

Ministry of Oil and Minerals  
(of the Republic of Yemen)

v.

- 1) Canadian Nexen Petroleum Yemen
- 2) Consolidated Contractors  
(Oil & Gas) Company S.A.L.
- 3) Occidental Peninsula LLC
- 4) Occidental Peninsula II, Inc.

ICC Arbitration No. 19869

Partial Dissenting Opinion  
Of  
W. Laurence Craig  
Arbitrator

21 November 2016

We hereby certify that this is a true copy of the original

Clyde & Co  
Clyde & Co LLP

02/02/2023

**ICC ARBITRATION N° 19869 MLP**

I feel obliged to file this partially dissenting opinion to the draft award in this case submitted by the majority to the ICC Secretariat on 11 November 2016 because, although there are many points in the draft on which I am in agreement, as presently drafted the award fails to adequately recognize that the Claimant has advanced its claims for indemnification based on the alternative legal grounds of Contractor's breach of abandonment obligations, breach of specific performance obligations (or damages in lieu of specific performance) of the Contract (including respect of obligation of good faith and performance in accordance with good oil field practices) and claims of damages for breach of contract.

The manner in which the majority has accepted to render a partial award on the "Threshold Legal Defenses" risks prejudicing the ability of the Claimant to get a full and fair hearing on the merits after it will have obtained adequate document production and had the opportunity to present oral evidence and expert testimony on the obligations of the Contractor both in respect to the good oil field practices standard applicable under the PSA, and the factual circumstances of the project, as well as the effect of these contractual obligations on establishing the dates on which the statute of limitations would apply for repetitive breaches of the obligations.

For the purposes of rendering a preliminary award on Threshold Legal Defenses, the Tribunal is required to accept the allegations of fact as pleaded by the party against

whom the legal defense is asserted (in this case against the Ministry who is Claimant in the arbitration but Respondent on Contractor's request for an award on Threshold Legal Defenses). Each party is required to respond to the allegations of law as framed by the other party.

The Contractor has failed to do this in respect to the major issues of breach of contract as framed by the Claimant for the most major shortcomings of Respondent in respect to performance of the Operator's major mission to properly execute its obligations in respect to drilling, completion and maintaining oil wells in the concession area in conformity with good faith and good oil field practices.

The factual basis of the claims based on the inadequate drilling and completion practice of Respondents and its failure to respect environmental norms established either by legislation or good oil field practices cannot be examined or determined by the Tribunal at this stage of the proceeding. All it can do is determine whether the defenses alleged could, if proved, constitute a defense to the conduct charged and the allegations made.

The majority award at Para. 154-178 well sets out the factual basis for the claims made by Claimant and in particular details those claims based on inadequate planning, drilling and completion of the wells and failure to comply with environmental standards.

It fails, however, to recognize the effect required to be given to the legal characterization given to its claim by Claimant, who has stressed from the outset that it presents alternative bases for its claims and indemnifications therefore:

- i. Breach of contract by Contractor leading to increased abandonment costs having to be supported by the Ministry in the future; (PSA Section 8.2, SOC. Para. 134)
- ii. Breach of contract creating an obligation of specific performance (or the monetary equivalent thereof) by the Contractor; (SOC 372) such performance to be in conformity with good oil field practices continuing until the end of the PSA;
- iii. Breach of contract, remediable in contract measure of damages in respect to Contractor's performance obligations under the contract, including respect of good oil field practices.

In terms of the factual basis of its claims, the SOC (Statement of Claim) is divided into three principal parts: i) Well design and drilling issues; ii) Abandonment costs; iii) Other environmental claims indemnifiable in damages.

One of the major decisions (and this one by a unanimous tribunal) of the award presented to the ICC Court is that the Settlement Agreement (Award, ch. 9, Section 2) entered into on or about March 1996 (Award ¶¶ 478), settled any obligation of Contractor to be responsible for abandonment costs, the Ministry having undertaken pursuant to that agreement (in consideration of receipt of a payment of US\$ 20 million) to be responsible for abandonment costs defined as "any and all claims and demands ... relating to the carrying out the work necessary upon termination or cancellation under the Masila Block (14) PSA with respect to dismantlement, abandonment and reclamation." (Emphasis added). The Award, para. 611, finds that the obligation undertaken by the Ministry covers all abandonment costs whether or

not those costs (at the end of the PSA) have been caused or accelerated by the performance failures of the Contractor (and breaches of the PSA).

To find that the Ministry accepted, for consideration, to release the Contractor from its obligations to perform dismantlement, abandonment and reclamation operations at the time of cessation of operations and the end of the project does not, and cannot, mean that the Ministry settled or released the Contractor from liability for breaches of the PSA during the life of the PSA and as it was performed, an observation which is all the more pertinent since as of the present date, six years after the expiration of the PSA only a very few of the wells have been abandoned (and hence no, or almost no, costs of abandonment have been incurred) and oil field operations are expected to continue for another four years or longer. Those operations are impacted and damaged by the previous operations, contrary to good oil field practices, of the prior operator.

As stated above, Claimant has, from the outset, maintained that its claims were made on three different and parallel legal bases:

- i) Recuperation, or refunding by the Contractor, of abandonment costs pursuant to Article 8.2 of the PSA; which imposed an obligation on Contractor to undertake, on cessation of activities and abandonment, to plug all wells and clear the contract area;
- ii) Specific performance (or the damages equivalent thereof) of Contractor's obligations under the PSA, including obligations for drilling and completion of wells and the continuous performance of good oil field practices (SOC 371-373);
- iii) Claims for other damages for breaches of contract of the PSA including claims from deficient design ("These claims arise both as damages claim and as

claims for the cost of plugging the wells and clearing the Contract area, SOC 373(i)”) environmental damages and damages to facilities and equipment (SOC 373). These claims also arise as a consequence of serial breaches of the Operator’s obligations of good faith and good oil field practices.

The award (this part by unanimous decision) finds that the Settlement Agreement has settled the issue of who should pay for abandonment costs at the end of the contract (Claimant Ministry). The award does not, however settle the issues of whether Contractor must respond in damages for its breaches, during the life of the contract particularly its breaches of good oil field practices, particularly those standards for drilling and completion and respect for environmental standards; nor could it. At this stage of the proceedings all that can be determined is whether Respondent’s Threshold Defenses are capable as a matter of law of requiring dismissal of Claimant’s claims. If not, Claimant must be allowed, after obtaining adequate document disclosure and production, to proceed with presenting its case on fact and law in support of obtaining indemnification by way of damages. In particular, Claimant urges its right to present its case on the requirements of good faith and good oil field practices in the circumstances of this case and its argument that Respondents have failed to respect them in this case and the consequences thereof.

It is important that we as an arbitral tribunal and the ICC as an arbitral institution be careful to protect the rights of a party to fully present its case. While we may seek to pursue the goals of efficiency, speed and cost savings by procedural devices such as bifurcated proceedings, as in the present case, we must be careful not to sacrifice the rights of a party to fully present its case.

In the present case the Tribunal accepted to rule on the much contested issues of the existence and effect of a settlement agreement as a preliminary matter, without the assistance of any witness having personal knowledge of the negotiation and execution of the Settlement Agreement, despite the denial by one of the parties that any agreement existed at all. The documentary evidence supports the conclusion that the Tribunal has reached, and I do not contest that decision but one must ask as well whether each party accepts that it was fairly treated and that the procedure adopted made every effort to require production of, and to consider, all available evidence on the issue.

I am much more concerned with the approach of the majority to attempt to finally resolve as a preliminary issue the question whether certain claims based on alleged failures to maintain acceptable drilling and completion performance and to perform the Operator's obligation in accordance with good faith and in compliance with good oil field practices are barred by the statute of limitations. The issue of what acceptable practices are and whether the professional obligation is recurrent and causes new obligations during the ongoing life of a PSA and Operating Agreement are issues arising under industry practice and are resolved by professional expertise, as to which we have not yet heard any witness testimony. In my view it would be an error, and an important one, to dismiss claims of continuing breach of good faith and good oil field practice on the ground that some commentators and some English law precedents may be viewed as supporting the thesis that a continuing duty does not necessarily give rise to a continuing breach (Award, paras. 287-291). Particularly since there is substantial precedent relating precisely to the oil industry and oil field operating agreements for a continuing duty giving rise to liability for continuing breaches (see, e.g., Perenco v. Ecuador).



I am very reluctant, and oppose, the recognition in a preliminary and procedural phase of the arbitration without knowing all the facts of the case and without having heard expert testimony on the content and industry practice concerning good oil field practices, the barring on limitation grounds of claims brought well within the period of the continuing duty of the Operator, a PSA partner, to respect good oil field practices in respect to the drilling completion and maintenance of oil wells.

For all the above reasons I feel obliged to dissent from that part of the Tribunal's award which (at pp. 232-233) would dismiss eleven claims of Claimant (numbered (i) through (x) and (xii)) as "time-barred in accordance with the limitation periods under Article 10.2 of the UNIDROIT Principles".

*W. Laurence Craig*

W. Laurence Craig,  
Arbitrator

*06 February 2017*

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