AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW
LL.M. International Commercial Arbitration Moot Competition
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OUTLINE FOR RESPONDENT

TEAM 16

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Kreindler (eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 13 ("Banaiftemi").

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THIS TRIBUNAL DOES NOT HAVE JURISDICTION OVER THESE PROCEEDINGS

I. In recognition of the injunction issued by Harris County Court, this Tribunal does not have jurisdiction over these proceedings (Terms of Reference, 8).

a. The injunction is compatible with international arbitration law: nothing in the New York Convention deprives the District Court of the authority to issue an anti-suit injunction (Karaha Bodas, 124).

b. The injunction did match the criteria to issue an anti-suit injunction: (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).

II. The arbitration proceedings should be stayed until the corruption's investigation is completed (Terms of Reference, 8).

a. If corruption is found, the JOA will be void.

i. It is generally accepted among arbitrators and in Magestican law that contracts obtained by corruption are void (Banaiftemi, 17), notably following the principle of *fraus omnia corrumpit* (fraud corrupts everything) (Banaiftemi, 21).

ii. Consequently, the Tribunal should stay the arbitration to avoid potential conflicting decisions.

b. The Tribunal cannot make a decision on the allegations of corruption.

i. Criminal matters are not compatible with an arbitrator's mandate (HUBCO, 1318).

ii. The allegations of corruption do not constitute a dispute "arising out of or related to the (…) Joint Operative Agreement" and, consequently, are not within the scope of the arbitration clause (JOA, Clause 10).

c. Even if the stay is not granted, the Tribunal should reject the claim on the grounds that the contract is void according to the Magestica Law regarding corruption and because of the lack of public bidding process (Clarifications, 4).

III. This Arbitral Tribunal cannot grant an anti-suit injunction, because the Tribunal does not have the authority to issue such injunction.

a. Arbitrators would violate state sovereignty by deciding on a judge's jurisdiction (SGS, 301).

b. The Tribunal must render an enforceable award and consequently should not render an awards that will not be enforceable by Government's Courts (ICC Rules Art. 35, ICC case No. 9593, 109-110).

IV. Magestica is not a party to the arbitration.

a. Magestica is not a party of the JOA and, therefore, is not bound by the arbitration agreement.

i. No Magestica's representative signed the JOA and the Letter of Guarantee does not provide that Magestica contractually undertook obligations and became party to the JOA because of Magestica's commitment to facilitate the performance and to assist financially Respondent is unspecified (Letter of Guarantee).

ii. Magestica was merely involved in the operation in its capacity as regulatory authority and not as a party to the JOA (EGOTH, 118; ICC Case No. 8035).

b. Magestica is not liable for Respondent's actions under the alter-ego liability theory.

i. The requirement of complete domination by Magestica over Respondent is not met (1st requirement), because the facts that Magestica wholly owns Respondent and that Magestica appoints the Board of Directors of

Respondent, only shows a "*typical government instrumentality*", which implies a separate status for liability (Bancec, 2600).

ii. The requirement of fraud or injustice against Claimant is not met (2nd requirement), because there is no proof that Government used Respondent's corporate form "to manipulate circumstances in such way as to do something Respondent otherwise would not have been able to do" (Marshall Islands, 755).

V. The provisional relief sought by Respondent should be granted and the provisional relief requested by the claimant should be rejected.

a. The abandon of Sole Risk Operations or operations under the forfeiture clause is necessary to prevent irreparable harm to Respondent's rights under the JOA (Born, 2466).

b. Claimant does not prove that the non-continuation of the operation would constitute an irreparable harm, or that the continuation of the operation is urgent (Lévy, 125).

THE JOA WAS VALIDLY TERMINATED AND RESPONDENT IS ENTITLED TO DAMAGES FOR THE BREACHES OF THE JOA

I. The forfeiture provision set forth in the JOA (JOA, Clause 7) is unconscionable and should be considered as unlawful.

a. The forfeiture provision is against Government's public policy and its Unfair Contract Terms Act.

i. It is a form of self-help not admitted under the laws of Government and the amount of the forfeiture of Respondent's percentage interest is unconscionable.

ii. As a subsidiary company governed by the laws of the Democratic Republic of Magestica, it would be inconsistent to allow Claimant to violate mandatory rule of law belonging to Government public policy.

b. Claimant has invalidly availed itself of the JOA's forfeiture provision.

i. The cash call was improperly issued by Claimant and it constitutes a breach of the JOA.

ii. Respondent did not consent to the AFE and validly exercised its Non-Consent rights under the JOA; therefore, the JOA is deemed terminated and the concession reverts back to governmental authority (JOA, Clause 6.e).

II. The Limitation of Liability Clause should not exempt Claimant from its liability.

a. Any breach arising from the JOA should not be covered by the Limitation of Liability Clause and, therefore, Respondent is entitled to damages.

i. The issuance of the AFE was invalid because Claimant failed to provide environmental reports, which constitutes a breach of the JOA.

ii. Environmental damages constitute a breach of the JOA.

b. The scope of the Limitation of Liability Clause is unfair and inappropriate.

i. The terms of such a provision do not comply with the standards of a JOA (Model Form 1989); by omitting the concept of 'gross negligence', Claimant voluntarily narrowed the scope of its liability under the JOA.

ii. Claimant did not act in a good and workmanlike manner as an operator and was deficient and negligent in the conduct of oil and gas operations.

III. The AFE provisions should be regarded as vitiated and unfair.

a. Claimant did not comply with the AFE provisions under the JOA.

i. Claimant did not comply with the AFE procedure, by failing to provide for environmental reports, which constitutes a breach of the JOA.

ii. The AFE caused Respondent damages, because it forced Respondent to exercise its Non-Consent Rights (Abraxas, 755, 758).

b. An AFE may be approved by the affirmative vote of Claimant since its percentage interest under the JOA is sufficient to overcome any refusal from Respondent.

IV. Claimant should be considered as jointly and severally liable with Gasoky Corp. as its alter ego for any damages granted to Respondent in this arbitration.

a. The corporate veil should be pierced to extend the liability to Gasoky Corp.

i. As a wholly-owned subsidiary of Gasoky Corp., Claimant lacks autonomy to be considered as the sole claimant of these proceedings.

ii. Denying Gasoky Corp's liability would be contrary to the parties'intent under the JOA.

b. The parent company's purpose (i.e., Gasoky Corp) is to receive a direct benefit from the operation under the JOA, so that it would be inappropriate to not include the parent company in this proceeding.