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RENEWABLE ENERGIES AND GREEN HYDROGEN IN LIBYA – THE LEGAL FRAMEWORK

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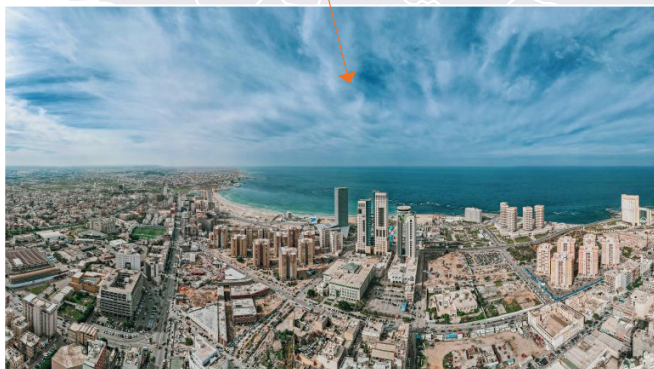
Introduction

Libya has excellent conditions for renewable energies both in the fields of solar and wind energy, though the tremendous potential is thus far untapped. There are several reasons for this including regulatory shortcomings, conflicting administrative competencies, and a lack of funding in the electricity sector.

As part of a comprehensive decarbonization strategy, the Libyan National Oil Corporation (NOC) has recently claimed a leading role in the development of renewable energies. Though the NOC at present lacks an explicit administrative mandate, this is a potential game changer. The NOC has the financial resources and administrative capabilities for the development of mega projects and for building the infrastructure to export green energy to Europe. Green hydrogen is expected to play a key role.

This paper outlines the legal framework for investments in renewable energies and green hydrogen in Libya. It shall provide investors with an initial overview of the legal and regulatory landscape. It is not meant as a substitute for legal advice on a specific transaction or project. It was completed in mid-January 2023.





Applicable Laws

There is no comprehensive legal framework for renewable energies in Libya. Instead, scattered pieces of legislation apply, and projects are usually based on a power purchase agreement (PPA) or investment agreement with the Libyan authorities.

Thus far, there is no statutory feed-in tariff, nor are there any specific provisions for the allocation of land or the connection of projects to the grid. Consequently, all project essentials such as allocation of land, construction and operation of the project, connection to the grid, purchase of electricity and pricing are subject to the contractual agreement between the investor (respectively the project company) and the off-taker of the electricity (usually a public entity).

Laws that apply to renewable energy projects include the following:

- Law 17/1984 Establishing the General Electricity Company of Libya (**GECOL**)
- Ministerial Decree Nr. 426/2007 Establishing the Implementing Authority for Renewable Energies (**REAOL**).
- Administrative Contracts Regulation 563/2007 (**ACR**) and CoM Decree 12/2023 on Government Procurement
- Libyan Civil Code (1953) and Commercial Code (2010)
- The Decree 207/2012 Regulating the Activity of Foreign Enterprises in Libya.¹
- Law 9/2010 Promoting Investment (**Investment Law**), Decree 499/2010 enacting the Executive Regulations for the Investment Law (**Executive Regulations**) and Decree 61/2019 Reregulating the Privatization and Investment Board (**PIB**).

¹ In October 2022, Decree 207/2012 was replaced by Decree 944/2022. The new Decree has been suspended since in order to better align existing legislation with the amendments that shall be introduced, so at the time of writing again Decree 207/2012 applies.



Competent Administrative Authorities

The Libyan electricity sector is characterized by various entities with overlapping competencies. At present there is no dedicated ministry of electricity.

Traditionally, the key player in the Libyan electricity sector is GECOL. GECOL is a state-owned joint stock company established by Law 17/1984 as the implementing agency of the People's Committee for Electricity² at the time. GECOL is responsible for operating and maintaining power stations and the grid and is mandated to develop and implement projects in the electricity sector (Article 3 of Law 17/1984). This gives GECOL a broad mandate to implement projects in the power sector, also extending to renewable energies.

In 2007 REAOL was established to develop the renewable energy sector. REAOL's competencies extend to regulating the renewable energy sector as well as to the licensing of renewable energy projects. REAOL was initially set up as a department of GECOL. Since 2017, it has been directly affiliated with the Libyan Council of Ministers. REAOL has been notoriously underfunded, and there is no clear delineation of the responsibilities and competencies between REAOL and GECOL.

Most recently, the NOC has emerged as an actor in the renewable energy sector. In connection with the announced decarbonization strategy, the NOC claims a key role in developing renewables in Libya and has appointed a dedicated board member for the task. Thus far, however, the NOC is not yet vested with a clear mandate to develop renewable energy projects, at least to the extent such projects will be connected with, and feed electricity into, the national grid. The NOC's competencies in accordance with establishing decrees are restricted to activities in the oil and gas sector. If it is intended for the NOC to take a lead role in the development of renewable energies in connection with a comprehensive "decarbonization strategy," this arguably would require an amendment of NOC's mandate.

In practice, most projects are set up as investment projects under the Investment Law. This also vests the Privatization and Investment Board (**PIB**) with a key role in the approval process (see *infra*).

² This was equivalent to the Ministry of Electricity under the constitutional system of the Jamahiriyya.





Power Purchase Agreements

In the absence of a specific renewable energy law to provide for a pricing mechanism and interconnection with the grid, a PPA is considered the baseline document for all renewable energy projects.

The PPA would typically be concluded between the sponsor (or the sponsor's SPV) and either GECOL or REAOL. It is expected that the NOC will be an important partner for all export-oriented projects, for example where the renewable energy project shall fuel the production of green hydrogen that can then be exported to Europe. In addition, the NOC may, in future, be a potential off-taker.

The PPA provides a comprehensive contractual framework for projects and regulates the technical specifications including the allocation of the project land, the connection to the grid, the off-take of the electricity produced by the project, and the purchase price.



Land Allocation

The allocation of project land is typically regulated by the PPA. The purchaser would generally provide the land, but where the project is established under the Investment Law regime, the PIB will allocate the land for the project.

It must be noted that – except under strict conditions – non-Libyan citizens and entities or Libyan entities with foreign participation are not entitled to own real property in Libya. This in principle extends to all rights in rem.

As an exception, an investor establishing a project under the Investment Law regime can be granted a long-term usufruct right on the project land (Article 17 of the Investment Law).

Export – the Role of Green Hydrogen

The idea of exporting green electricity from North Africa to Europe has been under discussion for many years. It is prominently associated with the DESERTEC initiative (<https://www.desertec.org>). There generally are no legal restrictions to export green electricity to foreign buyers, however, there are certain technical limitations that hinder the process.

The export of electricity through the grid, as originally envisaged by DESERTEC, requires a connection between the Libyan grid and European grids, which is currently non-existent. The Libyan grid requires a substantial technical upgrade before such an interconnection is technically feasible.

As an alternative, green electricity can be converted into hydrogen and then shipped to Europe. This, however, requires infrastructure for production and shipping which is not yet in place. This may be an area for the NOC to develop within the framework of a more comprehensive decarbonization strategy. The NOC's experience in operating Libya's oil infrastructure could provide a good basis for that.

Lastly, virtual export structures could be considered, under which the green electricity is consumed locally and respective certificates are issued and traded on the international market. This requires a reliable certification and trading scheme that currently does not exist. Virtual export would be the most sophisticated export structure. It, however, depends on a regulatory infrastructure that is yet to be developed.



Due to the lack of local infrastructure, the export of green electricity will require significant investments. Moreover, given the electricity shortage in Libya at the moment with frequent blackouts, export is an unlikely priority for Libyan decision makers. In the medium to long term, however, the export of green electricity and/or hydrogen could become a key component of the decarbonization of the Libyan economy. This also makes it plausible that the NOC would take a leading role in this process.



Local Registration Requirements

Any foreign company operating a renewable energy plant in Libya will be considered as ‘carrying on business’ in Libya and would need to register a presence in Libya.

Pursuant to Decree 207/2012, a local presence of a foreign company can be set up either as a branch (provided the activity falls into one of the permitted branch activities) or a joint venture company with a Libyan partner. Additionally, the project can be set up under the Investment Law.

Branch

Decree 207/2012 only permits the “*construction and maintenance of a power plant*” as a branch activity but does not allow the operation of a renewable energy plant.

Joint Venture

In view of the above, a project sponsor has the option to either set up a joint venture with a Libyan partner or to apply for an investment license. In a joint venture, the Libyan partner must have participation of at least 51%, unless the Ministry of Trade grants an exemption – which would allow up to 60% foreign participation. These permissions are granted only in exceptional cases.

Investment Law

Alternatively, a renewable energy project can be set up under the Investment Law. In this case there are no restrictions on foreign ownership. However, on the business side there often would be an expectation that a Libyan partner is a shareholder in the project company.

Additionally, PIB restricts the issuance of the investment license in certain sectors to JVs with participation of private (or public) Libyan shareholders. Until now there is no such restriction for the renewable energy sector. It should be noted, however, that the Libyan “investment map” and investment sectors are currently under review by PIB.

The benefits for establishing the project under the Investment Law regime are mainly that the project can be owned 100% by a foreign entity or person. In addition, the project will be exempted from all taxes and customs duties for a period of five years subject to renewal for a further three years (Articles 11 and 13 of the Investment Law and Articles 24 and 26 of the Executive Regulations).

An investment project requires an investment license that is issued by PIB. To this end, the project must have a budget of at least five million LYD and must additionally fulfill the following conditions as provided in Article 7 of the Investment Law:

- Transfer of technology or intellectual property
- Enhancement of the integration of already existent commercial projects and activities lowering the production costs or providing raw materials for the said projects
- Utilizing or helping to utilize local raw materials
- Participating in the development of rural areas
- Producing exportable products or enhancing the export of products
- Providing, developing or rehabilitating a service needed by the national economy
- Providing a workplace for Libyan nationals (minimum of 30%)

We understand that PIB has thus far only issued investment licenses to solar energy investors.



Taxation in Libya and Repatriation of Profits

There are no general tax and customs exemptions for renewable energy projects in Libya, nor are there general tax and customs exemptions for investments in green hydrogen. Neither REAOL nor GECOL have the powers to exempt an investor from applicable tax laws. Any promise to exempt a project from taxation in a PPA must be treated with care.

If, however, a renewable energy project is structured under the Investment Law and an investment license is granted, the general tax exemptions under the Investment Law apply.

To the extent that revenue is collected on a project account in Libya, a repatriation will only be possible after the project company has declared a respective dividend and made the respective tax declaration. It would need to be discussed in detail whether revenues from a project with the NOC could be collected outside Libya.

Administrative Contracts

Any contracts with the Libyan authorities in connection with the project will be subject to the Administrative Contracts Regulation (ACR) as supplemented by Decree 12/2023. The ACR applies to all government projects and projects that are ultimately funded from the government budget. The ACR regularly applies to PPAs and other contracts that government entities enter into with investors in connection with a power project. Decree 12/2023 on government procurement was issued on 8 January 2023 to supplement the ACR.

Pursuant to the ACR, all government projects must be awarded through competitive tender proceedings. With respect to large infrastructure projects such as IPPs, the tender rules are often considered inappropriate and the projects are awarded by way of sole sourcing, normally based on a Council of Ministers resolution. Sole sourcing now is addressed in Articles 14 sequitur of Decree 12/2023.

In addition to tender rules, the ACR also provides for certain substantive contract law principles that are applicable to government projects. These principles include the exclusion of a private party's suspension right in the event of non-payment and the government authority's privilege to terminate the contract for convenience at any time. In the event the termination is not attributable to the private party, the government authority is obliged to fully compensate the private party. Typically, the parties would agree in the PPA how the compensation would be calculated in that case.

Dispute Resolution and Investment Protection

The ACR provides for the exclusive jurisdiction of the Libyan courts for all disputes based on a government contract. An arbitration clause with a foreign party is only permissible under special circumstances and with special permission from the Council of Ministers (Article 83 [2] of the ACR). We recommend discussing dispute resolution at an early stage of any transaction.

There is no established framework for the recognition and enforcement of foreign arbitral awards in Libya. The Libyan courts, however, have recognized and enforced foreign arbitral awards pursuant to the general rules of the procedural code on the recognition of foreign judgements. In addition, in relation to other Arab League States, the Convention of Riyadh (1983) applies. In view thereof, we recommend determining the seat of arbitration in another Convention of Riyadh state, such as Tunisia or Egypt.

Libya is a party to a number of bilateral investment protection treaties (**BITs**). Libya, however, has thus far not acceded to the ICSID-Convention. This means that there is no unified procedure for bringing claims under any of the BITs.



Our Firm

AMERELLER is an international law firm with comprehensive commercial law and dispute resolution offerings tailored to the Middle East. We are one of the largest law firms in the region with more than sixty lawyers working in legally separate but fully-integrated offices in Baghdad, Basra, Berlin, Cairo, Dubai, Erbil, Munich, Ras Al Khaimah, and Tripoli. Our lawyers are sensitive to the cultural and legal nuances of conducting business in the Middle East, and are often retained as local counsel on major projects and transactions in the region. We are known as a “go-to” firm for transactions in difficult markets including Iraq and Libya.

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Our Libya Practice

Our Tripoli office advises on all legal aspects of Libyan business law. The office was set up in 2012 in co-operation with P&A Legal and has a particular focus on advising international companies on infrastructure projects. Renewable energies have been a focus area for many years.

We frequently advise on public sector contracts and on transactions with the GECOL and the NOC. We also represent international companies advising them on their distribution and supply agreements with Libyan parties, the setting up of branches and joint ventures, as well as employment, compliance and tax matters.

With unmatched experience in the public international law aspects of the Libyan transition, we are regularly retained to advise on the changes of Libyan constitutional and administrative law and how those changes affect international businesses in Libya. Our team consist of international and Libyan lawyers with many years of experience working in Libya. These lawyers are fluent in English, Arabic, Italian, German, and French.

Recognition

Legal 500 EMEA 2021, 2022 – Leading Firm in Libya

We advise on all aspects of Libyan business law, with a particular focus on energy and infrastructure. In addition, we regularly represent clients in disputes relating to Libya and act as experts on Libyan law in international court and arbitration proceedings.

Representative transactions include:

- Advising a Qatari investor on an investment in a renewable energy project in Libya
- Advising DII GmbH on the regulatory framework for renewable energies in MENA and the export of green electricity
- Advising an Emirati investor on an EPC contract for the construction of a power plant with the GECOL
- Advising an IOC on setting up a joint venture company with the NOC
- Advising an IOC on the sale of its Libyan oil assets to an investor
- Advising an international investor on the proposed investment in the port of Misurata
- Advising an IOC on all ongoing contractual, employment, tax and social insurance issues in Libya
- Advising an international technology company on issues of force majeure in relation to a cement plant
- Advising the German technology company KSB on the termination of projects on basis of force majeure in Libya
- Advising an oilfield services provider on contracting with Libyan Mellitah



DR. KILIAN BÄLZ

Dr. Kilian Bälz is the head of the Libya practice at AMERELLER and has many years of experience in advising international companies on all aspects of doing business in Libya. He focuses on project development and finance, and divides his time between the Berlin, Cairo, and Tripoli offices.

Kilian has broad experience in advising clients on investments in the energy, transportation, telecom, and financial sectors across the Middle East and North Africa. He further represents clients in arbitration proceedings under all major arbitration rules. Before joining AMERELLER as partner in 2010, Kilian was the acting director of RCREEE, a MENA policy platform based in Cairo promoting renewable energies.

Contact us

Dr. Kilian Bälz

Partner

T: +49 30 609 895 662

M: +49 171 425 7828 (GER)

M: +20 106 692 2698 (EGY)

E: kb@amereller.com

Hussam Mujally

Local Partner

T: +49 30 609 895 660

M: +49 176 2934 4422

E: mujally@amereller.com



/\MERELLER

AMERELLER

in association with P&A Legal

Asbah Assoubhu Street
near Tutat bin Jaber Mosque
Zawiyat Dahmani, Tripoli, Libya

E: tripoli@amereller.com

www.amereller.com