ICC Arbitration No. 19869/MCP/DDA

The Ministry of Oil and Minerals of the Republic of Yemen (on its own behalf and/or for and on behalf of the Republic of Yemen) (Republic of Yemen)

Claimant

and

1. Canadian Nexen Petroleum Yemen (Republic of Yemen)
2. Consolidated Contractors (Oil & Gas) Company S.A.L. (Republic of Lebanon)
3. Occidental Peninsula, LLC (United States of America)
4. Occidental Peninsula II, INC (Federation of Saint Kitts and Nevis)

Respondents

PARTIAL DISSENTING OPINION
OF
W. LAURENCE CRAIG

4 February 2020

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Partial Dissenting Opinion

Of

W. Laurence Craig

I feel obliged to render this partial dissenting opinion in respect to the majority's failure to give full effect in its draft final award of 6 February 2017 to the Claimant's decision, after the majority had rendered its Partial Award of 6 February 2017, to withdraw its claims based on Respondent's faulty design of the wells and pursue only claim for repair or replacement of wells that had failed, or were in danger of failing, post turnover because of the effects and expected effects of corrosion on the wells casing and due to the obligations on the Contractor pursuant to Articles 8.1 and 8.2(a) of the PSA[1].

I preface these remarks by stating that this a very complicated and difficult case and that while on a number of issues there were disagreements amongst the arbitrators, we have worked cooperatively to attempt to reach a common decision and, in most cases, have been successful. Nevertheless, I disagree with the majority's fundamental and important failure to give full consideration to the Claimant's Amended Statement of Claim of 8 December 2017, a substantial document (124 pages) which deserves full consideration.

[1] These legal obligations are summarized in the Claimant's Amended Statement of Claim at paras. 78-197. Sec. esp. paras. 78-83 ("the legal basis of the well claim"). At para.82 Claimant precises : "In light of these terms it does not matter to the Ministry's case whether the original design of the wells was or was not in breach of the PSA. What does is that on or after 22 March 2010, the wells were not in good working order, thus condition did not comply with GOP and the Contractor did not prevent environmental damage.

The Amended Statement dropped the claims against Respondent Contractor for damages for deficient design of the wells (which the Tribunal in its earlier partial award had found to be time barred) and restated and made explicit its independent claims for the repair and/or replacement of deficient wells which were not in good working order at the time of the handover and the end of the PSA.

The Claimant in its Post Hearing Memorial 30 April 2019 [Min. PHB1] elaborates at paras. No. 78-80, after itemizing the specifics as to its well claims and their amounts:

> "78. The legal basis for the wells claims is that the condition of the wells as at 22 March 2010, and as at 17 December 2011 was that the Contractor was in breach of Articles 8.1, 8.2 and 18.2 of the PSA.
>
> 79. More specifically, the Contractor was in breach of the PSA as at 22 March 2010 and as at 17 December 2011 because on those dates (and all days between them):
>
> a. The wells were not kept in original working order contrary to Articles 8.1 and 18.2.
>
> b. The condition of the wells did not comply with good oil field practices contrary to Article 8.1.

c. The Contractor failed to prevent damage to water bearing formations, to prevent unintentional entrance of water into petroleum formations, and to take all necessary precautions to prevent pollution of or damage to the environment, contrary to Article 8.2.

"80. The main point is that at the end of the PSA 208 wells had corrosion which meant that they had suffered casing failures or were likely to do so imminently, all of them required ongoing treatment. The Contractor had not even complied with its own well integrity program."

I believe that by amending and limiting its Statement of Claim (see in particular the redlined version of the Amended Statement of Claim, showing the modifications from the original Statement of Claim), the Claimant has been largely successful to respond to the findings of the Preliminary Award and eliminate its claims which could be time barred or otherwise eliminated as a matter of law by the provisions of the first award without the necessity of a hearing and taking witness testimony. I also believe that Claimant had the right to amend its claim. The whole point of having a preliminary proceeding over dispositive issues is to eliminate the necessity of hearing evidence at the final hearing on issues which have been eliminated as a matter of law by an interim decision.

The essence of the amendments to the Claimant's Statement of Claim is to abandon a claim based on faulty design of the wells (failure for early well designs to require cementing up to the surface) and to make clear that:

> "The Ministry makes no allegation that there was any breach prior to 22 March 2010. When the Tribunal looks at the Min. PHB it will see that the only allegations that are pursued are that the Contractor did, or failed to do, something in breach of the PSA after 22 March 2010. The suggestion that there are "alleged breaches" prior to 22 March 2010 is simply wrong. The Ministry does not rely on any continuing state of affairs ..." Min. PHB(2d), 1, 2.

These alleged breaches, notwithstanding, are that the Ministry failed to repair and keep in good working order the wells that had failed or were in the process of failing and thus in breach of Articles 8.1 and 8.2 of the PSA without the necessity of proving that the failures were due to design failure.

The applicable parts of the text of Articles 8.1 and 8.2 are:

"Article 8.1:

> "CONTRACTOR shall ensure that all materials equipment and facilities used in Petroleum Operations comply with

generally accepted engineering norms are of proper and accepted construction and are kept in good working order".

Article 8.2(b) provides in part that the CONTRACTOR shall:

"b. prevent damages to any adjacent Petroleum, water-bearing formations and other natural resources.

Both parties have pleaded throughout this case that Operator (Contractor) had an ongoing duty to maintain the integrity of all of the wells throughout the life cycle of the wells.[2]

As a consequence, Claimant has pleaded in its ASOC "that its current claim cannot be time barred (based on the date a well was designed and drilled) since the Tribunal's analysis in the Partial Award was based on the assumption that there was a wrongful act when the wells were drilled, and that by contrast, its current claim is not based on the design of the wells.

Indeed, there is no contest by the parties that Contractor had an obligation to maintain the integrity of the wells against attacks by corrosion (whether new or continuing) or anything else specifically pursuant to Article 8.2 of the PSA.

[2] Claimant's PHB (First Round) 2019, para. 95)

It is thus with considerable surprise that one reads at ¶ 404 of the draft award:

> "This notwithstanding, the Claimant argues that its current claim cannot be time barred since the Tribunal's analysis in the Partial Award was based on the assumption that there was a wrongful act when the wells were drilled; and that by contrast its current claim is not based on the design of the wells. The Tribunal cannot accept this distinction which it finds artificial in light of the Claimant's claim as presented to the Tribunal. (emphasis added).

The "artificiality" of the amendments made by Claimant to its Statement of Claim is not a legal ground for rejection of amendments made to the Statement of Claim as duly authorized by procedural order.

The reality is that Contractor had an ongoing duty to keep the wells in good working order and it is up to the Claimant to prove that they are not, whether such failure is due to the Contractor's erroneous design or construction practice, or something else is not the point and is not required. By the majority's *ipse dixit* of the "artificiality" of Claimant's revised claim, the Claimant would be denied his day in court on the merits of its claim.

I believe that the matter should be returned to the Tribunal for a ruling on the merits of the Claimant's claims.

Whether the claim arises from a failure of design (as arguably stressed in the original claim) or in a repair obligation probably makes a difference in the amount of indemnity obligations. A failure of design would probably indemnify for the re-design and reconstruction of the wells. A claim for failure to repair (if the wells could be repaired) would probably be measured by the cost of repairs, presumably considerably less than the damages based on design errors.

I feel, however, that to deny indemnification based on the "artificiality" of the revision of the basis of the claim would be an error of law.

This is a case which requires further consideration by the Tribunal.

In its present state the award leaves the parties in an unbalanced status in comparison with the aim of the PSA. The Operator was to obtain access to the oil wealth of a nation and through its exercise of its skill and finance and exploit the assets and receive a share of production (both "cost oil" and "profit oil") over the life of the contract which it did. A condition for this sharing by the Operator in the proceeds of production was that it would return the asset in good working order which the Owner could operate to its sole benefit. This did not happen, and that is why this conflict must be resolved by arbitration.

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