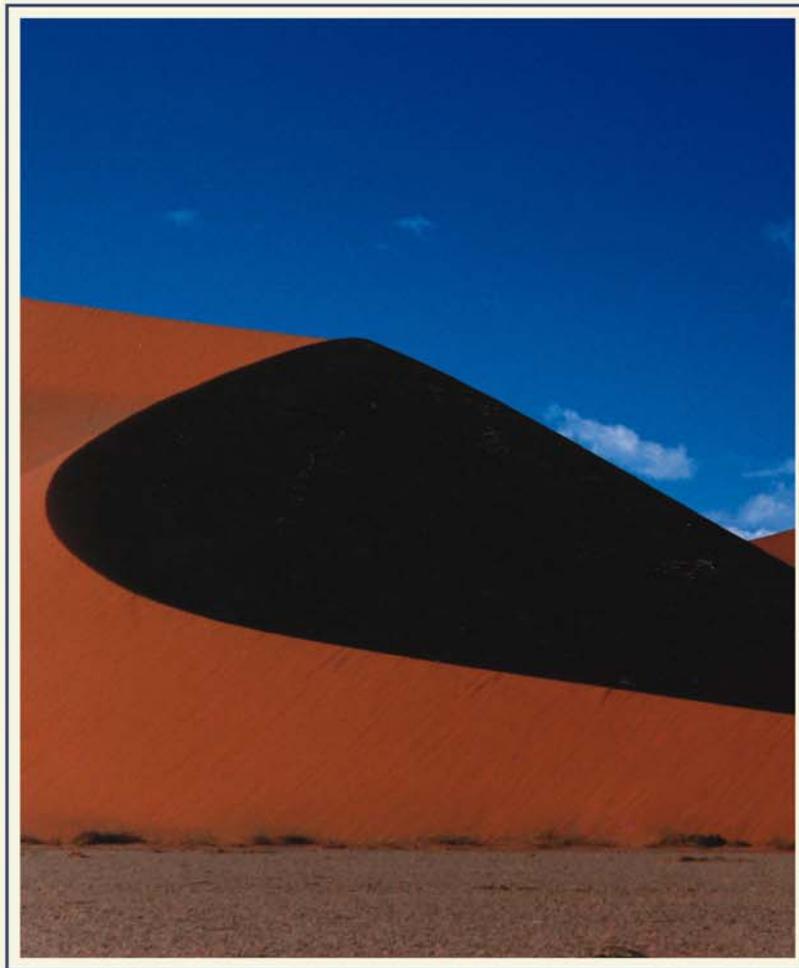


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**INVESTING IN THE LIBYAN HEALTH SECTOR –
OPPORTUNITIES AND CHALLENGES OF THE TRANSITION**

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Important warning and disclaimer

The purpose of this paper is to provide potential investors with an introduction to the Libyan legal system and doing business in Libya. It does not purport to provide legal advice and should not be relied upon as a comprehensive and/or formal legal opinion on such matters, nor as a recommendation as to whether or not to make any investment in Libya. Any questions regarding the contents of this paper should be addressed to the contact persons indicated on the last page.

Investing in the Health Care Sector in Libya – Opportunities and Challenges of the Transition



Geographical map of Libya

The Market

The fall of the Gaddafi Regime in August 2011 marked the end of an era and it is difficult to predict what direction Libya will take in the future. The time ahead will inevitably provide both opportunities and challenges for companies active in Libya and investors targeting the Libyan market. This holds true in particular for the health sector which has

suffered from structural weaknesses for many years. The destruction caused by the armed conflict in 2011, as well as increased demand for war-related treatments, have further fuelled the crisis of the health sector which is in need of investment at all levels. In addition, Libya has an urgent need for essential medicines and other medical supplies.

The Political and Constitutional Framework

In late July 2012 the National Transitional Council (NTC) transferred political power to the General National Congress (GNC), which consists of 200 elected members. The GNC will serve as the country's interim parliament and will appoint a government and a constitutional assembly, which is to draw up the country's new constitution.

The transfer of power from the NTC to the GNC is considered a major step forward towards stabilization of the political situation. Rebuilding the country's infrastructure, including its health sector, will be among the GNC's top priorities.

In August 2011 the NTC proclaimed a Constitutional Declaration consisting of 37 Articles. This set out how political power was to be exercised during the transitional period pending the adoption of a new constitution, probably in the first half of 2013. The Constitutional Declaration provides some pointers to the democratic transition. In addition to political liberalization and democratization, one of the main objectives is to diversify the economy which has traditionally been heavily dependent on oil. The promotion of the private sector is another priority.

The Regulation of the Health Sector

The establishment, operation, and management of hospitals and the practice of medical professions in Libya are governed by a number of laws, executive regulations and decrees issued by the Libyan Government and the Ministry of Health.

The key piece of legislation which governs hospitals and clinics is Law No. 106 of 1973 (the "Health Law"), which enacted the Libyan Public Health Code and its executive regulations issued by the Governmental Decree No. 654 of 1975 (the "Executive Regulations"). The Health Law governs the establishment and operation of hospitals as well as the practice of medical professions.

In addition, medical liability is governed by Law No. 17 of 1986. This applies to both individuals practising any medical professions and medical institutions. The 1986 law, and supplementary regulations, provide for a system of mandatory insurance system covering civil liability resulting from medical malpractice.

The Ministry of Health

The Ministry of Health is the lead regulator of the health sector in Libya. According to the Health Law, the Minister of Health is responsible for implementing the law and issuing executive regulations. The Ministry of Health is also the body responsible for all matters relating to public health, precautionary health, therapeutic medicine, medical institutions, pharmaceuticals, control of the circulation of drugs and the practice of the medical and related professions.

Decree 38 of 2012 reorganised the competencies of the Ministry of Health and provides that all the central, special, general and rural hospitals fall under the direct supervision of the MOH which is responsible for the quality of the services provided by the hospitals.

Private Investments in the Health Sector

During the Gaddafi Era, the health sector was dominated by the state.

Up to the 1990s all the hospitals and general medical centres were owned and managed by the public sector. Today, there are small private hospitals and medical centres. Moreover, there are two hospitals which are 100% owned and managed by foreign healthcare providers. These foreign investors were permitted to set up these projects under the umbrella of the foreign direct investment law.

In 2007, the Libyan government authorised the creation of the Libyan Company for Investment in and Operation of Medical Facilities. This is an investment vehicle owned by certain sovereign wealth funds and private entities, including commercial banks and foreign oil and gas companies active in Libya. The Libyan government has concluded long term agreements with this company covering the management and operation of a number of medical institutions in Tripoli and Benghazi. These agreements follow the structures used in PPP projects, with the government leasing state-owned medical institutions to the private sector, to be run as profit-making businesses.

The NOC Good Neighbourhood Policy

The National Oil Corporation (“NOC”) is Libya’s state oil company. It supervises the conduct of all oil and gas companies in Libya and represents the state in exploration and production sharing agreements with international oil companies. In 2009, the NOC invited IOCs operating in the country to participate in its sustainable development programme and to apply the “Good Neighbour Policy” by investing in social activities in education, sports, health and the environment.

A number of companies including Repsol, Total, OMV, Hess, Statoil and Eni responded by supporting various projects in the healthcare sector. These include financing of training programs, the maintenance and upgrade programs for public medical

institutions, sponsoring foreign scientific missions and providing finance for new projects such as the emergency hospital in Jalo in the Libyan desert.

Licensing of Hospitals and Clinics

The establishment and management of a private medical institution requires a license from the Ministry of Health.

According to Decree 38 of 2012, the Medical Services Department at the Ministry of Health is in charge of the licensing process. License applications must give details of the plot of land proposed for the project, its area and location as well as design details of the building. The applicant must also provide information on the supply of pure water and on the proposed treatment for sewage and waste. The detailed design drawings must be certified by the competent municipality as being adequate to meet the requirements.

Choice of Corporate Structures

The owner/operator of a hospital or clinic must be set up as one of the following legal forms provided by the law:

- A civil society organisation.
- A branch office of a foreign health care provider, under the umbrella of the Investment Law No. 9 of 2010.
- A conditioned donation for the benefit of a the local civil society organisation.
- A JV company, managed by a professional medical services provider (local or foreign).

According to the Ministry of Economy Decree No. 103 of 2012 concerning the Participation of Foreign Companies in JV Companies and Set Up of Branch Offices in Libya, which is the key piece of legislation governing foreign commercial activity in Libya, foreign companies with the necessary experience can open wholly-owned branch offices to perform the installation, commissioning and maintenance of medical equipment and/or the management of hospitals and medical institutions.

Hospital Management

The regulations on the management of hospitals have been subject to change. Under the latest scheme adopted by the health authorities, every medical institution must have a qualified general manager responsible for administrative issues, and a scientific management committee.

The manager must (i) be a qualified physician who is authorized to practice in Libya, (ii) have at least 12 years relevant experience in the health care sector; and (iii) have successfully completed a training course on hospital management.

Price Controls

Prices for health care services are capped. The Ministry of health issued a notice in December 2011 stating that the price regulation enacted by Decree No. 63 of 2008 continues to apply.

Regulation of the Medical Profession

The practice of medicine is regulated by the Health Law.

Foreigners can apply to be licensed medical professionals in Libya provided they fulfill certain requirements.

Medical Malpractice

Medical malpractice is governed by Law No. 17 of 1986 concerning Medical Liability. It imposes liability for all “professional mistakes.” The applicable standard of care is defined by law and by professional standards. In addition to the physician, malpractice liability may extend to the healthcare provider, the supervising physician, and other related medical professionals who share jointly liability for any malpractice.

Compulsory insurance cover is required by law.

Commercial Agency

Commercial agency and distribution are mainly governed by the Commercial Code which abrogated the Commercial Agency Law No. 6 of 2004. The Executive Regulations of the 2004 law (which continue to be in force) provide an extensive list of goods and services for which a local commercial agent is required. These include controlled pharmaceuticals, over-the-counter medicines and medical devices. Only Libyan nationals or Libyan companies wholly-owned by Libyan nationals may act as commercial agents. However, the importation for private use or for the purpose of a specific project does not require a local commercial agent or distributor.

The laws governing agency and distribution have been subject to numerous amendments, reflecting policy changes of the Libyan government in this area.

Contracting with the Public Sector

Special rules apply to contracts with the public sector. It is expected that such contracts will continue to play a key role in Libyan business in the future, affecting supplies of goods and services to public hospitals, as well as the upgrade of existing public hospitals and new hospital construction.

The rules are contained in the Administrative Contracts Regulation no. 563 of 2007 which applies to all contracts with Libyan government entities or which relate to development projects funded by public funds. The Regulation, which is mandatory, covers public tenders and contains special rules for state contracts. Contracts are subject to Libyan law (any other choice of law is not permitted) and the Regulation provides for the exclusive jurisdiction of the Libyan courts. It is possible to stipulate that disputes are to be submitted to arbitration but this requires the prior approval of the General People's Committee (a Gaddafi era body which is likely to be disbanded). In practice, obtaining GPC consent will be a challenge.

EPC Contracts

EPC Contracts used in Libya are often based on international models such as the FIDIC forms. Contracts are subject to the rules of the Civil Code or the Administrative Contracts Regulation, depending on whether the employer is a private company or a state entity. Libyan law imposes a ten year warranty on the architect and contractor in relation to "fixed installations" (so-called "decennial liability"). The rules on decennial liability are mandatory and form part of Libyan *ordre public*. A Libyan court will apply local law in relation to projects in Libya, even if the contract provided for a foreign governing law.

In general, it is permissible to cap or exclude certain types of damages, with the exception of gross negligence and fraud.

The contractor may be obliged to employ a certain percentage of local workers.

Importing Medical Equipment

As a general rule, the importation of medical equipment and supplies into Libya is permissible as long as the manufacturer of the imported equipment is registered with and recognised by the Ministry of Health.

According to the general importation regulations, however, the importation for the purpose of trade is generally restricted to Libyan nationals and Libyan entities that are wholly-owned by Libyan nationals.

There is a large number of different classifications and descriptions of medical equipments listed in the customs tariff list. According to Decree No. 48 of 2011, certain drugs, vaccines and hospital supplies are exempted from customs duties.

Dispute Resolution

Enforcing claims through the Libyan courts is generally challenging and lengthy.

Libyan courts are competent to hear claims against Libyan nationals or entities, or relating to real property located in Libya. Libyan conflict of law rules permit to choose the proper law of the contract.

The arbitrability of disputes is subject to certain restrictions. In contracts subject to the Administrative Contracts Regulation, the prior approval of the General Peoples Committee (or the body replacing it in the future) is required.

Libya is not a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). However, the Riyadh Convention on Judicial Cooperation (1983) may apply, which also contains a basic mechanism for the recognition and enforcement of judgements and arbitral awards among the (Arab) member states.

In theory, the Code of Civil Procedure permits the recognition and enforcement of foreign judgements and arbitral awards (on a reciprocity basis). In practice, this has not been a practical option in the past. It remains to be seen if this situation will change with the opening up of the Libyan economy.

Amereller Legal Consultants

The Firm

AMERELLER LEGAL CONSULTANTS is an international law firm with offices throughout the Middle East and Germany. The firm specializes in corporate and commercial law in the Middle East and is one of the few law firms with a direct presence in key markets in the region. This enables us to keep our finger on the pulse of this dynamic legal environment and provide tailored advice to clients consistent with evolving practices in the Arab World.

We have had leading roles in some major transactions in the Middle East, especially in the UAE, Egypt, Libya, Iraq, Saudi Arabia, Syria, Oman and Qatar. Clients consult us for expert advice and commercial guidance that we provide. Our personalized focus on supporting clients across country borders and industry sectors is central to our firm's culture. We aim to provide our clients with the professionalism, depth of expertise and quality offered by top-tier international law firms, together with the personal attention and practical knowledge available only through on-the-ground presence.

AMERELLER LEGAL CONSULTANTS has offices in Cairo, Tripoli, Damascus, Dubai, Ras Al Khaimah, Baghdad, Basra and Erbil, as well as in Berlin and Munich. Our six partners lead a team of 30 internationally trained, multilingual and experienced lawyers, who are sensitive to the cultural and legal nuances of conducting business successfully in the Arab World. Through our network of best friend firms we cover all jurisdictions in North Africa and the Middle East - including Iran and Afghanistan.

Our Libya Practice

AMERELLER LEGAL CONSULTANTS has been advising on transactions in Libya for many years. In early 2012, AMERELLER LEGAL CONSULTANTS has opened an office in Tripoli in cooperation with P&A Legal.

Recent Transactions

AMERELLER LEGAL CONSULTANTS have been active in the MENA markets for many years. Our recent experience in relation to Libya includes:

- Advised an investor in relation to a private financed health care project in Libya;
- Advised an international health insurance company on a management agreement with a leading Libyan health insurance provider;
- Advised an international supplier of medical equipment on the restructuring of its business set up in Libya;

- Advised the PE arm of an international development bank on the acquisition of a stake in a Libyan commercial bank, being the first transaction of its kind;
- Advising an international energy company on the restructuring of its operations and the effects of the political transition on an EPSA concluded with NOC;
- Advising an international technology company on the restructuring of its Libyan operations;
- Advising an international technology company on an energy project with a Libyan public entity;
- Advised a number of international contractors on questions of force majeure under Libyan law.
- Advised a number of EU companies on the EU and UN sanctions levied on Libya and its effects on existing contracts;
- Advised a Middle Eastern company and its US based investors on the acquisition of an oilfield services provider in Libya.

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