THE NATIONAL LAW REVIEW

Risk Analysis: Libya's Oil and Gas Market

Tuesday, May 12, 2015

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Antitrust & Trade Regulation
Environmental, Energy & Resources
All International

Libya is reputed to hold the ninth largest proven oil reserves in the world (approximately 38% of Africa's total proven crude reserves)[1] making it a key player in the global energy market. Since 2011 however, the country and its energy sector has been in turmoil and there are currently two rival governments struggling for control over Libyan territory and resources. In this article, we highlight the five major legal risks currently facing companies operating in the territory (or indeed outside when handling Libyan crude exports).

1. *Disputed sovereignty*

Most fundamentally, the Libyan civil war has raised important questions of sovereignty over Libyan territory and resources; who actually owns Libya's hydrocarbons and who can legally contract for their processing and export.

The international community has largely recognized Prime Minister Abdullah al-Thinni as the legitimate head of Libya's government operating from a base in the eastern city of Tobruk. However, the established National Oil Company (NOC) is based out of Tripoli in Libya's west and under the control of a forces loyal to a rival government. Al-Thinni is currently trying to set up an alternative state-run oil company (also called NOC) in the east and declared that contracting or sale outside the "legal framework represented by National Oil Corp headed by Mabrouk Bou Seif and based in Benghazi" is considered a "violation".

The lack of a clear and unified government (and particularly the schism between internationally recognised government and control of the established NOC) means that parties contracting with either party currently run the risk of title disputes and potential nullification of associated contracts.

2. *Sanctions*

Following the incident involving the vessel Morning Glory – the North Korea-flagged ship loaded at the rebel-held port of Sidra which was subsequently boarded by US Navy Seals and returned to the Libyan government – in March 2014, the UN Security Council adopted resolution 2146 (2014), enabling the 1970 Libya Sanctions Committee (the "**Committee**") to designate vessels attempting to illicitly export crude oil from Libya, upon request by the Government of Libya, subjecting them to various actions by Member States to prohibit the vessels from entering ports and requiring their nationals not to engage in any financial transactions with respect to crude oil aboard such designated vessels. On 5 March this year, the Security Council extended the measures imposed by the resolution only as far as 31 March. The EU's sanctions regime in Regulation 204/2011 also requires prior authorization by competent authorities in respect of the loading, transport or discharge of crude oil from Libya on certain vessels. Prospective purchasers of Libyan crude should proceed with extreme caution to ensure that they are not handling illicit cargoes which are liable to be seized or otherwise impaired by UN or EU measures.

3. *Force Majeure*

The force majeure provision in the EPSA-IV contract (Libya's most recent form of Production Sharing Agreement) which IOCs relied on during the turmoil of 2011 reads as follows: *"Any failure or delay on the part of a Party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to force majeure. Force majeure shall include, without limitation: Acts of God; insurrection; riots; war; and any unforeseen circumstances and acts beyond the control of such Party which render the performance of its obligations impossible."*

In March this year, the Tripoli-based NOC also declared force majeure on 11 oilfields due to the deteriorating security situation after several oil installations and ports were targeted by terrorist attacks. The "impossibility" threshold for force majeure imposed in the Libyan Civil Code is a high one and while in the current extreme circumstances the deduction of force majeure appears unequivocal, operators should be mindful that this will not always be the case. Termination of contracts for prolonged force majeure is also a possibility if the period of "impossible" performance is sustained.

4. *Labour issues*

Oil and gas projects that employ domestic workers, and even those that do not, may face the prospects of protests and port closures. Recently, protesters demanding state employment effectively shut down the eastern Libyan port of Zueitina, a major oil exporting port in Eastern Libya. This is not a new phenomenon as civil strife has consistently shut down oil ports and oil fields throughout the country since 2011. Armed militias have used oil facilities, in part, as a proxy for control of the county since hydrocarbon production is largely the Libyan State's sole source of revenue. These shutdowns raise questions of liability as well as performance of obligations that must be carefully considered and negotiated by operators in Libya.

5. *Enforcement action*

When dealing with hydrocarbon legal disputes in Libya, oil and gas operators can rely on two potential dispute resolution mechanisms: bilateral investment treaties (BITs) and international arbitration. Under the EPSA-IV, disputes between the parties will be dealt with under the Rules of Arbitration of the International Chamber of Commerce (ICC) in Paris. However, Libya has not ratified the New York Convention (nor signed the Washington Convention) and arbitral awards (both foreign and domestic) are only enforceable by virtue of a court order granting leave to enforce leaving doubts over their feasibility. Libya has also entered into numerous BITs with countries including Jordan, Turkey, France, Italy, Germany and Russia (though none with the US or UK). Such BITs often provide for international arbitration in the event of disputes, and provide that foreign investments shall be afforded fair and equitable treatment.

[1] Oil & Gas Journal, "Worldwide Look at Reserves and Production" (January 1, 2014)