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LIBYA : NOW FOR THE THREE COMMERCIAL GHOSTS

By Raid Abu-Manneh and Wisam Sirhan

Rather like Dickens' Mr Scrooge, Libya under new management has, commercially, to confront three ghosts – Contracts Past, Present and Yet to Come. Tough decisions have to be made about them and those with business interests in Libya need to think hard about what the answers might be. So, legally, does the way things were provide a likely practical solution for the new Libya and its contracts or might the new commercial landscape be something completely different?

Contracts Past (a case of force majeure?)

The recent upheaval in Libya will have had a significant impact on the performance of contracts entered into under the old Gaddafi regime. The contracts that treat civil war or insurrection as an event of force majeure will have contractual machinery to deal with the consequences but those contracts that don't may find some help in the Libyan Civil Code.

Article 360 (Impossibility of Performance) of the Code says that:

“An obligation is extinguished if the debtor establishes that its performance has become impossible by reason of causes beyond his control”.

If impossibility can be shown then, as a matter of law, the obligation to perform the contract is terminated but it is not necessarily an easy test to satisfy. It is *impossibility* that must be shown and not just an inability to perform. This may also be the case if the force majeure clause in the contract is ambiguous.

Contracts Present (Libyan law now is...?)

Like most Arab laws, including that of the UAE, the Libyan Civil Code of 1953 is based almost entirely on the Egyptian Civil Code. In fact Sanhoury, who was responsible for drafting the Egyptian Civil Code, combining some of the Shari'a with the then modern Western codes (primarily the French Civil Code), chaired the Committee which wrote the Libyan Civil Code. Despite the similarities between UAE and Libyan law, however, those negotiating contracts to which Libyan law is to apply should not assume that current Libyan law will be identical and they will need to obtain specific advice on its application. Where, for example, the contract is with the Libyan Government, administrative and public procurement laws may apply to the project and these need to be carefully considered.

If there are problems on a project the Libyan courts generally have a good reputation on enforcement but can be expected to have a significant backlog of cases. In any event they are unlikely to be able to cope with a large and complex project dispute.

This gap is normally filled by arbitration but Libya does not yet have as yet a separate arbitration law and all awards currently have to be ratified by the courts before they can be enforced. In addition, because Libya is not a signatory to the New York Convention on the Recognition and Enforcement of Foreign Awards, even if arbitration awards are recognised by the Libyan courts, parties are often able to appeal and so delay the process of enforcement.



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Effective contract management may, of course, avoid disputes but, as a deterrent to disputes, it is important to ensure that contracts therefore include reference to arbitration in an established venue such as London and Paris. This is particularly effective where the employer has assets outside Libya against which the contractor could execute an award.

It is, of course, too early for answers as these are unlikely to come until after the elections in which are due to take place next year, but should the Ghost of Yet to Come turn out to be Shari'a, it is a ghost to be understood, commercially, rather than to be feared. Shari'a, with its underpinning theme of good faith, can be a good friend to a contractor in a time of need.

Contracts Yet to Come (Reassertion of Shari'a?)

This is the most uncertain of them all, and one ghost whose exact form remains undefined. What is clear is that there is a desire for change and, reportedly, for a reassertion of the Shari'a.

In October, Libya's National Transitional Council leader, Mustafa Abdul-Jalil, told a rally in Benghazi that, as a Muslim country, the Shari'a will be the main source of law in Libya, and any law that contradicts the Shari'a will be "null and void legally".

If this is indeed the future for Libyan law it raises a number of questions about the shape of Libya's future legal system. Will the new system be based, for instance, on the Saudi system where Shari'a is the *only* source of law or will its legal system be more like its new ally Qatar, where Shari'a is the *main* source of law? Will Libya sign up to the New York Convention?

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