First award on force majeure and Final award in case no. 4462 of 1985 and 1987*

Facts

On 20 November 1980, NOC - a Libyan State enterprise - and Sun Oil signed an Exploration and Production Sharing Agreement ("EPSA") under which Sun Oil was to undertake, finance and carry out an oil exploration program in Libya. In consideration therefor, Sun Oil was entitled to receive a share of the petroleum production fixed at 19% or 10% depending on the explored areas. The EPSA became effective on 20 December 1980.

The agreement was to be governed by and interpreted in accordance with Libyan law, including the Libyan Petroleum Law. It also contained an ICC arbitration clause.

The EPSA was concluded for a term of 20 years, subject to the following provisions:

"3.4. Withdrawal by Second Party

[Sun Oil] shall have the right, upon six months' prior written notice to [NOC], to withdraw from this Agreement with respect to any Area at any time during the Exploration Period for such Area, provided that the part of the Exploration Program applicable to such Area has been properly completed or [Sun Oil] has paid to [NOC] the
costs of the uncompleted part thereof (calculated by a reputable third party contractor working in [Libya] and acceptable to both Parties)."

"Article 22 - Force Majeure

22.1. Excuse of Obligations

Any failure or delay on the part of a Party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to force majeure. Force majeure shall include, without limitation: Acts of God, insurrection, riots, war, and any unforeseen circumstances and acts beyond the control of such Party.

22.2. Extension of Term; Termination

Exploration activities began in the first semester of 1981. With NOC's consent, Sun Oil hired the US company Petty-Ray to carry out a seismic survey of certain areas.

On 18 December 1981, Sun Oil suspended performance, invoking the force majeure provision in the EPSA. Sun Oil claimed that its personnel, all of whom were US citizens, could not enter Libya after the US Government instituted an order declaring that US passports were no longer valid for travel to Libya. NOC disputed Sun Oil's claim and called for the performance to be continued.

In March 1982, importation into the US of Libyan oil was banned by the Reagan administration, and export of goods and technical information was subjected to obtaining a license. Sun Oil's application for a license to export oil technology was denied on 21 June 1982 on the ground that "implementation of the (contract) program could result in the transfer of technical data having significant strategic value to the ultimate consignee . . . ."

In late June 1982, Sun Oil notified NOC that it had no alternative but to continue to invoke the force majeure provisions of Art. 2 of the EPSA. It considered that the US passport and export regulations made it impossible for it to fulfill its contractual obligations under the EPSA and that, under these circumstances, it had terminated its contract with Petty-Ray.

On 19 July 1982, NOC initiated ICC arbitration proceedings pursuant to the arbitration clause in the EPSA. The Terms of Reference were signed by the parties and the three arbitrators on 12 April 1983 in Paris.

On 31 May 1985, the arbitrators rendered a first award on the issue of force majeure, holding that Sun Oil was not excused from its contractual obligations on the ground of force majeure. The reasoning of the arbitrators is reproduced herebelow in its relevant part.

On 23 February 1987, a final award was rendered in favour of NOC in the amount of US$ 20,000,000. An excerpt of the final award is also reproduced herebelow.

NOC sought enforcement of the arbitral award in the US. On 15 March 1990, NOC's petition was granted by the US District Court of Delaware. This decision is reported in this Yearbook at pp. 651-663 (US no. 110).
Excerpt

First award on force majeure of 31 May 1985

I. Definition of Force Majeure

1 "It is admitted by both Parties that the expression 'force majeure' covers, under general Libyan law, a legal notion which is reflected in Art. 360 of the Libyan Civil Code. According to said article and to the interpretation given thereof by the Supreme Court of Libya, the effect of force majeure is to release the obligor from his obligation under the agreement and force majeure is established when an event meeting the three following conditions occurs: (i) being beyond the control of the parties, (ii) being unforeseeable at the time the agreement is entered into and (iii) rendering the performance of the obligation absolutely impossible. The Parties acknowledge that under Libyan common law force majeure is subject to the existence of these three conditions even if there are dissenting opinions as to the manner, more or less strict, of how to construe them.

2 "The Parties also acknowledge that Art. 360 of the Libyan Civil Code is not a public order provision and that it is therefore possible to contractually waive its provisions. It is admitted that contracting parties are entirely free either to exclude force majeure or, on the contrary, to make its conditions more flexible. This is the mere application of the principle according to which the contract constitutes the law between the parties, which principle is contained in Art. 147 of the Libyan Civil Code.

3 "As a consequence, both Parties first refer to the force majeure clause set forth in the EPSA (Art. 22) in order to find out the common intent of the parties. While they agree on this approach, NOC and Sun Oil fully disagree on the meaning and the consequences entailed by such clause.

(....)

4 "The fact that the Parties felt it necessary to include in the EPSA a force majeure clause, demonstrates that they were not satisfied with the mere application of the rules of the Libyan Civil Code relating thereto. What was their common intention? This intention is not obvious when reading Art. 22 of the EPSA. This article, notwithstanding the comments made upon it, while referring at many times to force majeure, does not give any definition thereof.

5 "The first sentence of Art. 22.1 merely indicates the situations in which force majeure may be invoked ('any failure or delay on the part of a party in the performance of its obligations or duties') and the effects of force majeure when it is established ('failure or delay . . . shall be excused to the extent attributable to force majeure'). As to the second sentence of Art. 22.1, it only lists - while specifying that such enumeration is made without limitation - a certain number of events which are expressed only as falling within the scope of applicability of force majeure and not as constituting per se events of force majeure ('Force majeure shall include . . . '). Art. 22.2 entitled 'Extension of Term; Termination', merely specifies the consequences of the situation created by force majeure once it has been established ('If operations are delayed, curtailed or prevented by force majeure . . .') and the time limit for performing the agreement has been thereby affected ('. . . and the time for carrying out obligations . . . is thereby affected . . .').

6 "Among the events which may constitute force majeure are 'any unforeseen circumstances and acts beyond the control of the party'). This definition is extensive. It proves without any doubt the intent of the parties to extend the scope of force majeure beyond the cases traditionally deemed to constitute an irresistible occurrence (war, natural disasters etc.). In this respect, it reflects a certain trend, which is displayed to a greater or lesser extent in long term international contracts, to define force majeure less strictly that under most domestic contracts. It still remains to define how far did the parties intend to go in making this approach more flexible.

7 "The Tribunal does not exclude the possibility that in selecting the adjective 'unforeseen' instead of 'unforeseeable' Sun Oil and NOC expressed their intention to exclude the requirement of unforeseeability or at least, not to give to such requirement a strict meaning. However, what of the other condition required under general Libyan law, namely the impossibility to perform? Art. 22 does not make any reference thereto. Does this mean that any
circumstance beyond the control of the Parties would excuse the nonperformance of the obligation or the delay in performing subject to the sole condition that such circumstance was not foreseen?

8 "Such approach would be difficult to be admitted because it would result in allowing the enforceability of contractual obligations to be challenged upon the occurrence of the slightest difficulty and neither party makes such an argument. Art. 22.1 provides that: 'Any failure or delay on the part of a Party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to force majeure . . .'. The word 'attributable' underlines the requirement for a direct casual link between the event invoked as a force majeure event and the non-performance or the delay in performing the obligation. It does not, however, give the key to the problem. There remains to consider whether the event invoked resulted in rendering, definitively or temporarily, impossible the performance of the obligation.

9 "It is true that more and more international long term agreements contain provisions according to which is considered as an event of force majeure any event beyond the control of the parties which renders the performance of the agreement very difficult and/or more expensive than anticipated or any event which cannot be overcome by the use of reasonable means at reasonable costs. Such provisions when agreed upon, leave no doubt as to the intent of the parties. They clearly reflect that the parties intended to avoid that the impossibility to perform be considered as the sine qua non requirement for force majeure. However, in order to be accepted, such exceptions to the common law of force majeure must be expressly provided for; they should not be presumed or implied.

10 "The word 'affected' which is contained in Art. 22.2, does not give any decisive indication as to the test of impossibility. This term is very vague and is contained in a provision of Art. 22 which, as previously mentioned, merely specifies what happens once force majeure is established. Also, according to Libyan common law which is to be referred to in case of ambiguity of Art. 22, the fact that the event invoked merely resulted in rendering the performance of the obligation more difficult or more expensive, would not be sufficient to establish force majeure.

11 "All this leads to the conclusion that it would be unjustified, in the absence of any specific provision to such effect in Art. 22, to construe such article as revealing an intent of the parties to waive an essential rule of Libyan common law according to which force majeure is only established when the event invoked by the defaulting party created an impossibility to perform whether on a temporary or a permanent basis.

12 "To summarize, the Tribunal considers that Art. 22 expresses the intent of the Parties not to strictly apply the usual criteria of force majeure, in particular with respect to the unforeseeability requirement, but that it does not exclude the fundamental requirement that the event must have rendered definitively or temporarily impossible the performance of the contractual obligations. The Arbitral Tribunal is satisfied that in entering into the EPSA, the Parties, whether inadvertently or on purpose, adopted a force majeure provision under which a Party's non-performance or delay in performance is excused only if it has become impossible for that Party to perform the Agreement according to its terms.

13 "Is Libyan Petroleum Law inconsistent with such interpretation? It does not seem so for the mere reason that the standard force majeure clause annexed to the Law which is to be included in concession type contracts, is drafted in terms which are very similar to those of Art. 22 and does not bring any new element for the purpose of the issue examined.

14 "As regards Libyan Civil Law, one must rely upon Art. 360 of the Libyan Civil Code and upon the case law of the Supreme Court of Libya in order to determine what is the meaning of 'impossibility to perform'. Art. 360 of the Libyan Civil Code reads in its English translation as follows:

  'Impossibility of Performance

  An obligation is extinguished if the debtor establishes that its performance has become impossible by reason of causes beyond its control.'"

15 The arbitrators then examined Libyan case law on force majeure and especially "the leading case on such matter", the
Libyan Supreme Court decision in the *Latsis* case, dated 20 June 1971. They concluded that:

"The oral and written testimonies of the experts on Libyan law submitted on this subject as well as a careful examination of the *Latsis* case leave no doubt as to the fact that, under Libyan Civil Law, the impossibility must not be determined subjectively, i.e., by reference to the capabilities and personal means available to the defaulting obligor but rather objectively. It is because of such meaning that the impossibility is said to be 'absolute' . . . .

16 "However, one should only compare what can be compared. The question is not to take as a reference an ideal and purely abstract type of obligor. The comparison can only be established with an obligor being liable for obligations of the same nature and of the same importance as those of the defaulting obligor, and who would be faced with the same difficulties. This also results from the *Latsis* case and from the experts' testimonies. Under this approach, one is led to believe that, under the meaning of Art. 22, non-

performance by a party or delay in performing contractual obligations is excused when an unforeseen circumstance beyond the control of the parties occur, which circumstance constitutes an obstacle such that an obligor, normally diligent, having the same obligations and placed in the same situation, could not have overcome it."

[...]

*For the policy of publishing the parties' names, see Note General Editor at p. 9.

1 Art. 360 of the Libyan Civil Code reads: "An obligation is extinguished if the debtor establishes that his performance has become impossible by reason of causes beyond his control."

2 Art. 147 of the Libyan Civil Code reads: "1. The contract is the law of the parties. It cannot be terminated or amended except by their mutual consent or for reasons admitted by the law. 2. However, if exceptional general circumstances arise which were not capable of being foreseen and in respect to which the performance of the contract, although it did not become impossible, it has become so onerous to the debtor that it threatens him with heavy loss, (then) the judge, according to the circumstances and after weighing the reciprocal interests of the parties, may reduce the onerous obligation to a reasonable limit. Any agreement to the contrary shall be void." (Based on translation in *ad hoc Award of 12 April 1977, Libyan American Oil Company (LIAMCO) v. Libya*, reported in *Yearbook VI (1981)* pp. 89-118.)

**Referring Principles:**

VI.3 - Force majeure