

AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW
LL.M. International Commercial Arbitration Moot Competition
March 23-25, 2017

OUTLINE FOR CLAIMANT

TEAM 16

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
THIS TRIBUNAL HAS JURISDICTION OVER THE PROCEEDINGS AGAINST OILGASESSE S.A. AND THE GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF MAGESTICA	5
I. This Tribunal has jurisdiction over these proceedings despite Harris County Court’s injunction	5
II. The corruption investigation and the alleged lack of public bidding process do not impact the Tribunal’s jurisdiction, therefore, a stay should not be granted	5
III. Government is a party to this arbitration	6
IV. The Tribunal should apply Texas Law to this proceeding	6
CLAIMANT IS ENTITLED TO THE CONTINUATION OF THE JOA	7
I. Respondent invalidly terminated the JOA and must comply with its obligations	7
II. Claimant was entitled to take the Percentage Interest of Respondent and its rights under the JOA because the forfeiture provision is valid and applicable under Texas Law	7
III. Claimant is entitled to provisional reliefs in order to secure the continuation of the JOA in accordance with Article 28 of the ICC Rules	7
IV. Subsidiarily, if the Tribunal decides that the JOA should not be continued, the operation should continue as a Sole Risk Operation and damages should be awarded to Claimant for the termination of the JOA	8
RESPONDENT IS NOT ENTITLED TO DAMAGES FOR THE ALLEGED BREACHES OF THE JOA	8
I. Claimant cannot be held responsible for the alleged breaches of the JOA because the Limitation of Liability Clause applies	8
II. Even if this Tribunal finds that the Limitation of Liability Clause does not cover any breach of the JOA, Claimant was diligent and did not act with willful misconduct	9
III. In any event, Gasoky Corp. cannot be held liable for any damages arising from JOA’s breaches because under Texas Law, in order to pierce the corporate veil, Respondent would have to prove that Gasoky Corp. committed fraud or injustice through Gasoky S.A.	9
IV. Under the JOA, Respondents are not entitled to environmental damages	9

TABLE OF AUTHORITIES

Case Law:

Bridas S.A.P.I.C. v. Government of Turkmenistan, 447 F.3d 411 (2006) (“Bridas”).

Campbell v. New York City Transit Authority, 32 A.D.3d 350, 821 N.Y.S.2d 27, 2006 N.Y.

Cole Petroleum Co. v. U.S. Gas & Oil Co., 121 Tex. 59 (1931) (“Cole Petroleum”).

First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd., 703 F.3d 742 (2012) (“Marshall Islands”).

Flat Wireless, L.L.C. v. Cricket Communications, Inc., 2014 WL 812831 (Tex. App. 2014) (“Flat Wireless”).

Golden Rule Ins. Co. v. Harper, 925 S.W.2d 649 (Tex. 1996) (“Golden Rule”).

Golfo, S.A. (Permargo), 767 F.2d 1140 (USCA 5th Cir 1985) (“Pemex”).

IP Petroleum Co. v. Wevanco Energy, L.L.C., 116 S.W.3d 888.

Reeder v. Wood County Energy, LLC, 395 S.W.3d 789, 2012 (“Reeder”).

Slip Op. 06348 (1st Dept. 2006) (“Campbell”).

Société OTV v. Société Hilmarton, Tribunal fédéral suisse, 17 April 1990, Revue de l'Arbitrage, Volume 1993 Issue 2, pp. 342 – 342 (“Hilmarton”).

Stine v. Marathon Oil Co., 976 F.2d 254, 261 (5th Cir. 1992) (“Stine”).

Arbitral awards:

All-Union Foreign Trade Association "Sojuznefteexport" v Joc Oil Limited, Award, ICAC Case No. 109/1980, 9 July 1984 (“Joc Oil”).

Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs,

Egyptian General Company for Tourism and Hotels, Award, ICC Case No. 3493, 16 February 1983 (“EGOTH”).

E-Systems, Inc. v. The Islamic Republic of Iran, Bank Melli Iran, Iran-US Tribunal, Award No. ITM I3-388-FT, Case No. 388, , 4 February 1983, 2 Iran-United States Claims Tribunal Rep. (1983) (“E-Systems”).

Government of Pakistan, Partial Award, ICC Case No. 9987, 26 June 2001 (“Dallah”).

Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/18 (“Niko Resources”).

SPP (Middle East) Ltd., Southern Pacific Properties Ltd. v Arab Republic of Egypt, The Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No. ARB/03/24 (“Plama Consortium”).

Articles:

Banaiftemi, Yas, Chapter 1: The Impact of Corruption on “Gateway Issues” of Arbitrability, Jurisdiction, Admissibility and Procedural Issues in Domitille Baizeau and Richard H. Kreindler (eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 13 pp. 16 – 31 (“Banaiftemi”).

Born, Gary, International Commercial Arbitration (Second Edition) (“Born”).

Fouchard, Gaillard, Goldman, International Commercial Arbitration, 1999 (“Fouchard”).

Gaillard, E. Anti-suit Injunctions Issued by Arbitrators. ICCA Congress Series n. 13, International Arbitration 2006: Back to Basics?, Kluwer, 2007, p. 235-266 (“Gaillard”).

Lévy, Laurent, "Anti-suit Injunctions Issued by Arbitrators", in Anti-Suit Injunctions in International Arbitration, IAI Series on International Arbitration No. 2 (Juris Publishing 2005) (“Lévy”).

Recent developments in Texas and United states energy law: II. Recent development in Texas and United States energy law: B. Reeder v. Wood County Energy LLC and the application by Texas Courts of the “exculpatory clause” in operating agreements used in oil and gas operations, 8 Tex. J. Oil Gas & Energy L. 202.

Rules:

Awards, New York, June 10, 1958 (“NYC”).

Business Organizations Code (“Vernon’s Texas Statutes and Codes Annotated”).

ICC Arbitration Rules 2012 (“ICC Rules”).

New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral.

Restatement (Second) of Contracts (1981) (“Rest.”).

Model Forms:

A.P.P.L. Model Form Operating Agreement – 1989 (“Model Form 1989”).

THIS TRIBUNAL HAS JURISDICTION OVER THE PROCEEDINGS AGAINST OILGASESSE S.A. AND THE GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF MAGESTICA (“GOVERNMENT”).

- I. This Tribunal has jurisdiction over these proceedings despite Harris County Court’s injunction (Terms of Reference, 8).
 - a. Texas Court should not have issued the anti-arbitration injunction because only the court of the seat has the power to interfere with the arbitration proceedings (Fouchard, 673, 674).
 - b. Because of the *Kompetenz-Kompetenz* principle, arbitrators have the obligation to rule on their own jurisdiction (Fouchard, 213).
 - c. Subsidiarily, the injunction was not issued under the following circumstances: (1) a threat to the court’s jurisdiction; (2) the evasion of public policy; (3) to prevent a multiplicity of suits; (4) to protect a party from vexatious or harassing litigation (Golden Rule, 651); notably because the parties to the Harris County litigation are not the same as the parties to this arbitration (Clarifications, 4).
- II. The corruption investigation and the alleged lack of public bidding process do not impact the Tribunal’s jurisdiction, therefore, a stay should not be granted.
 - a. The Tribunal has jurisdiction regardless of whether or not there was corruption.
 - i. American case law considers that the arbitrators’ jurisdiction is not excluded by a connection between the matter before them and a case pending before a court (Pemex, 1147), and the Tribunal has discretion to decide whether or not to stay the action (Campbell, 352, 29).
 - ii. Even if the JOA were declared void because of corruption or the lack of public bidding process, the severability principle would allow the Tribunal to maintain its jurisdiction (Prima, 400; Joc Oil, 98).

- b. The principle *nemo auditur suam turpitudinem allegans* (no one alleging its own turpitude is to be heard) prohibits Respondent from using its own wrong-doings as a defense (Niko Resources, 119).

III. Government is a party to this arbitration.

- a. Government is a party to the JOA and, therefore, is bound by the arbitration agreement.
 - i. Government, by signing the Letter of Guarantee, contractually undertook obligations and became party to the JOA and, therefore, is bound by the arbitration agreement (EGOTH, 114).
 - ii. The involvement of Government during negotiations, its performance provided by the JOA and its control over the Respondent's activities makes Government a party to the JOA (Dallah, 357).
- b. Government committed an injustice against Claimant through Respondent and, therefore, is liable for Respondent's action under the alter-ego liability theory.
 - i. There is a complete control by Government over Respondent (1st requirement) because (1) Oilgasse is wholly owned by Government; (2) Government controls Respondent's activities; and (3) Government economically controls Respondent (Bridas, 419; Marshall Islands, 752).
 - ii. Government used Respondent to commit an injustice against Claimant (2nd requirement) by reducing Respondent's liquidity in order to deprive Claimant of a remedy for the termination of the JOA (Bridas, 417).

IV. The Tribunal should apply Texas Law to this proceeding.

- a. The parties to the JOA chose the Texas Law to apply to their disputes (JOA, Clause 9)
- b. If the Tribunal applies another law than the law chosen by the parties, the award could be unenforceable (NYC Art. V1d; Hilmarton, 342).

CLAIMANT IS ENTITLED TO THE CONTINUATION OF THE JOA

- I. Respondent invalidly terminated the JOA and must comply with its obligations.
 - a. Claimant respected its obligations under the JOA.
 - b. Respondent did not exercise its Non-Consent Rights and, therefore, must comply with its cash call obligations.
- II. Claimant was entitled to take the Percentage Interest of Respondent and its rights under the JOA because the forfeiture provision is valid and applicable under Texas Law (See Cole Petroleum, 1931).
- III. Claimant is entitled to provisional reliefs in order to secure the continuation of the JOA in accordance with Article 28 of the ICC Rules.
 - a. The Tribunal can and should grant an anti-suit injunction in the form of a partial award.
 - i. Arbitrators have the authority to issue an anti-suit injunction. The principle of *Kompetenz-Kompetenz* gives arbitrators the power to rule on their own jurisdiction and they can sanction violations of the arbitration agreement (Gaillard, 5). The Tribunal can issue orders to ensure that its authority is effective (E-systems, 57) and that courts proceedings will not make the resolution of the dispute by this Tribunal more difficult (Plama Consortium, 12).
 - ii. The provisional measure required is necessary to prevent irreparable harm and is urgent (Lévy, 125).
 - b. Concerning other provisional reliefs, the Tribunal should reject Respondent's demand to stop and abandon any Sole Risk Operations and order Respondent to fulfill its obligations.

- i. A provisional relief must not be used to obtain an advance ruling on the merits, which is what Respondent is asking for (Flat Wireless, 1).
- ii. However, a provisional relief can be granted to preserve the contractual *status quo* (Born, 2483) and the contract's continuation is necessary to prevent irreparable harm and is urgent (Born, 2466).

IV. Subsidiarily, if the Tribunal decides that the JOA should not be continued, the operation should continue as a Sole Risk Operation and damages should be awarded to Claimant for the termination of the JOA (Rest., §236).

RESPONDENT IS NOT ENTITLED TO DAMAGES FOR THE ALLEGED BREACHES OF THE JOA.

- I. Claimant cannot be held responsible for the alleged breaches of the JOA because the Limitation of Liability Clause applies. (JOA, Clause 3).
 - a. The Limitation of the operator's responsibility to only willful misconducts set forth in the JOA is valid under Texas law, general usages and practices in the oil and gas industry (8 Tex. J. Oil Gas & Energy L. 202).
 - b. The Limitation of Liability Clause is applicable to any breach of the JOA committed by the operator.
 - i. The protection of the Limitation of Liability Clause extends not only to the operator's duty in operations ("acts unique to the operator"), but also to any acts done under the authority of the JOA "as operator" (Stine, 261).
 - ii. "Its functions" means "its activities under the agreement" such as the 1989 model form JOA because the parties modeled their JOA after the 1989 model form, therefore, the Parties should have been aware of the use of the term "its functions" includes actions under the JOA that are not limited to operations (Reeder, 795; Model Form 1989).

- II. Even if this Tribunal finds that the Limitation of Liability Clause does not cover any breach of the JOA, Claimant was diligent and did not act with willful misconduct.
 - a. Claimant did not breach the AFE provision.
 - i. Claimant did not have to submit environmental reports because such reports are not required in an AFE, where the operator only has to provide technical information necessary for the operations planned by the AFE (Model Form 1989, art. VI.B.1.).
 - ii. Claimant could not have submitted environmental reports, as the IFC's investigation was not finished until October, 2015 (CAO, 1).
 - b. Respondent did not prove an intent of misconduct such as a specific intent by the operator to cause substantial injury to Respondent (IP Petroleum Co., 897).
- III. In any event, Gasoky Corp. cannot be held liable for any damages arising from JOA's breaches because under Texas Law, in order to pierce the corporate veil, Respondent would have to prove that Gasoky Corp. committed fraud or injustice through Gasoky S.A. (Tex. Bus. Org. §21.223(a)(2)).
- IV. Under the JOA, Respondents are not entitled to environmental damages.
 - a. Claimant does not have to compensate public provincial entities and the general public suffering from environmental damages.
 - i. Government is claiming that it is not part of the arbitration so it cannot ask for compensation through arbitration.
 - ii. The impact on the public health is not proven (no certain causality).
 - b. Respondents did not show that they took part or will take part in the remedy of the environmental damages.