploration period, the Management Committee decides not to proceed with appraising a non-associated gas discovery due to lack of a gas exploitation scheme, the exploration period with respect to that discovery and any other discoveries made in the contract area is extended for a period of up to five contract years. During that extension, the company will then have to submit to the Management Committee a bi-annual assessment for a gas utilization scheme. The exploration period may be further extended for the duration of the appraisal programme if during the extension an appraisal programme is approved by the Management Committee.
  - The commencement of development operations under an approved development plan is linked to the execution of a gas sales agreement.
  - If the company approves a development plan for a discovery or discoveries of non-associated gas but NOC does not approve this

development plan, then the agreement remains in force for its remaining term with respect to the exploitation area for that discovery as identified in the proposed development plan.

The gas clause provides for the joint marketing of the gas if this is allowed by the target market, and identifies the basic principles of a gas sales agreement between NOC and the company, together acting as seller, and the buyer. The clause further provides for supply to the domestic market to be on a priority basis, and fixes the price of the gas sold to the domestic market at the international market price less 15 per cent.

- Bonuses: For the first time since the days of the concessions, Libya has introduced the payment of bonuses as part of an oil exploitation agreement. EPSA IV provides for two types of bonus. First, there is a signature bonus of a pre-determined minimum that varies from basin to basin, with bidders being invited to present in their offers an incremental amount that will be used as a bidding parameter for selecting the winning bid. The second type of bonus is a cumulative production bonus, standard for all agreements, and structured as follows: US $1 million payable upon the start of production from the first commercial discovery; US $5 million payable when cumulative production reaches 100 million barrels of oil equivalent; and US $3 million upon achieving each additional 30 million barrels of oil equivalent.
- Environment/abandonment: EPSA IV addresses the issue of protecting the environment in two ways. First, it adds to the obligations and duties of the operator the duty to conduct an assessment of the impact of each planned petroleum operation on the environment and to submit a report to the Management Committee prior to the start of such petroleum operation. The report must include measures to be taken to ensure that the conduct of petroleum operations does not cause damage to the environment. Second, a whole new scheme has been introduced, dealing with the abandonment of facilities at the end of exploration or production in order to ensure that the site is cleaned and restored. The abandonment costs related to exploration operations are to be borne by the company, while abandonment costs related to development and production operations are shared equally between the company and NOC. The company's share of the abandonment costs related to development and production operations is considered as recoverable costs.
- Tax receipt and grossing up: EPSA IV continues to embody the 'pay-on-behalf' concept applied under EPSA III, whereby NOC assumes the tax liability on behalf of the company. The tax clause under EPSA IV calls for the company to complete and submit to NOC a tax declaration. After this has been reviewed and agreed by NOC, NOC will process the tax declaration through the tax authority and will obtain from that authority a tax receipt for and in the name of the company, stating the gross income, allowed expenses including royalty, the net taxable income and the

amount of tax due at a rate of 65 per cent. The General People's Committee recently approved a mechanism allowing the companies and NOC to prepare their tax declarations based on the grossing-up concept, thereby enabling the companies to benefit from any tax credit regime that may be applied in their home countries.

For the purpose of calculating income for tax and royalty, the OSP set by the General People's Committee is used with respect to crude oil; the actual selling price according to the gas sales agreement(s) is used for calculating the revenue derived from disposal of natural gas; and for the revenue derived from disposal of liquid hydrocarbon by-products, the monthly weighted arithmetic average of the market price realized by the NOC on the world market (in arm's length trading between non-affiliates) for the same liquid hydrocarbon by-products is applied. Where liquid hydrocarbon by-products produced from the contract area are blended with other liquid hydrocarbon by-products to become blended stocks that have a market price, then the market price of the blended stock is used.

The oil industry has hailed these bidding rounds as a success. As may be seen from the following table, 43 EPSA IV agreements have been concluded under the three bidding rounds that have been conducted to date. Under these agreements the oil companies have undertaken to survey over 129,000 kilometres of 2D seismic lines, 15,000 square kilometres of 3D seismic and to drill 84 exploration wells. The aggregate of the signature bonuses paid under these agreements is more than 287 million US dollars.

Appendix

Summary of Three Bidding Rounds

		Bidders Name	Contract Area	2D	3D	Wells	Share %	Bonus
1st Round	Sirt Basin	OIL INDIA -INDIAN OIL	86	1000	0	2	18.4%	$0
		OXY -Liwa	106	1000	750	3	14.6%	$25,600,000
		OXY -Liwa	124	600	400	3	10.8%	$15,300,000
	Offshore	PETROBRAS -OIL SEARCH	18	2000	500	1	31.8%	$1,000,001
		WOODSIDE -Liwa -OXY	35	2000	0	1	20.4%	$5,210,000
		WOODSIDE -OXY -Liwa	36	1500	500	1	17.4%	$16,130,000
		WOODSIDE - OXY -Liwa	52	1000	500	1	17.9%	$10,510,000
		WOODSIDE -OXY -Liwa	53	2000	0	1	19.8%	$8,120,000
		AMERADA Hess	54	3000	0	1	12.4%	$3,000,000
	Murzuq Basin	OXY -Liwa	131	1200	0	2	13.3%	$25,600,000
		OXY -Liwa	163	3000	0	1	15.9%	$15,300,000
		CHEVRONTEXACO	177	3000	0	1	22.8%	$600,000
	Ghadames Basin	VERENEX -PT MEDCO	47	1000	200	3	13.7%	$250,000
		SONATRACH	65	1000	0	2	25.0%	$2,000,000
	Cyrenaica platform	OXY -Liwa	59	1200	0	1	38.9%	$1,100,000
	Subtotal	15		24,500	2,850	24		$129,720,001
2nd-Round	Sirt Basin	Oil India -Indian Oil	102-4	1000	500	1	10.5%	$3,001,001
	Offshore	Nippon -Mitsubishi	2-1&2	1000	1000	1	8.0%	$2,500,000
		PT Pertamina	17-3	0	1000	2	11.7%	$8,009,000
		Japex -Nippon -Mitsubishi	40-3&4	1000	500	2	8.0%	$1,700,000
		ExxonMobil	44-1,2,3&4	1000	1000	1	28.3%	$1,500,000
	Murzuq Basin	Hydro	146-1	750	0	2	7.0%	$7,068,000
		Turkish Petroleum	147-3&4	500	300	2	9.7%	$7,262,000
		Eni North Africa	161-1	1500	0	1	8.5%	$3,100,000
		Eni North Africa	161-2&4	2000	0	2	7.9%	$4,000,000
		Eni North Africa	176-3	2000	0	1	9.8%	$3,300,000
		Japex	176-4	2000	0	1	6.8%	$3,000,000
	Kufra Basin	Statoil -British Gas	171-1,2,3&4	2000	0	2	19.8%	$1,001,000
		Eni North Africa	186-1,2,3&4	2000	0	2	15.4%	$1,100,000
	Ghadames Basin	ONGC Videsh	81-1	500	500	1	11.8%	$6,000,000
		Teikoku -Mitsubishi	82-3	1200	0	1	7.5%	$6,000,001
		Tatneft	82-4	500	500	1	10.5%	$6,000,000
	Cyrenaica platform	TOTAL -INPEX	42-2&4	2500	0	1	27.8%	$1,801,000
		Statoil	94-1,2,3&4	3000	0	1	24.9%	$2,950,000
	Subtotal	18		24,450	5,300	25		$69,292,002
3rd Round	Sirt Basin	TATNEFT	69-1,2,3&4	5000	750	6	12%	10,000,000
		PETROCANADA -REPSOL	137-3&4	1000	500	1	18%	10,000,000
	Offshore	GAzProm	19-1,2,3&4	4000	2000	6	10.0%	$10,100,000
		ExxonMobil	20-1,2,3&4	20000	1000	4	22.3%	$10,000,000
		ONGC Videsh	43-1,2,3&4	40000	1000	1	28.0%	$10,000,000
	Murzuq Basin	INPEX	113-3&4	1000	500	3	12.9%	$10,000,000
		CHINESE PETROLEUM	162-1&2	1600	0	3	7.8%	$5,000,000
	Kufra Basin	WINTERSHALL -MITSUI	201-1,2,3&4	3000	0	1	13.5%	$3,000,000
	Ghadames Basin	TATNEFT	82-1	2000	750	5	10.4%	$10,000,000
		TATNEFT	98-2&4	2500	500	5	10.4%	$10,000,000
	Subtotal	10		80,100	7,000	35		$88,100,000
	Overall all rounds results	43		129,050	15,150	84		$287,112,003

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