Recent unrest in Libya – sanctions and other legal issues

Following the recent unrest in Libya, a raft of sanctions has been imposed against both the Qadhafi family and the Libyan government. Sanctions have rarely been introduced so rapidly or with such unanimity among the international community. There are significant repercussions both for companies operating in Libya and for companies outside Libya that have a business relationship with the Libyan government or Libyan state entities, such as the Libyan Investment Authority (LIA) or its subsidiaries.

Although there are differences in the scope of the sanctions implemented by different states, the measures adopted to date broadly cover the same three elements:
- an embargo on the supply to Libya of arms or equipment that can be used for internal repression;
- an asset freeze on certain members of the Qadhafi family and, increasingly, other members of the Libyan government and Libyan state entities; and
- a travel ban on the same individuals.

Breach of these sanctions is a criminal offence under most national sanctions laws. In some countries, company directors also face criminal penalties if their companies breach sanctions laws either with their consent or as a result of negligence. Understandably, this is increasing pressure on boards and in-house legal teams to address sanctions issues.

In this briefing, we focus on the key issues faced by companies seeking to comply with the evolving international sanctions regime targeting Libya. We also provide a timeline of the Libyan sanctions adopted to date by the United States (US), United Nations (UN), European Union (EU), United Kingdom (UK), Germany and Japan.

Key issues

The impact of the international sanctions on particular companies naturally varies: we identify below the six key themes that have emerged to date.

- Financial institutions and other companies need to identify if they hold assets belonging to a Libyan person targeted by the sanctions. If so, any such assets may need to be frozen and a notification sent to the relevant regulator(s). The scope of Libyan and Libyan-controlled persons targeted by the asset freeze varies by jurisdiction and is subject to change at short notice. The sanctions regime applies not only to cash balances held by financial institutions or other entities, but also to shares, letters of credit, property interests and many other classes of asset.

Regulators have generally been slow to offer guidance to companies on the interpretation of the sanctions tailored to their specific situation. Many companies have therefore found it necessary to form their own views, for example, about whether a particular entity is ‘owned or controlled’ by a person targeted by sanctions. Some protection is provided, at least in the EU, for decisions made with reasonable cause and in good faith. In some jurisdictions, such as Germany, regulators have taken proactive steps under national law to freeze the assets of targeted persons on a preliminary basis.
Companies need to identify all ongoing business relationships with targeted Libyan or Libyan-controlled persons and, in particular, whether they are obliged to make funds or economic resources available to any targeted persons. Owing to the sudden nature of the sanctions, in some cases companies are facing a stark choice between complying with the sanctions regime or complying with their contractual obligations to Libyan counterparts. It is important to assess for each such relationship:

- which sanctions regime applies to the relationship or transaction, bearing in mind the nationality of the companies and officers or employees involved and the currency of any payment (for example, US dollar payments will need to clear through US correspondent banks; thus, engaging US sanctions);
- whether the Libyan or Libyan-controlled counterpart falls within the scope of any of the sanctions regimes, for example, because it is controlled by a member of the Qadhafi regime, by the LIA or (in some cases) by another Libyan government entity;
- whether it is possible to continue performing the contract without a licence from the relevant regulator(s) (which will likely take some weeks to obtain);
- in the interim, whether contractual provisions such as force majeure clauses or clauses specifying dispute resolution mechanisms need to be invoked; and
- whether provisions of the sanctions will act as a shield for any contractual claims (for example, the EU Regulation contains statutory protection from certain claims by or for the benefit of the Libyan government).

Companies that had operations in Libya have been grappling with the challenges of seeking to evacuate personnel and shut down operations, while seeking to comply with applicable sanctions. Given the high level of involvement of state-owned enterprises in the Libyan economy, many companies have faced sanctions issues in seeking to maintain assets and to continue to provide salaries and other support to local personnel. Such issues may have been most acute for US-based multinationals and other companies that are subject to the broad US restrictions on direct or indirect dealings with Libyan state entities. To date the US government has not responded to calls for a general authorisation of in-country maintenance and support activities; instead, individual US-based companies have been seeking and obtaining specific licences.

Companies need to consider whether they have reporting obligations under each applicable sanctions regime, either of assets frozen or of other information that will assist regulators in enforcing sanctions regimes. Financial institutions will bear the greatest burden, but some obligations extend more widely – for example, the EU Regulation requires all persons within its scope to immediately supply regulators with ‘any information that would facilitate compliance’ with the EU sanctions, subject to certain limitations.

Companies should also take a longer term view, to ensure that actions taken now are without prejudice to future claims for compensation, particularly where operations in Libya have been suspended or staff evacuated. The two main areas we have seen companies exploring to date are:

- claims for indemnification under political risk insurance (either State or privately funded policies); and
- claims for compensation under applicable bilateral investment treaties with Libya, based on the Libyan government’s failure to accord full protection and security to an investment. We have prepared a separate client briefing detailing the bilateral investment treaty issues raised by the current unrest in Libya.¹

The situation in Libya is changing rapidly – and the sanctions regime is evolving to keep pace. In many cases it will be appropriate for companies to establish senior-level working groups or board sub-committees that have the expertise and authority to take any rapid decisions necessary to respond to the Libyan situation.

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Timeline

- The US was the first to adopt broad sanctions targeting Libya, through an Executive Order signed by President Obama that came into force on 25 February 2011 (the Executive Order).² The Executive Order catches the Libyan government, all entities controlled by the Libyan government, including the LIA, Qadhafi, his current wife and all his children. It applies to US nationals, US legal persons and any other person in relation to actions taken on US territory. Three general licences authorise certain limited types of transactions with targeted persons.
- The UN Security Council adopted Resolution 1970 (2011) (the UNSC Resolution) unanimously on 26 February 2011.³ Although all UN member states are required to implement the UNSC Resolution (before which it cannot bind private companies), some states will do so more quickly than others. However, the UNSC Resolution forms an important aid to interpreting national measures.
- The UK was quick to implement the UNSC Resolution through The Libya (Financial Sanctions) Order 2011 (the UK Order), which came into force on 27 February 2011.⁴ The UK Order has now been superseded in part by the implementation of the EU sanctions, which followed.
- The EU adopted sanctions targeting Libya on 28 February 2011, through Council Decision 2011/137/CFSP of 28 February 2011 (the EU Decision).⁵ The EU Decision set the political and foreign policy framework for the EU to adopt binding sanctions through Council Regulation (EU) No 204/2011 of 2 March 2011 (the EU Regulation).⁶ The EU Regulation entered into force on 3 March 2011 and is directly applicable in EU member states.
- EU member states are required by the EU Regulation to implement penalties for infringements of the EU regime. In some jurisdictions, such as Germany, penalties come into force automatically with the adoption of EU sanctions. In others, such as the UK, specific national legislation is required to implement EU sanctions. The UK again acted swiftly by adopting The Libya (Asset-Freezing) Regulations 2011 (the UK Regulations).⁷ Japan implemented the UNSC Resolution through a series of orders by relevant ministries, all of which came into force on 8 March 2011.
- The EU sanctions were significantly expanded on 11 March 2011 to include expressly various Libyan state entities, including the LIA, Central Bank of Libya and Libyan Foreign Bank.

² Available at www.treasury.gov/resource-center/sanctions/Programs/pages/libya.aspx.