CRISIS IN LIBYA

Press reports over the weekend have reported on widespread anti-government protests taking place across Libya which have now spread to the capital Tripoli. This could result in a key market for British construction expertise turning into a financial and legal catastrophe. No one knows whether the climate will return to normal in Libya, but the reality of the situation means that construction companies might have to write off the entirety of their investments. This could not come at worse time for the British construction and engineering sector. However, taking immediate steps to mitigate risk should reduce that possibility.

Construction Boom

Libya has always been a notoriously difficult jurisdiction for foreign companies, but over the last few years, it has sought to rehabilitate itself and become the self-appointed “Gateway to Africa”. In June 2010, the Libyan government announced its next £36bn spend on infrastructure and housing. British construction companies, experiencing hard times in the UK and in the Middle East, have poured into the fourth most attractive export market for UK companies.

Legal Environment

British construction companies operating in Libya have usually entered into joint ventures with local partners or, where permitted, opened a branch or representative office. However, many have found the local legal environment to be fraught with difficulty. In particular, Libya has not acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and therefore all arbitration awards have to be approved by the Libyan courts before enforcement. Our clients have found such enforcement to be costly and time consuming, with no guarantee of success.

Employee Safety

A company’s first thoughts will be for the safety of its staff in Libya. We recommend that you monitor and follow the Foreign & Commonwealth Office’s advice. Directors should bear in mind their duty under section 172 of the Companies Act 2006 to promote the success of the company, which includes the interests of the company’s employees. UK employees who spend a considerable amount of time in Libya are also likely to qualify for the full range of UK statutory employment rights. For example, the recent Scottish decision in Ravat v Halliburton Manufacturing and Services Ltd [2010] CSIH 52 found that an employee who lived in the UK but worked in Libya on a “one month on, one month off” rotational basis, qualified for unfair dismissal protection.

Contractual Protection

In order to mitigate risk and protect your position, we suggest creating an internal checklist against which you can review all your Libyan contracts. In particular, focus on the following key areas:

- **Choice of law and jurisdiction** – is the contract subject to English law or Libyan and which courts have jurisdiction?
- **Arbitration** – is there an arbitration clause or some other form of alternative dispute resolution procedure? Even if you obtain an arbitration award, it will still have to be enforced by the Libyan courts.
- **Force majeure** – most English law force majeure clauses permit you to suspend performance of your contractual obligations where there is civil war, civil commotion or riots. If your contract is subject to Libyan law, check whether there is a similar force majeure clause.
Termination – do not assume that you can terminate your contract due to the unrest in Libya. Such action might result in your breach of the contract and possible seizure of local assets. Under English law you might be able to rely on the doctrine of frustration e.g. if the UK places trade embargos on Libya, however, you should take Libyan legal advice if your contract is subject to Libyan law.

Payment provisions – if you are continuing to work in Libya, then ensure that your contracts contain clear provisions for payment by instalments. Do not allow substantial work in progress to build up.

Language – if your contract is subject to Libyan law, then you may find that any notice under the contract has to be given in Arabic. Ensure that you have a trusted translator and that you follow the contractual provisions.

Suggested steps:

• Keep up to date with the Foreign & Commonwealth Office’s travel advice here;
• Ensure the safety of your staff;
• Review your contracts; and
• Take UK and Libyan legal advice.

Beale and Company has experience in advising construction professionals operating in Libya and has a network of trusted local legal advisors. If you require advice regarding an ongoing project in Libya, or have any other queries regarding this article, please contact Antony Smith on 020 7420 8704 or at a.smith@beale-law.com or James Hutchinson on 020 7420 8653 or at j.hutchinson@beale-law.com.

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