

Libya – back in business?

On Friday 16 September 2011 the United Nations Security Council adopted Resolution 2009 (2011) welcoming recent developments in Libya and announcing a number of measures intended to support peace-building and reconstruction efforts. The Resolution is of significance for businesses with operations or assets in Libya or wishing to invest in Libya as it significantly eases the economic sanctions imposed earlier this year.

In this briefing, we highlight a number of issues which should be considered by businesses intending to resume or establish operations in Libya and before making new investments in the country.

UN sanctions

Security Council Resolution 2009 (2011) significantly eases the economic sanctions first imposed by the UN in February (UNSCR 1970 (2011)) and establishes a framework for making frozen assets available for certain purposes.

While the sanctions imposed against Colonel Gaddafi and five of his family members remain in place, the Resolution modifies the asset freeze previously imposed in relation to the Central Bank of Libya, the Libyan Arab Foreign Bank, the Libyan Investment Authority and the Libyan Africa Investment Portfolio, and entities they own or control.

UNSCR 2009 (2011) allows UN Member States to authorise the release of funds, other financial assets and economic resources of these entities which were frozen in accordance with previous resolutions provided that they are to be used for the following purposes by the Libyan authorities: (i) meeting humanitarian needs; (ii) the purchase of fuel, electricity and water for civilian use; (iii) resuming production and sale of hydrocarbons; (iv) establishing, operating, or strengthening institutions of civilian government and civilian public infrastructure; or (v) facilitating the resumption of banking sector operations, including to support or facilitate international trade with Libya.

Before allowing the release of frozen funds for these purposes, Member States must notify the UN Sanctions Committee (which may decide that the assets should remain frozen) of the purpose for which the funds will be used and that the funds will not be made available to persons who remain subject to UN economic sanctions. UNSCR 2009 (2011) also requires Member States to consult in advance with the Libyan authorities regarding the use of the funds.

From 16 September 2011, it will be permissible to conduct new transactions with the Central Bank of Libya, the Libyan Arab Foreign Bank, the Libyan Investment Authority and the Libyan Africa Investment Portfolio, and entities they own or control. Any 'new' funds of those entities generated after 16 September 2011 will not be subject to the asset freeze imposed under previous resolutions.

UNSCR 2009 (2011) also provides that the Libyan National Oil Corporation and Zueitina Oil Company shall no longer be subject to the asset freeze and other restrictive measures imposed under previous resolutions.

Key Issues

UN sanctions

EU and US sanctions

Dealing with the NTC

Resuming performance of pre-existing contracts

Protection against the risk of future political instability

If you would like to know more about the subjects covered in this publication or our services, please contact:

Rae Lindsay +44 (0)20 7006 8622

Michael Lyons +44 (0)20 7006 4317

Antony Crockett +44 (0)20 7006 2332

To email one of the above, please use
firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

EU and US sanctions

In the EU, Council Regulation (EU) No. 204/2011 of 3 March 2011 (as amended from time to time, the "**EU Regulation**") gives effect to the sanctions imposed by the UN in February 2011 across all Member States.

As well as designating the individuals and entities listed as sanctions targets by the UN, the EU has designated a number of additional individuals and entities as sanctions targets. Although the EU Regulation has already been modified in recent days, reducing the number of entities who are sanctions targets, the EU Regulation remains in force at the time of writing and the modifications to the UN sanctions regime will not take effect in EU Member States until the EU Regulation is amended accordingly. In the UK, HM Treasury has indicated that the EU will be bringing the EU Regulation into line with UNSCR 2009 (2011) '*as a matter of priority*'.

In the US, General Licence Number 6, issued by the Office of Foreign Assets Control ("**OFAC**") on 15 July 2011, permits all transactions involving the National Transitional Council ("**NTC**") (and its agencies as controlled entities) as long as those transactions do not involve any entities owned or controlled by the Gaddafi regime or any other blocked person or blocked assets (such as the Central Bank of Libya or entities designated as Specially Designated Nationals (SDNs) of Libya by OFAC). General Licence Number 7 issued on 9 September 2011 authorises transactions with various entities owned or controlled by the Libyan National Oil Company which were formerly prohibited.

Dealing with the NTC

In adopting UNSCR 2009 (2011), the Security Council welcomed a delegate of the NTC as the representative of the Libyan State. The NTC has now been recognised as the official government or legitimate representative of the Libyan State by a large number of States and international organisations, including France, India, Russia, the United States and the International Monetary Fund (IMF). The NTC has also consolidated its control of large parts of Libya, key infrastructure and State institutions.

Notwithstanding these developments, parties to contracts with the Libyan State (or Libyan State agencies) or parties interested in doing business with the Libyan State should not automatically assume that the NTC (or individuals purporting to represent the NTC) in every case has legal capacity or authority to bind the Libyan State (or Libyan State agencies). In particular, specialist advice should be sought prior to negotiating variations to existing contracts or new contracts intended to be binding upon the Libyan State (or Libyan State agencies).

It has been reported that a number of foreign companies have negotiated agreements or memoranda of understanding with the NTC in relation to the resumption of operations in Libya, particularly in the oil and gas sector. In this context, foreign investors may be able to seek advice or obtain practical assistance from their own governments and in many cases it will be prudent to do so, including to ensure compliance with applicable sanctions regimes.

Resuming performance of pre-existing contracts

Many companies operating in Libya prior to the crisis suspended performance of contracts in response to the violence, including to avoid risks to their personnel and property and in some cases in order to comply with applicable sanctions. In cases where a force majeure notification has previously been made, parties should continue to monitor conditions on the ground in Libya and all relevant sanctions. Parties should also take care to ensure compliance with contractual conditions, including notice requirements.

UNSCR 1973 (2011), adopted in March 2011, calls upon Member States to take 'necessary measures' to ensure that no claim shall lie at the instance of the Libyan authorities (or persons acting on their behalf or for their benefit) in connection with any contract or transaction where performance was affected by UN sanctions. The most recent Security Council resolution further calls upon the Libyan authorities to honour existing contracts and obligations in accordance with applicable laws.

While some comfort may be derived from these Security Council resolutions, it would be prudent to confirm that contracts remain in force before resuming performance. Parties should also consider whether there is scope to obtain waivers or indemnities from counterparties in respect of loss or damage arising as a result of the conflict or otherwise during the period in which normal contractual performance was impossible.

Protection against the risk of future political instability

UNSCR 2009 (2011) establishes a UN mission to Libya with a mandate to assist efforts to restore public security, promote the rule of law and to embark on constitution-making and establish electoral processes. While there is increasing optimism in Libya and internationally that peace will be restored rapidly, it is possible that the political situation may remain unstable for some time.

Parties intending to carry on commercial activities in Libya or to make new investments in the country should proceed with caution. All investors should consider taking steps to protect their investments against further instability, including by obtaining political risk insurance, structuring investments in order to benefit from bilateral investment treaties to which Libya is party or by negotiating appropriate host government agreements with the Libyan authorities.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

www.cliffordchance.com
