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# Reconstructing Libya – the Legal Framework







# CONTENTS

- 2 Reconstructing Libya
  - 5 The Libyan Legal System – A Short Introduction
  - 6 Public Procurement
  - 7 Agency and Distribution
  - 8 International Contract Law: Choice of Law and Public Order
  - 10 Dispute Clauses
  - 11 Limitation and Exclusion Clauses; Liquidated Damages
  - 12 Payment Security
  - 13 Force Majeure and Hardship
  - 14 Sanctions
  - 15 Registering a Presence in Libya
  - 16 Tax Issues
  - 17 Recognition and Enforcement of Foreign Court Decisions
  - 18 Recognition and Enforcement of International Arbitral Awards
- 

# Reconstructing Libya

The Second Libya Conference, convened in Berlin on 23<sup>rd</sup> June 2021, made the reconstruction of the Libyan economy a top priority, alongside the holding of elections and the withdrawal of foreign mercenaries. The truce between the civil war factions and the formation of a provisional Government of National Unity in Libya in March 2021 raises the chances for overcoming the division of the country, which had impeded economic activity for the past few years. For international companies, there are business opportunities in the electricity, water, and medical sector as well as in the oil and gas industry. The recent conflict in Libya is (also) a conflict about economic resources. Sustainable peace will be dependent on a swift economic recovery.



This guide discusses the relevant legal framework for economic activity in Libya with a specific focus on supply and service contracts and gives advice on drafting contracts with Libyan parties. It is meant to provide initial guidance to international companies which are considering doing business with or in Libya. It goes without saying that this guide is no substitute for legal advice in any specific transaction.





# The Libyan Legal System – A Short Introduction

Libyan civil and economic law largely follows the European Civil Law model.<sup>1</sup> The framework for international business transactions is provided by the Civil Code (1954), the Commercial Code (2010) and the Code of Civil and Commercial Procedure (1953), the latter also regulating arbitration. These laws are complemented by a tightly woven net of administrative regulations. Amongst them are Decree No. 207/2012 regulating the business activity of foreign companies in Libya and the Administrative Contracts Regulation (2007). The Administrative Contracts Regulation governs public procurement and contains substantive rules for contracts with public sector entities.

Civil and economic laws in Libya did not change fundamentally after the fall of the Gaddafi-Regime in 2011. Article 35 of the Transitional Constitution, adopted by the Libyan transitional government in August 2011, mandates the continued validity of the pre-revolutionary law except for provisions that are inconsistent with the Transitional Constitution. Therefore, the law of the Gaddafi-Era largely continues to be in force. However, the Civil Code and the Commercial Code were amended in 2016 (Law No. 6/2016 and No. 10/2016), also affecting supply and service contracts. Moreover, regulation for the activity of foreign companies was revised (Decree No. 207/2012). All in all, the regulatory system is multi-layered and somewhat inconsistent – and at times difficult to navigate for international companies. Additionally, the civil war and the division of the country affected the functionality of courts and the administration.

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<sup>1</sup> Family and inheritance law however is still based on the principles of Islamic Law (Sharia) even though it is mostly codified.

# Public Procurement

Most reconstruction work will be either contracted by the public sector or financed from the state budget, with the effect that the Administrative Contracts Regulation will apply (Article 2 Administrative Contracts Regulation).

In principle, contracts are awarded on the basis of tender proceedings (Article 8 Administrative Contracts Regulation). Only in exceptional cases, contracts may be awarded by way of direct contracting.

In view of political circumstances in recent years, tender proceedings have been extremely slow. Where contracts have been awarded, it often took a long time until the required budget lines were secured so that the Central Bank could open the required L/C. The division of the government and the development of parallel government structures in the east and in the west of the country further paralyzed the process.

On 7 August 2021, the Government of National Unity approved the award of a number of projects through a Council of Ministers Decree. It is expected that the Government of National Unity will use this method also for further reconstruction projects that are of particular urgency. However, given that under Libyan law sole sourcing is the exception and not the rule, foreign suppliers and contractors are well advised to ascertain that the award of any contract has been duly approved.

# Agency and Distribution

Many foreign companies would use agents or intermediaries in exploring and developing the Libyan market.

Commercial agency, distribution and the importation of goods is reserved for Libyan nationals and Libyan companies that are wholly Libyan owned.<sup>2</sup> At times, Libyan businesses would use offshore companies to act as agents or distributors. In these cases, the agency or distribution in the country has to be sub-contracted to a sub-agent or sub-distributor.

The contractual relationship between the principal and the agent or distributor is governed by the parties' contractual agreement as supplemented by the provisions of the Commercial Code. The parties have considerable freedom in determining their contractual relationship. In particular, there are no mandatory provisions on exclusivity or on the amount of commissions. It would be customary to include standard compliance clauses (compliance with law, ABAC, etc.).

The Libyan Commercial Code does not provide the agent or distributor with a claim for goodwill compensation at the end of the contractual term. However, a wrongful termination can entail a damage claim based on breach of contract.

It would be advisable to include an arbitration clause providing for arbitration outside Libya.<sup>3</sup> To the extent German law is applicable, the agent's compensation claim based on § 89b of the German Commercial Code (HGB) should be explicitly excluded.<sup>4</sup>

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<sup>2</sup>This follows from Article 8 of the Executive Regulations to the Commercial Agency Law No. 6/2004. Whereas the Commercial Code (2010) has abrogated the Commercial Agency Law, the Executive Regulations continue to be applied by the Libyan authorities. This also follows from Article 6 (4) of Decree No. 207/2012 regulating the business activity of foreign companies in Libya.

<sup>3</sup>Given the difficulties in enforcing international arbitration awards against Libyan parties in Libya, we recommend agreeing on a seat of the arbitration in a Convention of Riyadh member state, e.g. Egypt, Tunisia or the UAE (see *infra*).

<sup>4</sup>What is permissible pursuant to § 92c HGB.

# International Contract Law: Choice of Law and Public Order

Libyan law permits the parties to determine the proper law of the contract, however only within certain limits.

## Civil and Commercial Contracts

According to Article 19 (1) Civil Code, the law applicable to contractual obligations is primarily the law of the common domicile of both parties, alternatively the place where the contract is signed. However, this is not applicable if *“the parties agree or the circumstances indicate that it is intended to apply another law.”* Consequently, the parties may agree on the proper law of the contract. Contracts on immovables however are exempt from this. They are mandatorily governed by the law of the place, where the immovable is situated (Article 19 (2) Civil Code).

## Contracts with the Public Sector

Libyan law has adopted the concept of “administrative contract” that is borrowed from French law. Contracts with the public sector are generally governed by Libyan law, including the Administrative Contracts Regulation. Article 2 of the Administrative Contracts Regulation provides that these rules apply *“on all administrative contracts, which the public bodies and institutions conclude, as well as development contracts financed by the national budget irrespective of the body concluding the contracts.”* This provision is understood in Libya to render the provisions of the Administrative Contracts Regulation mandatory, hereby excluding the possibility to determine the proper law of the contract. Therefore, most contracts with the Libyan public sector are subject to the mandatory provisions of the Administrative Contracts Regulation.

The Administrative Contracts Regulation regulates public procurement law as well as substantive special provisions for contracts with public sector entities. It makes provisions on terms of payment (Article 88 *et seq*) and provides for penalties if the private party is in default (Article 102). It regulates subcontracting (Article 97) and acceptance of work (Article 124). Finally, the Administrative Contracts Regulation includes specifications on force majeure and hardship (Article 105-106). The general contractual provisions in the Civil Code and in the Commercial Code are complementarily applicable on administrative contracts.

## Public Order

According to Article 28 Civil Code, the application of foreign law is restricted by Libyan public order. Accordingly, a provision of foreign law may not be applied if this would infringe upon the public order or morals in Libya. Particularly relevant are the following provisions of Libyan law:

- The Administrative Contracts Regulation and the provisions on public procurement and contract law included therein.
- Rules on the activity of foreign companies in Libya and the limit of foreign shareholding in Libyan companies (Decree 207/2012). The foreign participation in Libyan companies is generally limited to 49%.
- Regulations on commercial agency, distribution, and importation of goods (all that, as a general rule, is reserved for Libyan nationals and wholly owned Libyan companies).
- Regulations on combatting corruption in the Penal Code (1954) and the Law to Combat Economic Crime (Law No. 2/1979).
- Competition law and consumer protection (Article 1282 and following Commercial Code). The Commercial Code (2010) for the first time introduced detailed rules regulating competition. The Competition Council, envisaged by the Code, however, has so far not been set up.

In addition, interest on pendency and late payment recently became a controversial issue. Law No. 1/2013 on Usurious Transactions prohibits any kind of interest in civil and commercial transactions. Respective agreements are void and may not be enforced in court (Article 1 and 2). Moreover, all provisions on interest in the Civil Code and the Commercial Code were deleted in an amendment in 2016. The amendment aimed to reconcile Libyan law more with traditional Islamic principles.<sup>5</sup> According to Islamic Law, interest is forbidden.<sup>6</sup> Libyan courts, however, continue to award interest for pendency and delay in payment, but framing it as a kind of compensation (calculated on the basis of interest rates). International arbitration tribunals, moreover, have awarded interest in proceedings against Libyan parties as well.<sup>7</sup>

<sup>5</sup> Laws No. 6 and 10/2016.

<sup>6</sup> According to the predominant opinion among Islamic scholars, interest is prohibited for conflicting with the “ban of ribā.”

<sup>7</sup> E.g., Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB%28AF%29/15/1>; 25.6.2021.

# Dispute Clauses

Libyan law is very restrictive with regard to jurisdiction and arbitration clauses.

## Jurisdiction Clauses

Jurisdiction clauses which exclude the jurisdiction of the Libyan courts in favour of exclusive jurisdiction abroad are not upheld by Libyan courts. According to the prevailing Libyan doctrine, the international jurisdiction of the courts is related to state sovereignty and thus is part of public order. Therefore, derogation is impermissible. According to Article 3 (2) of the Civil and Commercial Procedure Code, Libyan courts are competent if the place of performance of a contract is in Libya. Therefore, the Libyan courts regularly have jurisdiction to hear disputes based on supply, work, and service contracts relating to Libya.

## Arbitration Clauses

Arbitration is regulated in a chapter of the Code on Civil and Commercial Procedure (Articles 739-771). The rules provide a general legal framework for arbitration; they are however somewhat outdated. A reform based on the UNCITRAL Model Law certainly would be desirable.<sup>8</sup>

Libyan law provides for a broad concept of arbitrability, and most commercial disputes can be submitted to arbitration. Notably, questions regarding public order and employment disputes may not be subject to arbitration. Additionally, the parties must be able to dispose over the matter in dispute and a settlement must be possible (Article 740 Civil and Trade Procedure Code).

Therefore, it is usually possible to agree on an arbitration clause in a commercial agreement, which provides a foreign place of arbitration and the usual international procedure in contracts with Libyan private companies. Arbitration clauses require written form.

## Contracts with the Public Sector

Disputes based on contracts with the public sector are subject to the exclusive jurisdiction of the Libyan courts that cannot be waived (Article 83 (1) Administrative Contracts Regulation). Disputes arising from administrative contracts may in principle be subject to arbitration if the private party is foreign. The arbitration clause, however, must be approved by the Council of Ministers in advance (Article 83 (2) Administrative Contracts Regulation).<sup>9</sup> The approval is rarely granted outside of the oil and gas industry.

<sup>8</sup>The LCICA recently published the draft of a new arbitration law that has been long awaited and continues to be under discussion. It is unclear if and when the new law will be enacted.

<sup>9</sup>According to Article 35 Transitional Constitution the ministerial council replaces the General People's Committee.

# Limitation and Exclusion Clauses; Liquidated Damages

An amendment of the Civil and Commercial Codes in 2016, among other modifications, also affected limitation and exclusion clauses. Libyan law does not uphold standard exclusion and limitation clauses.

Law 6/2016 amended Article 220 (2) Civil Code as follows: “*Any agreement to exonerate a debtor from liability because of the non-fulfilment of contractual obligations is impermissible.*” Therefore, clauses limiting contractual liability to a specific amount (caps), excluding specific damages (e.g., loss of profit, indirect damage) or in general limiting liability to certain cases (intent, gross negligence) are no longer permissible. Furthermore, the possibility to agree on liquidated damages has been restricted to contracts for work (Article 226 Civil Code in the form of Law 6/2016). Therefore, liability cannot be limited by agreeing on contractual penalties (in connection with a sole-remedy-clause).

Until now, it is not clear how these rules will be applied in practice and there is no case law that would provide guidance on these issues.<sup>10</sup> Still there is a significant risk that a Libyan court will not uphold standard limitation clauses. In the past, clauses limiting or excluding contractual liability were valid in private and in administrative contracts, if the breach was not intentional, fraudulent or grossly negligent (Article 220 (2) Civil Code old version). In addition, claims based on tort cannot be excluded.

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<sup>10</sup> Several other amendments made by the law 6/2016 are discussed controversially – amongst them the abolition of pendency and default interest (see above).

# Payment Security

Many international companies are facing outstanding debt in Libya, mostly resulting from contracts with public partners. If and how international companies participate in rebuilding the Libyan economy depends not least on solving the old debt issue.

In any case, it is advisable to secure payments in future transactions accordingly. At the moment, security by letters of credit is the only viable option. Letters of credit are however processed by the Libyan Central Bank, which was partially paralyzed in recent years due to the political division of the country. The Second Berlin Libya Conference therefore prioritised reinstating the effective functionality and the reform of the Central Bank.<sup>11</sup>

According to Libyan law there is no possibility to agree on a reservation of title. Article 519 *et seq* Commercial Code were repealed by Law No. 10/2016.<sup>12</sup> A reservation of title agreed under foreign law will become ineffective once the respective goods are transported to Libya.

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<sup>11</sup> Final Declaration No. 41 (<https://www.auswaertiges-amt.de/de/newsroom/libyen-konferenz-abschlusserklaerung/2467822>) 25.6.2021.

<sup>12</sup> Laws No. 6 and 10/2016.

# Force Majeure and Hardship

Since 2011, international courts and arbitral tribunals have heard many cases on force majeure and hardship in relation to the situation in Libya. For many projects, the military conflict and volatile security situation since the fall of the Gaddafi regime had resulted in obstacles and delay of work.

Libyan law distinguishes in this question between private and administrative contracts on the one hand and between impossibility (force majeure) and impediments to performance (hardship) on the other hand. In practice, the following points are critical:

- Force majeure, with the effect that a contractual obligation lapses, requires objective impossibility (Article 360 Civil Code und Article 106 Administrative Contracts Regulation). This is rarely the case in practice. Even in a situation of revolution and civil war there are usually subcontractors, which are still able to complete the work – only at a significantly higher price.
- In the case of hardship (obstacles making the performance onerous, without rendering it impossible) the primary legal remedy is the adjustment of the contract price (Article 147 (2) Civil Code und Article 105 Administrative Contracts Regulation). Prerequisite, however, is a “substantial disruption” of the contractual balance. This threshold is high and rarely reached. In contracts with private parties, the adjustment of the contract price requires a court ruling. This is often not very practical.
- Termination of contract for force majeure requires a formal legal notice which must be delivered by the bailiff. This often gives rise to problems if the counterparty refuses to accept the document or – for example, because of the turmoil of the civil war – ceases operations.

In principle, termination leads to a rescission of the contract (Article 162 Civil Code) with the effect that the contract is unwound retroactively. This is usually not appropriate with service contracts and contracts for work. A contractor usually is interested in receiving partial remuneration. The parties are, however, free to agree on a different arrangement.

These points should be considered when drafting force majeure clauses. The usual international clauses are a good starting point.

# Sanctions

There are still international sanctions in place against Libya. In case of doubt, it is highly advisable to check with the competent regulator and make consummation of the transaction subject to obtaining export clearance.

The EU sanctions that were put in place in 2011 are now consolidated in EU-Regulation 2016/44.<sup>13</sup> They concern, amongst other, the following sectors:

- **Arms:** An arms embargo is still in place against Libya.
- **Internal repression:** The supply of goods and services in relation to internal repression is forbidden. The relevant goods are listed in Annex I of Regulation 2016/44.
- **Human trafficking:** Export of goods that can be used in connection with human trafficking are subject to authorization. The relevant goods are listed in Annex VII of Regulation 2016/44.
- **Gaddafi-Regime:** There are still financial sanctions in place against key figures of the Gaddafi-system as well as certain institutions (e.g., the Libyan sovereign wealth fund, Libyan Investment Authority – LIA) listed in Annexes II and III of Regulation 2016/44.

On a political level, discussions are pending regarding a lift of sanctions against some of the listed institutions (especially LIA), because the sanctions significantly impede on the economic mobility of the Libyan government.<sup>14</sup> The EU is expected to only take that decision after the parliamentary elections in Libya scheduled for December 2021. The decision will also be dependent on the progress in reforms of the Central Bank and LIA.

<sup>13</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0044>. Last amended through amending Regulation 2021/1005 of 21. June 2021.

<sup>14</sup> See also the Final Declaration of the Second Berlin Libya Conference on 23.6.2021 No. 46 and 47 (<https://www.auswaertiges-amt.de/de/newsroom/libyen-konferenz-abschlusserklaerung/2467822>) 25.6.2021.

# Registering a Presence in Libya

Foreign companies operating in Libya must set up a registered presence. This also applies to a supplier or contractor who engages in works on the ground in Libya. Under Libyan law, it is not permissible to do business in the country without a registered presence.

Since 2011, the regulations applicable to foreign companies have been amended several times, most notably in July 2012 by Decree No. 207 of 2012 of the Minister for Economic Affairs (as amended in January 2013 by Decree No. 22 of 2013). The Decree imposes a number of restrictions on foreign companies doing business in Libya.

By Decree 207 of 2012, a foreign company can either establish a branch in Libya or enter into a joint venture with a Libyan partner. In addition, it is permissible to register a representative office. A representative office is limited to general marketing activities and may not engage in any commercial activity.

Most contractors would opt to establish a branch. The reason is that a branch does not require a Libyan partner (but only a Libyan manager, who typically would be appointed as deputy branch manager). Furthermore, a lower capital commitment (an amount of LYD 250,000) must be paid as “branch capital” into the account of a Libyan branch.

The permitted activities of a branch are exhaustively listed by the Ministry of Economic Affairs in Decree 207 of 2017 (Article 9). They include certain contracting and civil works (provided the project exceeds LYD 50 million), electricity works, oil, telecom and IT activities, industrial activities, planning and consultancy services and environmental protection. The list of permitted activities should be carefully reviewed as part of the planning process.

# Tax Issues

The corporate tax rate is 24%.<sup>15</sup> This tax rate applies to profits from business achieved through a Libyan registered entity or branch. Libyan tax laws do not recognize the concept of the “permanent establishment” but will rather look formally at the registration of the respective branch or entity.<sup>16</sup>

Any contract with a Libyan counterparty must be registered with the Libyan Authorities within 60 days as from signing. At registration, a stamp duty of 1% of the contract value is due.

It should be noted that in recent years, the Libyan authorities have also taxed supply transactions at a deemed profit rate of 5% to 8% of the contract value. In the past, supply transactions were exempted from taxation in Libya if the supply was to the port only.

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<sup>15</sup> Corporate income tax of 20% plus 4% “Jihad Tax”.

<sup>16</sup> As explained above, however, any activity onshore in Libya requires the registration of a presence and, therefore, triggers the obligation to register with the Libyan Tax Authorities.

# Recognition and Enforcement of Foreign Court Decisions

The most important international treaty for the recognition and enforcement of foreign court decisions in Libya is the Convention of Riyadh from 1983. The Convention stipulates in Article 25 (b) and 37 the respective recognition and enforceability of court rulings and arbitral judgements in civil and commercial cases, however only among Convention parties (essentially congruent with the members of the League of Arab States). It does not apply to EU court decisions. The Convention of Riyadh, moreover, does not apply to judgements against the state or a public sector party.

Under municipal law, Articles 405 to 411 of the Code of Civil and Commercial Procedure provide the framework for the recognition and enforcement of foreign court decisions. Recognition is based on reciprocity. According to Article 405 the declaration of enforceability of a foreign ruling is admissible “*pursuant to the same conditions that are in place there to recognise Libyan rulings and decisions.*” This is understood to mean that Libya recognizes foreign judgements strictly on the basis of reciprocity (i.e. Libya will recognize the court decisions of country X if country X also recognizes Libyan court decisions). This reciprocity requirement significantly limits the recognition and enforcement of foreign court decisions. There is, for example, no reciprocal enforcement of court decision in relation to Germany.

According to Article 407 Civil and Trade Procedure Law, recognition of a foreign decision further requires:

- The deciding court must have been competent according to *lex fori* and the decision is enforceable according to the law of the country of decision;
- The parties were duly summoned and represented in court;
- The decision does not conflict with a prior decision of a Libyan court; and
- The content of the decision does not infringe on morals and public order in Libya.

The competent authority for the *exequatur* proceeding is the court of first instance in the district, where the claim is pressed (Article 406 Civil and Trade Procedure Law).

# Recognition and Enforcement of International Arbitral Awards

There is only a very basic legal framework regulating the recognition and enforcement of international arbitral awards in Libya.

Libya, notably, is not a party to the New York Convention of 10. June 1958 (NYC). Libyan NYC membership is highly desirable since it would enhance international commercial and banking relations.

As mentioned before, Libya is a party to the Convention of Riyadh of 1983 which regulates recognition of arbitral awards amongst Arab states. Therefore, agreeing on a seat of the arbitration in a member country of the Convention of Riyadh can be an option if the arbitral award shall potentially be enforced in Libya. Options are Egypt, Tunisia and the UAE, all of which have modern arbitration laws on the basis of the UNCITRAL model law and are, in addition, NYC signatories.

Under municipal law, the recognition and enforcement of foreign arbitral awards follows the rules of recognition and enforcement of foreign civil decisions (Article 761 in conjunction with Article 408 Code of Civil and Commercial Procedure). There are precedents where the Libyan courts have recognized and enforced foreign arbitral awards in the past. There is however no established practice of recognition.

# 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 (power stations, roads) and transactions in the oil and gas industry.

We frequently advise on public sector contracts and on transactions with the Libyan National Oil Company (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 consists 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 – Leading Firm in Libya

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**We advise on all aspects of Libyan business law, with a particular focus on projects in the fields of 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.**

- Advising an IOC on all aspects of the sale of their Libyan oil assets to an international investor
- Advising an international supplier of medical products on the restructuring of its distribution network in Libya
- Advising an oilfield services provider on a contract for a Libyan oilfield
- Advising a supplier of identity solutions on a contract with the Libyan government for the personalization of passports and related IT systems
- Advising an automotive company on the restructuring of its distribution network in Libya
- Providing ongoing advice to an IOC on all aspects of Libyan petroleum, employment, tax and social insurance law
- Advising an international technology company on issues of force majeure in relation to a cement plant
- Advising an international sponsor on a power project with Libyan GECOL
- Representing an international technology company in Libyan court proceedings and related ICC arbitral proceedings defending against claims brought by a former Libyan state trading company
- Regularly providing expert advice on Libyan law in court and international arbitral proceedings



## 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 projects and finance, and divides his time between the Berlin, Cairo, and Tripoli offices.

Kilian has broad experience in advising clients on debt and equity 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 and advises on trade sanctions as well as business and human rights.

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