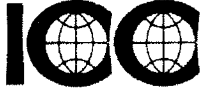

International Chamber of Commerce

The world business organization

International Court of Arbitration • Cour internationale d'arbitrage

AWARD
SENTENCE

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05-011026-015A

INTERNATIONAL COURT OF ARBITRATION

CASE No. 9058/FMS/KGA

1. BRIDAS S.A.P.I.C.
(Argentina)
2. BRIDAS ENERGY INTERNATIONAL LTD
(British Virgin Islands)
3. INTERCONTINENTAL OIL & GAS VENTURES LTD.
(British Virgin Islands)
4. BRIDAS CORPORATION
(British Virgin Islands)

v/

1. GOVERNMENT OF TURKMENISTAN
(Tukmenistan)
2. CONCERN BALKANNEBITGAZSENAGAT
(Tukmenistan)
3. STATE CONCERN TURKMENNEFT
(Tukmenistan)

This document is an original of the Award rendered in conformity with the Rules of the ICC International Court of Arbitration.

INTERNATIONAL COURT OF ARBITRATION

OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE NO. 9058/FMS/KGA

BETWEEN

BRIDAS S.A.P.I.C.
BRIDAS ENERGY INTERNATIONAL, LTD.
INTERCONTINENTAL OIL & GAS VENTURES, LTD. and
BRIDAS CORPORATION

CLAIMANTS

AND

GOVERNMENT OF TURKMENISTAN
CONCERN BALKANNEBITGAZSENAGAT and
STATE CONCERN TURKMENNEFT

RESPONDENTS

FINAL AWARD

Background and General Comments

In the Third Partial Award, the arbitrators stated:

> "The arbitrators retain jurisdiction to deal with all questions relating to the interpretation and implementation of the this award, any matters of calculation and to correct any errors of form or arithmetic. If their further assistance were required, they are to be so notified within 60 days of the date of this partial award, after which steps will be taken to conclude finally the arbitration."

After being apprised of the wish of the Respondents to seek further assistance from the arbitrators and after considering comments made by the parties, the arbitrators set a schedule for the delivery of submissions.[1] Both parties made requests for assistance.

The jurisdiction retained by the arbitrators is narrow and is consistent with the law and practice that applies to international commercial arbitrations. Partial Awards finally dispose of the issues they address. It usually is not appropriate for arbitrators to re-open decided issues of fact and law in the absence of new evidence or developments and then only in exceptional circumstances. The integrity of the arbitral process requires as much certainty as possible. Arbitrators, like other decision-making tribunals, have the obligation to bring finality to their process. Those who disagree with their decisions may avail themselves of whatever avenues are open to them, but arbitrators should be wary of venturing into the corridors of those processes.

The jurisdiction retained in this case is limited to interpretation, implementation, calculations and errors of form or arithmetic. It goes no further.

The arbitrators will address the matters raised by the parties, but they shall not re-open substantive determinations of fact and law.

The Claimants' Issues

Turkmenbashi Refinery Award

The Claimants say that the arbitrators made an error in determining the total payable to them because it does not include 50% of the amount of an arbitration award made in favour of JV Keimir against the Turkmenbashi Refinery. They note that the Respondents were content to have this amount included in the sum payable to the Claimants, but with an assurance that the Claimants could not try to collect on the award themselves. The only disagreement appears to concern a nominal amount in the calculation of interest. To resolve any impasse, the

[1] In their submission, the Claimants state that "The deadline for submissions was later moved to 27 November 2000". In fact, as is apparent from the wording of the quoted passage from the Third Partial Award, no date had been set for the delivery of submissions.

Claimants say that they are prepared to have included in the award $28,423,000[2] plus interest at 10% from January 31, 2000 until the date of payment.

At the hearings in January and February 2000, both sides agreed that the 50% should be included in the quantum payable to the Claimants. The Respondents stated:

> "...all that needs to be said is that -- is the award reflect that compensation of their entire interest in that award has been included in the award, and, therefore, they have no further right, title or interest to the award."[3]

The Respondents now assert that the Claimants request for inclusion of the sum is time-barred. The arbitrators are satisfied that consideration of this matter is within the bounds of the jurisdiction retained by them in the Third Partial Award. It is a calculation error. The effluction of time is not a bar.

Although the arbitrators expressed concern with the conceptual accuracy of dealing with this receivable of JV Keimir in this fashion and suggested that the amount should have been included in the income stream and adjusted for the risk of non-collection, they accede to the position of the parties. The calculation of the sum payable to the Claimants will be amended accordingly.

Declarations

The Claimants ask the arbitrators to make declarations that they have no liabilities or obligations with respect to JV Keimir and that the Respondents hold the Claimants harmless and indemnify them for claims.

This request goes far beyond the jurisdiction that the arbitrators retained. Having accepted the repudiation of the JV Agreement by the Respondents and the Government, it is at an end. Whatever rights and liabilities remain are matters of law and not within the mandate of the arbitrators.

---

[2] The amount as presented initially was $28,446,181. All monetary amounts in this award are expressed in United States' dollars.

[3] Transcript, February 5, 2000.

Expenses after July 5, 1999

The Claimants ask for an award of the money they say they spent from July 5, 1999, the date they accepted the repudiation, and October 11, 2000, the date they say they were removed from management of JV Keimir.

This also is not a request within the bounds of the jurisdiction that the arbitrators retained. Recovery of money expended after July 5, 1999 is a matter dealt with previously by the arbitrators. It is not appropriate for it to be considered further by this tribunal.

Retention of Jurisdiction

The Claimants ask that the arbitrators retain jurisdiction for a further 90 days to take into account the possibility that the parties may settle the dispute and want a consent award.

The arbitrators are not prepared to accede to this request. On several occasions steps have been taken and offers made to assist the parties to resolve this matter. It now is time to bring closure to the proceeding.

Costs

The Claimants seek a further order concerning costs.

Apart from the clarification requested by the Respondents and the necessary disposition of the "costs of the arbitration", the arbitrators make no further order as to costs.

The Respondents' Issues

Reasons

The Respondents contend that the Third Partial Award does not contain adequate reasoning expressing the arbitrators' decision concerning the quantum of damages.

The parties can be well assured that throughout this proceeding all three arbitrators considered very carefully all of the evidence adduced and the submissions made by the parties. A review of the three partial awards and of the rulings that are reproduced in them,

together with the dissenting comments of Professor Smit illustrate the extent to which all of the arbitrators have gone in articulating their conclusions.

An assessment of damages for breach of contract can, but need not be, a specific formula-based calculation. A trier of fact is entitled, if not obliged, to exercise judgement in determining what is appropriate compensation based on the evidence as a whole.

In this case, the formula for calculating damages based on a loss of bargain, is stated. The arbitrators were entitled to quantify the components of the formula based on their judgement taking into account all of the relevant evidence and they did so. In the process they were entitled to accept and to reject evidence and they did so. In this context the arbitrators said in the Third Partial Award:

> "Determination of the input numbers for a calculation of damages for loss of bargain is a question of fact which is a matter of judgement based on the evidence."

and

> "Calculation of the present-day value of the Claimants' lost income stream is complex. It must take into account not only relevant risk and discount factors, but deductions dictated by the JV Agreement. These include certain funds, royalties and taxes at different rates. The numbers advanced by the parties, as noted above, take these matters into account."

A reasoned decision must state the basis on which conclusions are based. It needs to address the essential components of the case and to explain why the decision-maker made the decisions that were made. The essential contentions of the parties are considered, but not every point made is addressed.

Present Value

The arbitrators are accused of a "back of the envelope" approximation of damages in the context of the present value of the lost income stream. The basis for the arbitrators' conclusion is stated in the Third Partial Award as follows:

> "The volume of oil calculated by the parties is significantly less than that of gas. In a chart presented by the Respondents at the 2000 hearing, the total barrels of oil and BOE of gas asserted by the Respondents are respectively 40,807,107 and 127,247,004 and for the Claimants 48,089,648 and 161,527,189. In either calculation, gas is approximately 75% of the total reserve volume.
>
> The present value of the lost oil and gas income stream accounts for approximately $798,000,000 of the Claimants' total claim as of July 5, 1999. It is based on a gas price of $1.75 per mcf, which the arbitrators have concluded is too high. As an approximation, it could be inferred that something in the order of 75% of that value, or $598,000,000, is attributable to gas. The arbitrators conclude that a fair assessment of the present value of the lost income stream for gas is $295,000,000 to which they add $200,000,000 for the value of oil, making a total of $495,000,000."

The conclusion is rooted in the positions taken by the parties, some of which were accepted and some of which were not, a consideration of the mathematical relationship which is revealed by a consideration of those positions and the opinion of the arbitrators as to what was a fair assessment of the present value. The resulting number is not a mathematical calculation. It was neither determined nor expressed as such. It is a conclusion of judgement that flows out of the arbitrators' consideration of the positions advanced by the parties. Those positions were themselves based on the estimates of experts, which derived from their judgements of a number of factors. The Respondents would have the arbitrators bound to accept completely the judgement of one set of experts and to reject completely the judgement of the other set of experts. The arbitrators were not required to and did not do so.

It also is essential to recognize that the Third Partial Award, like all decisions, must be read and considered as a whole. The conclusion concerning present value flows out of previous analyses of positions and issues, for example, the price of gas.

Discount Factor

The Respondents hearken back to their submission made several times and fully considered by the arbitrators related to the statement in the First Partial Award concerning the

arbitrators' preference for the evidence of the Respondents' expert. It would serve no useful purpose to repeat in this award the comments made previously by the arbitrators on this issue, but there can be no doubt that the position of the Respondents was aired a number of times and well-considered by the arbitrators.

The Respondents assert that the arbitrators dealt with the question of the appropriate discount rate "[I]n a mere six lines...." This presumable refers to the following paragraph in the Third Partial Award:

> "Having considered the evidence adduced and submissions made at the January and February, 2000 proceeding, the arbitrators see no reason to depart from their earlier assessment of the appropriate discount factor. It was higher than the non-risk discount factor advanced initially by the Claimants[4] and takes into account the various risks referred to by the parties in the evidence, including those that derive from a consideration of the production plan insofar as it delays or eliminates volumes of production."

In fact the arbitrators had much more to say on the subject. They began by noting that the exercise was "... a question of fact which is a matter of judgement based on the evidence". Then continued stating:

> "It is instructive to note what was said in the First Partial Award concerning the discount rate.
>
>> 'Claimants' rate is too low and does not adequately reflect risk and the provisions of the contract. The arbitrators conclude that a rate of 10.446% which is the rate charged by the Claimants to the Respondents on the Claimants' FPC account, *in the circumstances of this case reflects the reality of the factual context as of June 30, 1997*, the notional date for the receipt of money, and the terms of the JV Agreement.' (emphasis added).
>
> Although they consider it to be too high, the Claimants do not challenge the arbitrators' conclusion in the First Partial Award concerning the discount factor, but the Respondents say that it is too low and should be revised upward,

[4] 7.5% as opposed to 10.446%.

> particularly because in another arbitration proceeding, the Claimants admitted that risk is relevant whereas the discount number they advanced in this proceeding did not include risk. Both parties adduced expert evidence concerning the feasibility of marketing the resource. The Claimants reviewed recent developments and future plans. They also referred to the optimistic, public position taken by the Government in recent times. The Respondents noted the absence of completed transportation facilities and the fact that control over them is in the hands of others. It was their position that no gas would be exported for several years."

Once again, an examination of what the arbitrators actually did shows that they considered the positions advanced by the parties, including the fact that the Claimants apparently took a different position on risk in another arbitration. The arbitrators are criticized for referring to the non-risk rate advanced by the Claimants, but this merely illustrated the fact that the arbitrators were alive to the fact that risk did have to be taken into account and that they did so. Their judgement was that 10.446% was an appropriate rate.

The Respondents repeat arguments concerning the long-term equity rate that were canvassed thoroughly previously. They did not then agree with the rate expressed in the First Partial Award and disagree with it now. The arbitrators considered all submissions concerning the discount rate and the widely disparate positions of the parties. The resulting rate was and remains their judgement of the rate that is appropriate in the circumstances of this case.

Amiable Composition

The majority of the arbitrators are accused of acting as *amiable compositeurs*. Albeit in a different context, the majority dealt expressly with its mandate saying:

> "The arbitrators are obliged to decide the matters in issue in accordance with law and are not authorized to act as *amiable compositeurs* or to decide *ex aequo et bono* and do not do so."

This fact has been central to the approach taken by the majority arbitrators throughout this proceeding. Repeatedly, they anchored their conclusions in the law. In some measure, their believe that the law constrained their ability to reach certain conclusions and to

fashion certain remedies has been at the root of the disagreement between the majority and the minority.

The Respondents confuse the exercise of judgement in the determination of facts with *amiable composition*. The majority arbitrators freely confess to undertaking the former and did not entertain the latter.

The Yashlar Award

No application was made to the arbitrators to consider the Yashlar Award. After the Third Partial Award was submitted to the ICC Court for review, the Respondents asked the Court to make the Yashlar Award available to this tribunal. The majority expressed their view that this should not be done in a June 2, 2000 letter to the ICC saying:

> "The arbitrators have received a copy of the Respondents' May 31, 2000 letter to the Secretariat.
>
> The Court previously declined to combine the Yashlar and Keimir arbitrations. Although similar, the contracts and circumstances involved differ. The quantification of damages, which is the subject matter of the Third Partial Award, is a fact-driven exercise. Conclusion of fact reached by another tribunal based on the evidence and arguments presented to it are of no assistance either to this tribunal or to the Court in reviewing the draft award.
>
> The points of difference between the two tribunals as noted by the Respondents at page four of their letter are neither surprising nor of concern. The reasons for concluding that the Government was a proper party in the Keimir arbitration were extensive and based on that contract and the course of dealings of the parties to it. The refusal to terminate was based on a finding of fact that the Respondents had not established 'cause'.
>
> It would not be appropriate for the arbitrators in either case to base their decisions on the conclusions in the other case, particularly in the absence of full argument identifying the basis upon which they could and should do so."[5]

[5] The chairman advised the ICC that Professor Smit preferred not to comment and to leave the matter entirely in the hands of the ICC Court.

They remain of that opinion. In any event, the Court itself refused to release the Yashlar Award to this tribunal in accordance with the ICC Rules that concern confidentiality.

Costs

The Respondents ask for clarification that the allocation of the costs of the audit as stated in the First Partial Award is separate from the costs dealt with in the Third Partial Award. That is the case. A partial award is final with respect to the matters dealt with dispositively therein.

Summary

The application of the Claimants is dismissed save for their request for a correction of the calculation of the amount owing to them by the Respondents related to the Refinery Award.

The application of the Respondents is dismissed save for their request for clarification of the costs of the audit.

This is the final award in this arbitration.

Disposition

The arbitrators award:

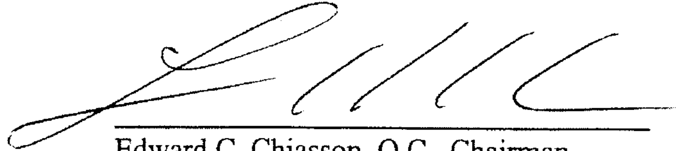
1. in addition to the sums expressed in the Third Partial Award, the Respondents shall pay to the Claimants $28,423,000 plus interest at 10% from January 31, 2000 until the date of payment;

2. upon payment of the aforesaid amount, the Claimants shall have no further right, title or interest in the arbitration award in ICC Arbitration No. 9046 made against the Turkmenbashi Refinery in favour of JV Keimir;

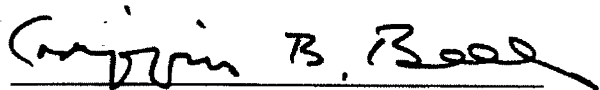
3. the disposition of the costs of the audit as set out in the First Partial Award is unaffected by the disposition of the costs of in the Third Partial Award or in this award;

4. the costs of the arbitration are fixed at $1,295,700; each side is responsible for 50% of this amount.

Made by the arbitrators and signed in the original as of January 26, 2001.



Edward C. Chiasson, Q.C., Chairman



Griffin B. Bell, Esq., Arbitrator

Professor Smit does not agree with the substantive conclusions in this Final Award and is providing separate comments to the parties stating his reasons.

INTERNATIONAL COURT OF ARBITRATION OF THE
INTERNATIONAL CHAMBER OF COMMERCE

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1. BRIDAS S.A.P.I.C. (ARGENTINA); 2. BRIDAS ENERGY INTERNATIONAL, LTD. (BRITISH VIRGIN ISLAND); 3. INTERCONTINENTAL OIL & GAS VENTURES, LTD. (BRITISH VIRGIN ISLANDS) V.TURKMENISTAN,
Claimants,

v.

GOVERNMENT OF TURKMENISTAN AND TURKMENNEFT,
Respondents.

Case No. 9058/FMS/KGA

Dissenting Opinion
of Hans Smit,
Fuld Professor of Law
Columbia University

I. INTRODUCTION

1. In my Dissenting Opinions to the First, Second, and Third Partial Awards, I have stated how, even if it were assumed, with the majority, that Turkmeneft did fundamentally breach the Joint Venture Agreement and that Bridas did not, I would resolve the dispute put before this Tribunal and have indicated my disagreements with the majority's decisions. I continue to adhere to the conclusions I reached in those Dissenting Opinions and therefore also dissent from the Final Award.

2. Pursuant to a statement in the Third Partial Award, the majority retained jurisdiction "to deal with all questions relating to the interpretation and implementation of this [i.e., Third Partial] award, any matters of calculation and to correct any errors of form or arithmetic. I believe that, but for one exception, none of the allegations and arguments advanced by the parties in their submissions purporting to be based on this retention of jurisdiction clause does in fact come within the powers reserved by the Tribunal. The one exception relates to the dispositions as to the allocation between the parties of the cost of the audit and those

of the arbitration. I agree with the majority's disposition that the allocation of the costs of the audit in the First Partial Award is independent and separate from the allocation of costs made in the Third Partial Award.

II. THE MERITS OF THE OTHER ARGUMENTS

3. Since I believe that the other allegations advanced by the parties do not trigger application of the retention of jurisdiction clause, I can be brief as to the merits of these allegations.

a. The Turkmenbashi Refinery Award

4. I do not judge that the request for an additional $28,423,000, with interest, raises a question that can fairly be regarded as one of interpretation and implementation of the Third Partial Award, nor one of calculation or error of form or arithmetic." I therefore judge that the Tribunal is functus officio in regard to this request.

5. Furthermore, the Turkmenbashi Award was rendered between the JV Keimir and the Turkmenbashi Refinery. This Tribunal has no authority to make a disposition in regard to this award, since it has authority over neither of the parties to this award.

6. If, as I have proposed earlier, Bridas had been ordered to transfer all of its interests in the JV Keimir to Turkemeneft, the argument for granting Bridas this additional recovery would be more compelling. But, in the absence of such a disposition, the Tribunal should leave the Turkmenbashi award alone. It is, of course, true that the majority's award does in fact grant Bridas recovery for revenues that, it is speculated, would have been generated by the JV Keimir. This approach is questionable, especially when not coupled with a disposition of Bridas' interests in the JV Keimir. It would appear to go too far when extended to awards actually recovered by the JV Keimir against a third party. As the majority properly notes, if the Turkmenbashi award is to be taken into account, account should also be taken of the real value of this award and the risk of

non–collection and should have been included in the putative income allotted to Bridas. In view of these conclusions, I need not rule on whether Bridas' claims are time–barred.

b. The Declarations Asked for by the Claimants

7. Since the Tribunal has no authority over the JV Keimir, it has no authority to make declarations in regard to claims the JV Keimir may have on Bridas or vice versa. In fact, whether the JV Keimir has claims on Bridas for alleged mismanagement is to be determined by another tribunal under applicable law.

c. Post July 5, 2000, Expenses

8. Any claim Bridas may have for post July 5, 2000, expenses cannot be grounded on the joint venture agreement. They arise under applicable law, arguably Turkmenistan law, and are to be determined by a competent tribunal, arguably a Turkmenistan tribunal. Indeed, since there was no legal basis for Bridas' continued management of the JV Keimir after July 5, 2000, under generally prevailing principles of quantum meruit, there would appear to be no basis at all. On the contrary, Turkmeneft may well have a claim on Bridas for unlawful retention of control of the JV Keimir.

d. Further Retention of Jurisdiction to Approve Consent Award

9. There is no basis in law or in the ICC Rules for a retention of jurisdiction for such purposes. In fact, with the rendition of the Final Award, the Tribunal loses any remaining jurisdiction it may have had.

e. The Reasons for the Majority's Award

10. The Third Partial Award is final insofar as regards the reasons for it. If the Claimants judge the reasons given to be inadequate, their recourse, if any, is in the courts.

f. The Yashlar Award

11. The Yashlar Award strikingly illustrates the problems inherent in multiple arbitrations between the same parties regarding their relationship. When Turkmeneft nominated me as its arbitrator in the Yashlar arbitration, I stipulated that it should commit itself to approving the selection of the same chairman in the two arbitrations. The aim was to have the same arbitrators appointed in the two cases that involved the same relationship. Regrettably, the ICC Court's refusal to confirm my nomination has led to exactly the problems I sought to avoid: The rendition by two separate tribunals of awards relating to the same relationship and raising substantially identical or similar issues that appear to be conflicting on essential points.

12. While I considered it not to be within the purview of my duties as arbitrator to advise the ICC Court on how it should rule on Turkmeneft's request to refer the Yashlar Award for consideration by this Tribunal, I strongly believe that this Tribunal should have considered it by inviting the parties or Turkmeneft to submit the award for possible avoidance of conflicts and such other action as might appear proper.

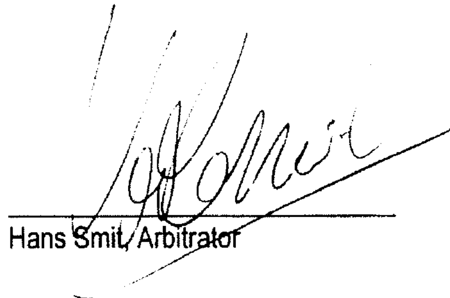
13. Consideration of the Yashlar award would have afforded the Tribunal an opportunity to consider whether issues that have arisen in this arbitration had been adjudicated conclusively in the Yashlar arbitration. If so, principles of res judicata would bind the Tribunal to make its findings concordant with those of the Yashlar Tribunal.

14. Furthermore, tribunals are properly concerned about the correctness of their conclusions. It is therefore surprising that the majority states that the difference between the findings of the two tribunals are not "of concern." Since there are at least some indications that the Yashlar Tribunal's findings are similar to the ones I proposed, it would have been both natural and proper for the majority to consider whether its conclusions, endorsed by only two arbitrators, were compatible with those of four other arbitrators addressing the same or similar issues.

III. DISPOSITIONS

15. I therefore do not concur in the first two dispositions of the Final Award, but agree with the third and fourth.

Houston, 31 January, 2001



Hans Smit, Arbitrator