



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date:

Gujarat State Petroleum Corporation (India), Alkoor Petroo Limited (India), Western Drilling Contractors Private Limited (India) v. Republic of Yemen (Yemen), The Yemeni Ministry of Oil and Minerals (ICC Case No. 19299/MCP) – Award

Case Report by:

Tammi C. Pilgrim**, Anastasiya Ugale***

Summary:

In the unanimous Award rendered on July 10, 2015, the Tribunal decided that it had jurisdiction over the First Respondent, the Republic of Yemen, and upheld the Claimants' claims that: (1) a Force Majeure period of over 6 months existed, thereby entitling the Claimants to terminate three Product Sharing Agreements ("PSAs") entered into with the Yemeni Ministry of Oil and Minerals; (2) the Claimants validly terminated the PSAs; and (3) the Respondents were and are not entitled to draw down on three related standby letters of credit issued by the International Bank of Yemen on August 9, 2008. However, the Tribunal denied the Claimants' claim that the Respondents should return bonus payments made to them under the PSAs. Finally, the Tribunal dismissed all of the Respondents' counterclaims claiming entitlement to draw down on the said standby letters of credit, and entitlement to monetary compensation for the Claimants' failure to perform the PSAs. The Tribunal awarded the Claimants 75% of their costs of the arbitration, including 40% of the costs and expenses incurred by the Claimants in extending the standby letters of credit for the benefit of both parties (as ordered by the Tribunal in a previous procedural order).

Main Issues: Jurisdiction – agency – choice of law; Interpretation of "Force Majeure" – applicability of substantive law to contract.

Tribunal: Dr. Laurent Lévy – President, Philippe Pinsolle, Sir Bernard Rix

Claimants' Counsel: Marcus Burianski, Nandan S. Nelivigi, Christian M. Thiessen, Daniel Eckstein (White & Case LLP, Frankfurt, Germany).

Respondents' Counsel: Benjamin Knowles, Darcy Beamer-Downie, Ian Hopkinson, (Clyde & Co. LLP, London)

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Digest

1.- Relevant Facts and Procedural Dates

The Claimants are all companies duly organized and existing under the laws of India, and are engaged in petroleum exploration and production. In 2006, the Claimants decided to engage in hydrocarbon activities in Yemen. Pursuant to this, the Claimants bid for and were awarded exploration and development rights over 3 Blocks (the “Blocks”) across various governorates¹ in Yemen. On March 17, 2009, the Claimants entered into Production Sharing Agreements (“PSAs”) with the Yemeni Ministry of Oil and Minerals and the Yemen General Corporation for Oil and Gas.² The PSAs were divided into an Exploration Phase of 6 years, followed by a Development Period. The Exploration Phase was further sub-divided into a First Exploration phase of 4 years, which is the relevant period for the purposes of the dispute, and a Second Exploration period of 2 years. The First Exploration period commenced on March 17, 2009.

The present dispute arose out of the suspension of payments and subsequent cancellation of the PSAs by the Claimants on the basis that they were entitled to do so because a Force Majeure event occurred and continued for a 6-month period, as stipulated in the PSAs. The Respondents disputed that a Force Majeure event under the PSAs existed. On April 10, 2011, the Claimants gave notice to the Respondents, invoking the Force Majeure clause and thereby giving rise (in the Claimants’ view) to the Claimants’ right to suspend payments under the PSAs. The Respondents rejected this notice on April 13, 2011. Despite attempts made to negotiate a solution, on February 13, 2013, the Claimants gave notice to the Respondents, purporting to terminate the PSAs on the abovementioned grounds. The Respondents rejected the notice and subsequently drew down on the standby letters of credit previously issued by the Yemeni International Bank as part of the guarantee of the performance of the Claimants’ obligations under the PSAs.

On February 25, 2013, the Claimants filed the request for arbitration with the ICC International Court of Arbitration. The Tribunal thereafter made several procedural orders in relation to the conduct of the proceedings. On January 10, 2014, the Respondents requested the Tribunal to decide whether the First Respondent should be included as a party to the arbitration. On January 14, 2014, the Tribunal denied the request on the basis that it was inapposite to determine that jurisdictional point at the time in light of the imminence of the

¹ This is a political subdivision in Yemen. (¶ 165).

² A mandatory partner required under Yemeni law.

evidentiary hearing. (¶ 33). After the evidentiary hearing was held on September 8-12, 2014, the Claimants objected to certain claims made by the Respondents in their post-hearing submissions, on the basis that the claims were “new claims”. (¶ 38). As a result, with the agreement of the parties, the Claimant filed submissions in response on November 10, 2014. The Tribunal closed the proceedings on May 4, 2015. (¶ 37).

The parties did not dispute that Yemen suffered a period of instability from early 2011 which saw, *inter alia*, the occurrence of kidnappings, attacks, tribal clashes, a declaration of a state of emergency by the Yemeni government which lasted 41 days, discussions by the Yemeni Cabinet on the security situation and the issuance of travel advisories by foreign governments. (¶ 21).

2.- Analysis by the Tribunal

2.1 Jurisdictional objection over the First Respondent (the Republic of Yemen, “ROY”): lack of agency relationship between the Ministry of Oil and Minerals (the “Ministry”) and the ROY.

As a preliminary issue, the Tribunal assessed whether the Ministry was an agent of the ROY, thereby making the ROY a proper party to the arbitration. The Respondents argued that Yemeni law (the substantive law of the arbitration) governed the issue. (¶ 60). Specifically, the Respondents relied on Decree No. 40 to support the position that the Ministry was a separate legal entity with capacity to enter into contracts independently of the ROY, and had in fact done so in the PSAs. (¶ 60). In contrast, the Claimants argued that jurisdiction of the Tribunal over the ROY was governed by French law, which recognized that the state is bound by the agreement where an arbitration agreement has been entered into by a state organ. (¶ 62). The Claimants further submitted that the Respondents were effectively the same under the Yemeni Constitution and that, contrary to the Respondents’ submission, Decree No. 40 stated that the Ministry was not a separately legal entity from the ROY.

The Tribunal found that irrespective of the application of Yemeni Law or French law, the ROY was a party to the PSAs. (¶ 75). Agreeing with the Claimants, the Tribunal found that Decree No. 40 supported the position that the Ministry was a suborgan of the ROY, and also that the Yemeni Constitution did not create or recognize separate legal existence between a ministry and the ROY. (¶ 69). Further, the Tribunal found that the parties had agreed under the PSAs to select French law to govern the procedural aspect of the arbitration, including jurisdiction issues. (¶¶ 71-72). Under French law, a valid arbitration agreement made by a ministry would bind the state except if the agreement violated international public policy. (¶ 73). Thus, having created a valid arbitration agreement, the Ministry bound the ROY and the ROY was also a proper party to the PSAs and the proceedings. (¶ 74).

2.2 Termination of the PSAs for Force Majeure

The Tribunal noted that the parties agreed that the PSAs contained certain prerequisites to the termination of the PSAs, namely, the occurrence of a Force Majeure event within the meaning of Article 22.2, which event continued for a 6-month period. (¶¶ 106, 111, 134). This gave rise to analysis of four areas of inquiry: (i) whether a Force Majeure event occurred that might enable the termination of the PSAs, (ii) the location and duration of any Force Majeure period, (iii) whether this event prevented the Claimants’ performance under the PSAs; and (iv) whether the Claimants served a valid notice of termination. (¶ 107).

However, the Respondents argued that the requirements in Article 22.2 were minimum requirements only, and that the Claimants would also have to demonstrate that (i) they would have performed their minimum work obligations under the PSAs but for the alleged Force Majeure events; (ii) the events relied on were unforeseeable at the time of contracting; (iii) the events made performance impossible and not just harder; (iv) the events fall within the contractual definition of Force Majeure; and (v) there was a continuing state of Force Majeure in the 6 months immediately preceding the Claimants' notice of purported termination. (¶ 106).

2.2.1 A Force Majeure event (as defined in the PSAs) existed

The parties agreed that Article 22.2 of the PSAs contained the criteria for determining whether a Force Majeure event existed, namely: direction of the government, riot, insurrection, events "not due to fault or negligence" which are "beyond reasonable control" (¶ 110).

In support of their position, the Claimants asserted that there was an extreme risk of crime and kidnappings in the areas of the Block regions and an extreme risk for transport and logistics activities relating to the Blocks. (¶ 112). The Claimants further argued that these events fell within the catch-all provision in Article 22.2 as constituting events "not due to fault or negligence" of the party asserting Force Majeure, and which are "beyond reasonable control" of that party. (¶ 113). For their part, the Respondents asserted that the Yemeni Law requirements of unforeseeability and impossibility were to be read into the contract and that the Claimants did not submit particulars of the alleged events, dates that they occurred or an explanation of how these prevented the Claimants' performance. (¶ 114).

The Tribunal found that a Force Majeure event "not due to fault or negligence" which was "beyond reasonable control" occurred and therefore did not find it necessary to consider whether other Force Majeure events within the meaning of Article 22.2 of the PSAs in fact occurred. (¶ 111). Mainly, these events were:

- Yemen's declaration in March 2011 of a state of emergency, due to riots in some cities, which lasted for 41 days;
- Yemeni cabinet meetings on combating the national security issues, including combating Al Qaeda attacks;
- The issuance by foreign countries of travel advisories advising their own citizens to leave Yemen or not to travel there;
- Two resolutions by the United Nations Security Council which described the "worsening situation" in Yemen, specifically calling for cessation of attacks on oil and gas infrastructure;
- Multiple news reports; and
- The fact that other companies in Yemen contemporaneously made Force Majeure declarations due to the deteriorating situation. (¶ 117)

2.2.1.1 No additional extrinsic criteria should be read into the PSAs Force Majeure clause

The Claimants argued that neither the clear wording of Article 22.2 of the PSAs nor the text of the PSAs permitted recourse to Yemeni law for interpretation, but instead showed that the Parties intended to craft a Force Majeure clause that confined the meaning of Force Majeure to the definition stipulated in the text of the contract. (¶¶ 136 - 137). According to the

Claimants, any ambiguity in the PSAs should be resolved to the Respondents' detriment under the *contra preferentum* rule of interpretation. (¶ 138).

The Respondents' position was that since the PSAs were Yemeni contracts, they could not be interpreted without reference to Yemeni legal concepts and principles, and relied on *National Oil Company v. Sun Oil Company of Libya* as authority for this view. (¶ 139). Further, Article 22.2 of the PSAs did not contract out of the Yemeni law requirements of proof that the events were unforeseen at the time of contracting and that performance had become impossible. (¶ 139).

The Tribunal found that the parties' experts agreed that where provisions of a contract are clear, they should be given effect. (¶ 142). The Tribunal also found that the language of Article 22.2 was unambiguous, and that its inclusion of some requirements of Yemeni law (for example, that the event was "beyond reasonable control") but exclusion of others, demonstrated the parties' intent to design their own custom-made definition of 'Force Majeure' for the purposes of the PSAs. (¶¶ 143 - 144). Further evidence that the parties intended the clause to be self-contained arose from review of the other terms of the PSAs, such that, where the parties had intended to introduce general Yemeni law, they used specific language in order to do so. (¶ 149, 154). This in turn gave rise to the presumption that the Tribunal should be slow to resort to Yemeni law, since this would require a proof (i) of ambiguity in a contractual provision; and (ii) that application of Yemeni law did not contradict the common intent of the parties. (¶ 149). The Tribunal found the Respondents' authority *National Oil Company v. Sun Oil Company of Libya* to be of limited persuasive value, since that case concerned a different contract (specifically, a non-exhaustive and vague force majeure clause) and different applicable law. (¶ 152).

The Tribunal also found that even if the principles of unforeseeability and impossibility were to apply, then they would also have been satisfied. (¶¶ 159 - 161). Here, the Tribunal disagreed with the Respondents by finding that the principle of unforeseeability required an analysis of whether or not there was a sharp increase in risk beyond what was contemplated by the parties at the time of contracting (¶ 159). The events of March 2011 to February 2013 satisfied that requirement. Further, using the Respondents' definition of impossibility as the party being "unable to perform its obligations in a practical way", the Tribunal determined that any impossibility requirement was also satisfied. (¶ 160).

2.2.2 The Force Majeure period existed from March 2011 to February 2013 which caused the inability of the Claimants to perform

The Tribunal also found that Article 22.2 of the PSAs, which stipulated the 6-month period for which the Force Majeure period was to occur, did not require the event itself to be continuous. Instead, the clause required the effect – the party's inability to perform – to continue for more than 6 months. (¶ 179). The Tribunal also noted that a party did not lose the right to rely on the Force Majeure clause in the PSA after the expiry of a 6-month period because a party may choose to wait for some time afterwards (for example, to determine whether performance was still possible). If not, that party should not be penalized for having waited before terminating the agreement. (¶ 182).

The parties also agreed that the clause required a causal nexus between the event and the non-performance, but disagreed on the extent. Whereas the Claimants argued that only a sufficient link was necessary between the event and the consequences, the Respondents submitted that a

“but for” analysis was required, and that a party could not rely on the Force Majeure clause if there were other breaches of the PSAs causing non-performance. (¶ 185). In this vein, the Respondents argued that the Claimants were not entitled to assert Force Majeure since their non-performance was caused by their “unstructured approach to performance” and “their inability to resolve the ongoing dispute with their joint venture partners.” (¶ 188).

The Tribunal noted that the Force Majeure clause in the PSAs did not exclude reliance on it by a party once a Force Majeure event occurs, even if the party is already in breach at the time of the Force Majeure events. (¶ 192). According to the Tribunal, the test was whether the Claimants were prevented from performing their obligations because of the Force Majeure events. (¶ 199).

The Tribunal referred to the Claimants’ detailed schedule chronicling the events which contributed to the security situation in Yemen from March 2011 to February 2013, finding as a matter of fact that the Force Majeure events (i.e. the security situation in Yemen, as evidenced by numerous incidents of social and tribal unrest, sectarian clashes and crimes, kidnappings and other incidents affecting peace and security) lasted for more than 6 months and prevented the Claimants from sending ground personnel to carry out seismic surveys from the capital Sana’a, in the governorates where the Blocks were located, as well as the roads to the Blocks and within the Blocks. (¶ 160, 170, 181, 213, 219, 224). The Tribunal further found that the situation on the ground could not have been mitigated, since the measures suggested by the Respondents these measures were either unrealistic to reduce risk, inappropriate for the task or too costly. (¶ 214-216).

The Tribunal also rejected the Respondents’ argument that the Claimants should also have demonstrated willingness to perform, on the basis that additional requirements are not to be introduced to the PSAs’ requirements, especially where the parties’ respective legal expert witnesses seemed to agree that “willingness to perform” is neither a requirement under the PSAs nor under general Yemeni law. (¶ 195).

2.2.3 The PSAs were validly terminated by the Claimants

On this point, the Claimants asserted that their notice of termination given on February 13, 2013 was given in time. However, the Respondents disagreed and argued that the right to termination must be exercised promptly. Thus, the Claimants could not validly give notice of Force Majeure where the Force Majeure event had arisen 11 months earlier. (¶ 225).

The Tribunal noted that the PSAs did not expressly provide a time period during which the notice was to be served. (¶ 225). Having determined that the effect of the Force Majeure events was felt within the period leading up to the Claimants’ notice of termination given on February 13, 2013, the Tribunal found that the Claimants were entitled to and did validly terminate the PSAs. (¶ 226).

2.3 Reimbursement of Bonus payments

The Tribunal found, as a matter of construction of the PSAs, that the Claimants’ bonus payment obligation to the Respondents continued as long as the PSAs were in full force and effect and were expressly excluded from suspension should a Force Majeure period have arisen. (¶ 238). Since the Claimants were contractually bound to make the bonus payments

until the PSAs were validly terminated, the Respondents were not required to reimburse the payments that had actually been made in the period of PSAs' validity. (¶ 238)

2.4 The Respondents' Counter-Claims

The issue relating to Respondents' counter-claims arose during the post -evidentiary hearing period, after the Respondents were allowed to amend their prayer for relief and filed a Note on Quantum on September 19, 2014. (¶ 240). In their reply of September 26, 2014, the Claimants objected to what they considered to be "new claims". The Claimants were permitted to and did respond to the claims. (¶ 240).

The Respondents' counter-claims were for the entitlement to draw down on the aforementioned standby letters of credit, as well as for monetary compensation under provisions of the Yemeni Civil Code for the Claimants' non-performance of their Minimum Work Obligations and obligations under Work Program & Budgets (WP&Bs) under the PSAs. (¶ 244).

None of the Respondents' counter-claims succeeded. (¶ 310). The Tribunal found that Force Majeure precluded the Respondents' right to draw down on the standby letters of credit and also excused the Claimants' performance for the Minimum Work Obligations, except for the obligation to reprocess data for the Blocks. (¶ 248, 250). In connection with the Claimants' obligation of reprocessing, the Tribunal also upheld the Claimants' argument that the obligation was either factually impossible or served no useful purpose (¶¶ 263, 270 - 271). Finally, the Tribunal declined to impose a binding obligation on the Claimants, where the express terms of the PSAs did not specify that the WP&Bs were binding in nature. (¶ 297).

3.- Decision

The Tribunal rejected the jurisdictional objection to the inclusion of the ROY. In addition, it upheld the Claimants' claims that: (1) a Force Majeure period of over 6 months existed, thereby entitling the Claimants to terminate the PSAs; (2) the Claimants validly terminated the PSAs; and (3) the Respondents were and are not entitled to draw down on the three related standby letters of credit issued by the International Bank of Yemen on August 9, 2008. However, the Tribunal denied the Claimants' claim that the Respondents should return bonus payments made to them under the PSAs. Finally, the Tribunal dismissed all of the Respondents' counterclaims claiming entitlement to draw down on the said standby letters of credit, and entitlement to monetary compensation for the Claimants' failure to perform the PSAs. The Tribunal awarded the Claimants 75% of their costs of the arbitration, including 40% of the costs and expenses incurred by the Claimants in extending the standby letters of credit for the benefit of both parties (as ordered by the Tribunal in a previous procedural order).