

*This case summary was prepared in the course of research for  
[S Ripinsky with K Williams, Damages in International Investment Law \(BIICL, 2008\)](#)*

**Case summary**

**Libyan American Oil Company (LIAMCO)**

**v**

**The Libyan Arab Republic**

**Year of the award:** 1977

**Forum:** *Ad Hoc* Tribunal (Draft Convention on Arbitral Procedure, ILC 1958)

**Applicable Law:** Concessions agreements, Libyan law, international law, general principles of law

<b>Arbitrator:</b> Dr. Sobhi Mahmassani	<b>Timeline of the dispute</b> 15 November 1973 – request for arbitration 27 January 1975 – arbitrator appointed 12 April 1977 – arbitral award
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## **I. Executive Summary**

In 1955, LIAMCO, an American company, entered into a number of Concession Agreements with the Libyan government for the exploration and production of petroleum. After the Revolutionary Command Council headed by Colonel el Qadhafi overthrew the government, LIAMCO was subjected to gradual measures restricting rights granted in the Concession Agreements, ultimately resulting in complete nationalization of all of LIAMCO's physical assets and concession rights in Libya.

In November 1973, LIAMCO initiated arbitration proceedings pursuant to Clause No 28 of the Concession Agreements, requesting as a principal relief the restoration of its concession rights together with all the benefits accruing from such restoration (*restitution in integrum*), and as an alternative relief, the payment of adequate damages (*damnum emergens* and *lucrum cessans*), in the amount of US\$ 207,652,667 plus interest. The pleadings and hearings were conducted in default of the Respondent.

The Tribunal, holding that *restitutio in integrum* was impossible, found that the Claimant was entitled to indemnification for (lawful) nationalization of its assets and concession rights. Noting the 'confused state' of international law as to appropriate standard on compensation for nationalization, the Tribunal used Equity as the 'general principle of law' and adopted the formula of 'equitable compensation'. Applying this formula to the facts of the case, the Tribunal accepted LIAMCO's claims with regard to *damnum emergens*, awarding the exact same sum claimed. With regard to compensation for loss of concession rights (i.e. lost profits), the Tribunal held that LIAMCO's claims were well founded in principle, but adjusted the exact amounts claimed. The Tribunal held that, in total, Libya would have to pay US\$ 79,882,677 plus interest and costs in compensation.

## **II. Factual Background and Claims of the Investor**

Libya was recognized as an independent sovereign State by the United Nations in 1949, effective 2 January 1952. Its form of government was monarchical under King Idriss I. In order to improve its economic conditions, to encourage the inflow of foreign capital and to ensure the exploitation and protection of its natural resources, Libya enacted Petroleum Law No 25 in 1955. The law established a framework for the exploration and production of petroleum within the Libyan Kingdom. It provided a concessionary system for the exploitation of petroleum products, and established an autonomous Petroleum Commission which was entitled to grant relevant concessions.

The Claimant, Libyan American Oil Company ('LIAMCO'), was an American corporation established for the purposes of research, exploration and exploitation of Petroleum and natural gas, particularly within the country of Libya.

After adopting the above mentioned Petroleum Law of 1955, the Libyan Government invited applications for exploration permits and concessions from companies which could meet the requirements of the Law. Among the invitees was LIAMCO, which

was subsequently, granted Concessions 16 – 22. Concession 21 and 22 were voluntarily surrendered prior to 1970 and Concessions 18 and 19 were relinquished thereafter by LIAMCO to the Ministry of Petroleum. Thus LIAMCO retained Concessions 16, 17, and 20 ('Concession Agreements') which were the subject of the arbitration.

In September 1969, the Revolutionary Command Council ('RCC'), headed by Colonel Muammar el Qadhafi, overthrew the Government of King Idriss I. and announced the formation of the Libyan Arab Republic. The new regime assured foreign interests that there would be no specific changes in policy and that the obligations of the State would be respected. However, subsequently gradual measures contrary to this promise were taken, proclaimed as a protection against 'imperialism' and in harmony with the 'nationalistic aims' of the Revolution.

In summer of 1973, the Libyan Government asked the oil producers to accept a 51% participation by the State in oil concessions. It set the end of August as a deadline for their acceptance, under threat of taking 'appropriate measures'. As no acceptance was made, the appropriate measures were the issuance by the RCC on September 1, 1973 of Law No. 1966, nationalizing 51% of the concession rights of a number of companies, including LIAMCO. The nationalization measures were immediately implemented. The National Oil Corporation ('NOC') appropriated 51% of all benefits accruing from those concessions and LIAMCO was deprived of its rights thereunder. In February 1974, the RCC issued Law No. 10 of 1974, nationalizing LIAMCO's remaining concession interests.

No compensation was paid or offered to LIAMCO for either the first or the second nationalization measures. After unsuccessful attempts to resolve the disputes with the Libyan government through negotiation, in November 1973 LIAMCO initiated arbitral proceedings pursuant to Clause No 28 of the Concession Agreements.

LIAMCO claimed that the Libyan nationalization measures of 1973 and 1974 concerning Concessions Nos. 16,<sup>1</sup> 17, and 20 of 1955 were politically motivated, discriminatory and confiscatory in nature, and constituted a denial of justice, a wrongful taking and an unlawful breach of contract and were contrary to both the principles of the law of Libya and to the principles of international law. In consequence, LIAMCO requested the issue of an award ordering:

- as a principal relief, the restoration of its concession rights together with all the benefits accruing from such restoration (*restitution in integrum*);
- as an alternative relief, the payment of adequate damages (*damnum emergens* and *lucrum cessans*), in the amount of US\$ 207,652,667 plus interest at 12% from January 1, 1974 to date of payment of recovery of the award in full. (pp. 54-55)

The pleadings and hearings were conducted in default of the Respondent.

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<sup>1</sup> It was confirmed that no oil was found under Concession No 16, and therefore only declaratory relief, but no relevant indemnification was sought by LIAMCO on this account. (p126, 152)

### **III. Findings on Merits**

#### ***A. Applicable Law***

The LIAMCO Concession Agreements provided that they were to be governed by and interpreted in accordance with the ‘common principles of Libyan and international law’, and in the absence of such common principles, in accordance with the ‘general principles of law’ as may have been applied by international tribunals. (p64) Therefore, the principal proper law of the contract in said Concession Agreements was found to be Libyan domestic law, unless in conflict with the principles of international law. Any part of Libyan law in conflict with the principles of international law was to be excluded. (p.67)

The Tribunal stated that in order to determine the meaning of ‘principles of international law’, it was useful to refer to those sources that were accepted by the International Court of Justice, as laid down in Article 38 of its Statute. (p.67) The ‘principles of Libyan law’ could be derived from Libyan legislation, Islamic law, custom, natural law and equity. (pp.68-70)

Concerning ‘general principles of law’, the Tribunal stated that these were usually embodied in most recognized legal systems, and particularly in Libyan legislation, including its modern codes and Islamic law. They are applied by municipal courts and are mainly referred to in international and arbitral case-law. They, thus form a compendium of legal precepts and maxims, universally accepted in theory and practice. Examples include the principle of the sanctity of property and contracts, the respect of acquired vested rights, the prohibition of unjust enrichment, the obligation of compensation in cases of expropriation and wrongful damage, etc. (p.72)

#### ***B. Nationalization***

LIAMCO asked the Tribunal to declare that the nationalization measures purporting unilaterally to terminate the Concession Agreements violated the express terms and guarantees offered by the Government of Libya in said agreements, and were therefore contrary to the principles of the law of Libya common to the principles of international law, and contrary to general principles of law.

The Tribunal found that concession rights did constitute ‘property’, as it could be both corporeal and incorporeal, as long as those rights had a pecuniary or monetary value. (pp.103-104) The Tribunal held that the right of property, including incorporeal property of concession rights, was inviolable in principle, as recognized by both Libyan and international law. The right of a State to nationalize, however, was held to be sovereign, subject to indemnification for premature termination of concession agreements. Nationalization of concession rights, if not discriminatory and not accompanied by a wrongful conduct was not unlawful, but a source of liability to compensate the concessionaire for said premature termination of the Concession Agreements. (pp.121-122)

## IV. Findings on Damages<sup>2</sup>

### **A. Law Applicable to the Determination of Damages**

The Tribunal held that LIAMCO was entitled to indemnification in accordance with the proper law of the Concession Agreements. The proper legal provisions, as discussed above in more detail, were the principles common to Libyan and international law. In the absence of such common principles, damages should be determined according to ‘general principles of law’. (pp.130-132, 149, see also above III.A.)

### **B. Standard of Compensation**

The Tribunal found that the standard of compensation should be determined according to ‘general principles of law’, given that international law was in a ‘confused state’ with regard to the question of the scope of compensation and that there was no conclusive evidence of the existence of community or uniformity in principles between the domestic law of Libya and international law concerning the determination of compensation for nationalization. (pp. 149-150).

The Tribunal held that one of these general principles of law was Equity. (p. 150). The Tribunal found it to be reasonable and just to adopt the formula of ‘**equitable compensation**’ as a measure for the estimation of damages in the present dispute. (p.151).

In accordance with said formula, the Tribunal concluded that *damnum emergens* should represent the **market value** which the nationalized assets had at the said premature expiration of the concession, as proved by Claimant’s evidence (see below). (p.155) The Tribunal also held, that it was ‘equitable’ to award lost profits (*lucrum cessans*). (pp.160-161)

### **C. Heads of Damages and Valuation**

The total amount claimed was US\$ 207,652,667, consisting of the following three elements:

- Physical Plant and Equipment US\$ 13,882,667;
- Concession 20 – Raguba Field US\$ 186,270,000 (loss of profits);
- Concession 17 – Mabruk Field US\$ 7,500,000 (loss of profits).

#### **1. Indemnification for loss of Physical Plant and Equipment**

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<sup>2</sup> LIAMCO had requested as principal relief the restoration of its concession rights together with all the benefits accruing from such restoration (*restitutio in integrum*). This was dismissed by the Tribunal on a number of grounds, including that ‘it is impossible to compel a State to make restitution; this would constitute in fact an intolerable interference in the internal sovereignty of States’. (p.124)

LIAMCO put forth that this item consisted of physical *current* and *fixed* assets that were taken by Libya pursuant to LIAMCO's nationalization. (p.153) *Current assets* included cash, crude oil in tankage, material and supplies, prepaid office rent and concession surface rentals. *Fixed assets* included Raguba field wells and connected facilities, Mabruk field wells and connected facilities, Raguba gas plant, Raguba surface facilities, office equipment, projects in process and pre-effective costs (the claimed value of fixed assets was reduced by depreciation, depletion and amortization). The net value of all physical assets (total value reduced by tax liabilities) was estimated at US\$ 13,882,677. In support of its calculations, LIAMCO submitted detailed schedules and reports signed by several experts. (p.154)

The Tribunal reiterated that on the basis of obligations arising from the Concession Agreements, Libya was liable to pay **full compensation** for all the loss sustained (*damnum emergens*). (p.155) The Arbitrator decided that the claimed sum of \$13,882,677 should be awarded to LIAMCO as just and equitable compensation.

## ***2. Indemnification for expropriation of Petroleum Concession 20 – Raguba Field (Loss of Profits)***

Under this heading LIAMCO claimed compensation for the loss of its concession contract rights. It contended that such compensation should cover the loss of profits or other economic benefits (*lucrum cessans*) which the concession would have yielded to the concessionaire over the remaining term of the concession or producing life of the petroleum deposits lying within the concession. This was set at the amount of \$186,270,000.

LIAMCO reached this evaluation as follows:

- Evaluation was made of crude oil, liquids and gas that would have been produced from January 1, 1974 through the end of the production life of the concession (December 31, 1988) as determined by LIAMCO's reservoir and production experts.
- In the evaluation process, the July 1976 official market price was used to value crude oil production for all years 1977 through 1988.
- The gross revenues thus evaluated were deduced by the operating costs and expenditures and by taxes and royalties payable to the Libyan Government at the rates in effect prior to the first nationalization measure in September 1973.
- From the result of that evaluation which reached \$90,420,000 from 1974 to 1976 and \$216,680,000 from 1977 to 1988, LIAMCO deduced new investment expenditures and other expenses then applied a discount factor at an annual rate of 12% and thus arrived at the lump sum of US\$186,270,000.

In support of its evaluation, LIAMCO again submitted various reports by experts and witnesses.

LIAMCO also compared the above evaluation of Concession 20 with the 'unjust enrichment' of the National Oil Corporation ('NOC') which effectively succeeded it as a concessionaire. It showed that the net profits realized by NOC from LIAMCO's share for the period of September 1, 1973 through the end of 1976 amounted to US\$45,913,228, and that the value of such profits through 1988 would be US\$56,895,645. It explained that the great difference between this figures and

LIAMCO own evaluation was due to the current high posted prices, income tax rates and royalty rates unilaterally imposed by the Libyan Government in derogation of the rights of the concessionaires, and acquiesced to by the latter under threat of full nationalization. (p.159).

Comparing these two greatly different evaluations, the Tribunal considered the following: (pp.159-160)

- In favour of the NOC unjust enrichment evaluation, it was more realistic as it represented the actual profit that had been realized. Although that evaluation was based on unilaterally imposed high posted prices and high rates of taxes and royalties, such prices and rates would probably have been accepted by LIAMCO. Nevertheless, the bases of this evaluation constituted a discharge of contract and a frustration of the intention of the contracting parties. Moreover, it did not take into account the great initial expenses and risks taken by LIAMCO in their pioneer works and subsequent activities.
- In favour of LIAMCO's evaluation, it was noted that although it did not heed the increase in said posted prices of crude oil and tax and royalty rates, it also did not heed the increase in the official market price of crude oil which was held to be a recurring certainty. On the other hand, this evaluation did not take into consideration the almost certain inflation in the currency till 1988.

For these reasons and considerations, the Tribunal considering both evaluations as two different exaggerated extremes, and applying the measure of 'equitable compensation' reached the conclusion that a lump sum of US\$ 66,000,000 was a reasonable equitable indemnification for the nationalization of the concession rights of LIAMCO's interest in Concession 20, Raguba Field. (p.160)

### ***3. Indemnification for expropriation of Petroleum Concession 17 – Mabruk Field (Loss of Profits)***

LIAMCO claimed indemnification for the loss of its rights to exploit the Mabruk field under Concession 17. It stated that at the time of its discovery in 1959 and for a number of years thereafter, the particular conditions of this field, including the nature of the oil reservoir, rendered it uneconomic to develop by the concessionaire. But considering the more recent fourfold increase in the world market prices of crude oil, the field would be economic to be developed.

Accordingly, LIAMCO claimed the value not only of the physical plant and equipment in this field, but also the sum of US\$ 7,500,000 which represented the minimum value to LIAMCO of the loss of the exclusive right and opportunity to develop this field under the terms of Concession 17.

Recalling that, to be taken into consideration, the loss of profits had to be certain and direct, the Tribunal considered that that loss claimed under Concession 17 did not possess these characters and was not in effect realized by NOC. The claimed loss of profits appeared thus doubtful and not probably realizable under the then conditions of petroleum exploitation in Libya. Therefore, the Tribunal decided that the indemnification claimed for this item could not be sufficiently sustained in law and rejected this claim. (p162)

## **D. Interest**

LIAMCO claimed interest on the sums mentioned above at the annual rate of 12% from January 1, 1974 through the date of payment of recovery of the arbitral award (p163). Article 229 of the Libyan Civil Code provided for an interest of 5% accruing from the date of its judicial demand, unless the contract or the commercial usage fixed another date for its accrual. The Tribunal decided that this rule should be applied and awarded interest at the rate of 5%. But as, in ‘general principles of law’, interest on damages was due on claims of money whose amount is known, it could not accrue for unliquidated damages before their judicial ascertainment and liquidation. Consequently, the Tribunal applied it only from the time of the final assessment damages at the date of this award. The Tribunal did not discuss as to whether interest should be simple or compounded. It can be inferred that it intended to award simple interest.

## **E. Costs**

According to Libyan law, costs should be split if both parties fail in some of their claims, otherwise they might be apportioned in a different manner among them according to the appreciation of the Court. (p.165) Clause 28 of the Concession Agreement included a similar provision. Pursuant to these provisions, the Tribunal deemed it ‘equitable’ to award the sum of US\$203,000 towards the costs and expenses of eth Claimant.

## **V. Implications / Initial Analysis**

- **International Law, Islamic Law, General Principles of Law.** This case attempts to identify common threads with regard to international and Islamic Law in relation to damages. Solutions to various questions (e.g. compensation for *lucrum cessans*) are often solved through analysis of Libyan, Islamic, and international law, as well as general principles of law. Relevant analysis may be useful for future disputes involving investors in countries operating under Islamic Law.
- **Historical context.** The Arbitrator’s analysis should be considered in the proper historical context (the award dates from 1977). It is clear that his reasoning was influenced by UN Resolutions of the 1970s (he referred to them on a number of occasions), which were initiated by developing countries in promotion of the New International Economic Order. With regard to damages, this is especially relevant for the standard of compensation, where the Arbitrator chose the formula of ‘equitable compensation’ (as opposed, e.g., to ‘adequate’ or ‘full’ compensation). However, this did not result in a palpable difference with respect to the heads of damages awarded and the methods of valuation. In particular, the arbitrator decided that it was ‘equitable’ to compensate not only for expropriated assets but also for lost profits.



- The principle of **Equity** is the overriding theme of the entire case. Particularly the determination of the scope of damages is exclusively solved through recourse to this ‘general principle of law’ recognized by Libyan, Islamic and international law. However, the status of this principle in international law is not clear. In particular, under what circumstances and to which extent may tribunals resort to this concept and what is its actual content? Is it different from adjudicating a dispute *ex aequo et bono*? It seems to be a very broad concept, and thus capable of accommodating almost any (subjective) line of reasoning; it therefore appears to be useful only in the absence of more specific rules of international law.
- The present case is an example of **creeping expropriation**, as the Libyan government took several measures which, eventually, led to total nationalization. In such cases, the relevant date for valuation of damages appears important because the market value of a given asset can be adversely affected as a result ‘creeping measures’ of expropriation and thus, one and the same asset might have a different value at different dates. However, in this case, the Arbitrator did not discuss the exact date on which the damages should be assessed.
- **Restitution in kind.** As explained by the Arbitrator, restitution in kind is not frequent in international law; given that an order of such restitution would severely interfere with State sovereignty.
- **Asset valuation.** Market value of physical assets was determined by the Tribunal on the basis of their book value reduced by depreciation, depletion and amortization. However, it could be argued that market value is higher than net book value.
- **Actual profits v estimated profits:** To award lost profits, the Tribunal considered Claimant’s estimates as well as actual profits made by the Claimant’s successor to the Concessions. While this seems an attractive method for determining lost profits, one should consider that each company differs with respect to management, know-how, resources, etc. Profits are therefore likely to differ, even when dealing with the same source of profit.
- The Tribunal suggested that to be recoverable, **lost profits** had to be ‘certain and direct’. Lost profits cannot be awarded where they are ‘doubtful and not probably realizable’ (as viewed at the time of expropriation, not at the time of arbitration).
- The Tribunal awarded **interest** only from the date of the award (under ‘general law’), which is inconsistent with many other awards where interest has been awarded from the date of expropriation.