

Doing Business in Sudan after the Lifting of US Trade Sanctions

An Introduction for Multinational Companies

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One of the last actions of the Obama administration was to suspend US sanctions against Sudan. This brings opportunities for many international companies, in particular in the fields of oil and gas, infrastructure, agriculture and trade. Sudan, however, remains a difficult and challenging market. This article provides a basic overview of the legal system for companies that intend to (re)engage with Sudan.

Lifting of US Trade Sanctions

The US announced the end of the embargo and a lifting of trade and financial sanctions against Sudan effective 17 January 2017. The move is part of a political deal by which Sudan will improve access for aid groups, stop supporting rebels in South Sudan, cooperate with American intelligence agencies, and end support for terrorism. The deal has a six-month review period and sanctions may be re-introduced if Sudan fails to live up to its commitments. It is reported that the outgoing Obama administration only removed the sanctions block with the support of the incoming Trump administration.

The mechanism for lifting the sanctions is to authorize transactions for everyone by a “General License” from the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC). The general license permits US persons and companies to deal with Sudan, including the government of Sudan, and OFAC has also unblocked property of the government of Sudan currently held by U.S. companies and financial institutions.

Because the sanctions have been lifted by a “general license,” U.S. persons and companies who use this authorization must comply with OFAC’s recordkeeping requirements, by keeping a “full and accurate record” of its Sudan-related transactions for a minimum of 5 years.

Some restrictions remain. For example, approximately 160 Sudanese companies remain on the US OFAC Specially Designated Nationals (SDN) and Blocked Persons list, and transactions with such blocked persons remains prohibited. Also, transactions for agricultural products and medical products that originated from the US continue to require a separate license. In addition, the persisting EU sanctions prohibiting the export of certain goods (in particular weapons and dual use) as well as dealing with certain Sudanese individuals and companies, remain in force.

Sudanese Legal System

Sudan is the only Arab jurisdiction that used to be based on a common law system. The Sudanese legal system today is made up of a mix of common law, *Shariah* Islamic law, customary law, and modern legislation.

The Civil Transaction Act of 1984 sought to codify *Shariah* for contractual matters, and has created a basic system of contract law that is similar to many other Arab states, creating a codified system that incorporates *Shariah* concepts such as with regards to contractual formation of contract, performance, assignment, breach, fraud, misrepresentation, voidable contracts, unfair contract terms, illegality, and remedies.

Contracts with government entities (so-called ‘administrative contracts’) are subject to special rules.

The Civil Transaction Act is supplemented by other economic legislation covering specific issues.

Key Contract Issues

The end of the US trade sanctions is not yet permanent and any contract with Sudan should contain a rescission clause in case of “snap back” sanctions. The parties should not rely on the doctrine of force majeure alone in this regard.

According to Art. 110 of the Code on Civil and Commercial Procedure, claims for interest cannot be enforced in the Sudanese courts. This extends even to default interest that arises due to late payment. As such, a clause for any payment of interest should be drafted in a *Shariah*-compliant manner, which may be a formula set out in the contract as an agreed mechanism for deciding damages.

In commercial contracts, the parties may limit or cap their contractual liability. It is required that the other party is made aware of the limitation clause or cap. Sudanese law provides that a judge can void a limitation clause or cap that is considered “unfair” or that is incompatible with the “essence of the contract”.

The parties can agree on liquidated damages. The judge, however, may reduce the amount of liquidated damages due in the event the amount of the liquidated damages is excessive given the actual damage that has occurred.

Dispute Resolution

Jurisdiction clauses are permissible and the Sudanese Courts will assume jurisdiction if the parties explicitly or implicitly have submitted to their jurisdiction. Jurisdiction clauses that exclude the jurisdiction of the Sudanese courts normally are upheld by the Sudanese courts.

In 2016 a new Arbitration Law was enacted that replaced the 2005 Arbitration Law. The new Arbitration Law permits all disputes to be subject to arbitration which the parties may settle through an amicable settlement. This means that most disputes based on commercial contracts can be submitted to arbitration. Arbitration agreements must be in writing.

The parties to an international contract in Sudan, in principle, are free to agree on the proper law of the contract. The Sudanese courts are bound to uphold a choice of law in a commercial contract.

Enforcement of Foreign Arbitral Awards and Foreign Court Decisions

The recognition and enforcement of international arbitral awards in Sudan is subject to the provisions of the Arbitration Law. Among the conditions is that there is a “reciprocal” enforcement with the

country where the award was made. This can significantly limit the possibilities of enforcing foreign arbitral awards in Sudan.

Sudan is not a party to the New York Convention on the enforcement of foreign arbitral awards, but it is a party to the Riyadh Convention, a convention of the Arab states that addresses the enforcement of foreign arbitral awards and court judgments that arise from fellow signatory states. As such, a commercial contract that must be enforced against a party in Sudan should consider selecting international arbitration in a jurisdiction such as Dubai.

The enforcement mechanism in the Riyadh Convention is based on the principle of *double exequatur*, which means that a writ of enforcement must first be obtained in the country of origin, before recognition proceedings can be brought in the country of enforcement.

The recognition and enforcement of foreign court decisions in Sudan is subject to conditions set out by law, which include that there is a “reciprocal” enforcement with the country of origin. Court decisions can also be enforced under the Riyadh Convention. The Convention, however, does not permit to enforce decisions against the Sudanese government and government entities.

If you would like more information about this topic then please contact us.

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