20 January 2023 – gaa/spn

NN 532/SP
1. CRESCENT PETROLEUM COMPANY INTERNATIONAL LIMITED (Bermuda) **2.** CRESCENT GAS CORPORATION LIMITED (British Virgin Islands) **vs**/ NATIONAL IRANIAN OIL COMPANY (Iran)

Counsel: Sébastien Pépin **(Tel.: +33 1 49 53 29 51)**
Deputy Counsel: Gulirano Abdullajonova **(Tel.: +33 1 49 53 29 28)**
(Fax: +33 1 49 53 57 75)
(Email: ica2@iccwbo.org)

Laurent Aynès
DARROIS VILLEY MAILLOT BROCHIER AARPI
69, avenue Victor Hugo
75116 Paris
France

By email: laynes@darroisvilley.com
mlaviani@darroisvilley.com

Charles Poncet
Rue Bovy-Lysberg 2
Case postale 5271
1211 Geneva 11
Switzerland

By email: charles@poncet.law

Klaus Sachs
CMS HASCHE SIGLE
Nympenburgerstrasse 12
80335 Munich
Germany

By email: klaus.sachs@cms-hs.com

Constantine Partasides
THREE CROWNS LLP
New Fetter Place
8-10 New Fetter Lane
London EC4A 1AZ
United Kingdom

By email: Constantine.partasides@threecrownsllp.com
CrescentvNIOCAssociates@threecrownsllp.com

Georgios Petrochilos
THREE CROWNS LLP
104, avenue des Champs-Elysées
75008 Paris
France

By email: georgios.petrochilos@threecrownsllp.com

…/…

Michael Darowski
MCDERMOTT, WILL & EMERY UK LLP
110 Bishopsgate
London EC2N 4AY
United Kingdom

By email: mdarowski@mwe.com

Ricky Diwan
ESSEX COURT CHAMBERS
14 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

By email: rdiwan@essexcourt.net

Tariq Baloch
3 VERULAM BUILDINGS
Gray's Inn
London WC1R 5NT
United Kingdom

By email: tbaloch@3vb.com

Kooroosh Ameli
AMELI INTERNATIONAL ARBITRATION
New Babylon
Anna van Buerenplein 41
2595 DA The Hague
The Netherlands

By email: k.ameli@ameliarbitration.com

Essam Al Tamimi
AL TAMIMI & COMPANY
Al Hind Tower, 30th Floor
Al Khan Corniche Street
Sharjah
United Arab Emirates

By email: e.tamimi@tamimi.com

David Sellers
Mark Howarth
Nanette Pilkington
EVERSHEDS SUTHERLAND LLP
8, place d'Iéna
75116 Paris
France

By email: davidsellers@eversheds-sutherland.com
markhowarth@eversheds-sutherland.com
nanettepilkington@eversheds-sutherland.com

Wolfgang Peter
Konstantin Christie
Avenue de Champel 8C
CH-1211 Geneva 12
Switzerland

By email: wpeter@peterandkim.com
kchristie@peterandkim.com

…/…

Simon Rainey
Ben Gardner
QUADRANT CHAMBERS
10 Fleet Street
London EC4Y 1AU
United Kingdom

By email: simon.rainey@quadrantchambers.com
ben.gardner@quadrantchambers.com

Maya Lester
David Heaton
BRICK COURT CHAMBERS
7-8 Essex Street
London WC2R 3LD
United Kingdom

By email: maya.lester@brickcourt.co.uk

Dear Mesdames and Sirs,

As indicated in our correspondence dated 12 January 2023, during its session of 11 January 2023, the International Court of Arbitration of the International Chamber of Commerce (the "Court") decided that the challenge was admissible but decided to reject the challenge filed against the three members of the Arbitral Tribunal on the merits (Article 7(1)(e)).

In accordance with Article 11 of the Rules of ICC as Appointing Authority (the "ICC AA Rules") and as Responding party requested the Court to communicate reasons in advance of the decision for which the reasons are sought, the Court decided to communicate the reasons for its decision as set out below.

REASONS

1. The Court considered the challenge by reference to the arbitration agreement and Articles 6(1)(e) and 7 of the ICC AA Rules.

2. The Court has examined with care all submissions filed by the parties concerning the challenge.

3. A summary of the main points of the procedural background of the challenge, as well as the reasons for the Court's decision, are set out below.

I. Procedural background of the challenge

4. This challenge was filed in the context of an *ad hoc* arbitration administered by the Permanent Court of Arbitration. The arbitration agreement provides for the International Chamber of Commerce (ICC) to decide on challenges of arbitrators.

5. The present arbitration is the second arbitration between the same parties and under the same Contract related to long term gas supply and subject to Iranian law.

6. In the present arbitration, Claimants, Applicants in relation to the proceedings before the Court, notified the Request for Arbitration to Respondent, Responding party to the proceedings before the Court, on 28 June 2018.

7. Claimants appointed Charles Poncet (Switzerland) and Respondent appointed Klaus Sachs (Germany), as co-arbitrators. Laurent Aynès (France) was appointed as chairman upon the proposal of the co-arbitrators.

8. The present arbitration has been divided into three phases: a first phase on jurisdiction, a second on the validity of the termination of the Contract, and a third on liability and quantum.

9. The evidentiary hearing on liability and quantum (third phase) was scheduled to take place for two weeks starting on 10 and 17 October 2022.

10. On 29 September 2022, Wolfgang Peter, a member of Respondent's counsel team, informed the arbitral tribunal that, due to a sudden and serious health problem, he would be unable to lead Respondent's counsel team in the hearing scheduled for October 2022 and Respondent requested the arbitral tribunal to reschedule the hearing to new dates as soon as possible considering its lead counsel's unavailability. Claimants requested that the request be dismissed, and the hearing dates maintained.

11. On 30 September 2022, the arbitral tribunal issued Procedural Order No. 10 ("PO No. 10"), whereby it (i) noted that it was "*undeniable that a postponement of the hearing, few days before its actual date, entails severe consequences for the Parties, their Counsel, the witnesses, and experts retained and last but not least, the Tribunal*"; (ii) noted that it could "*not take a decision that would deprive Respondent of its lead Counsel during the hearing and [wa]s compelled to grant Respondent's request to postpone the October hearing*", and (iii) ordered that the hearing be postponed to the period from 13 March to 30 March 2023.

12. On 5 October 2022, Mr Peter informed the arbitral tribunal that he would be unavailable on the new hearing dates as he had previously committed to act as lead counsel in a hearing for the weeks of 20 and 27 March 2023 and to sit as arbitrator in another *ad hoc* arbitration hearing in the week of 13 March 2023. He would be fully available in April and May 2023 and for most of June 2023.

13. On the same day, Respondent's counsel informed the arbitral tribunal that certain other senior members of its team also had scheduling conflicts for the new hearing dates fixed in PO No. 10 and confirmed their availability for a three-week hearing at any time in April, May or June 2023. Claimants requested the Arbitral Tribunal to confirm the hearing dates set in PO No. 10.

14. On 12 October 2022, the Arbitral Tribunal confirmed the dates fixed by the PO No. 10.

15. On 28 October 2022, Respondent sent a letter to the arbitral tribunal requesting it to urgently hold a Case Management Conference ("CMC") to discuss, amongst other things, the setting of alternative dates for the hearing. Respondent invoked the lack of any prior consultation with the parties before fixing the new dates of the hearing. Respondent also submitted that due to the two-week Nowruz (Iranian New Year) holidays starting on 20 March 2023, its ability to prepare the hearing would be severely affected.

16. Claimants requested that the arbitral tribunal dismiss Respondent's renewed request.

17. On 4 November 2022, the arbitral tribunal sent a letter to the Parties rejecting Respondent's request of 28 October 2022 to hold a CMC, commenting that "*a CMC now would only be useful if a new decision were to be taken and/or to revisit a decision that was previously taken in the presence of new key elements, which is not the case here*." The arbitral tribunal also upheld the March 2023 hearing dates and indicated that "*the dates of 13-30 March 2023 are the sole common availability of the members of the Tribunal in a long time from now*".

18. On 2 December 2022, Respondent filed its challenge against all members of the arbitral tribunal.

19. On 8 December 2022, the arbitral tribunal rejected the challenge filed by Respondent.

20. On 13 December 2022, Claimants submitted Respondent's challenge to the Court for decision.

II. The jurisdiction of the Court

21. According to the Article 5.3 of the ICC AA Rules, *"[w]hen requested to act as appointing authority or provide services under the Rules, the Court shall proceed if it is satisfied that an agreement empowering it to do so may exist*."

22. Pursuant to the arbitration agreement, "*a Party who intends to challenge an arbitrator shall send written notice of his challenge (with reasons for his challenge) to the other Party, the challenged arbitrator and the other members of the arbitral tribunal […] within thirty (30) days after the circumstances giving rise to the challenge became known to that Party. If the challenge is not accepted by the arbitrator or the other party, a decision on the challenge shall be made within forty (40) days by the International Chamber of Commerce (ICC)*".

23. Although the arbitration agreement refers to the ICC, the ICC AA Rules make clear that such functions are carried out exclusively by the Court (Article 1(2)). Moreover, none of the parties objected to the jurisdiction of the Court to decide on the challenge.

24. The Court has therefore jurisdiction to decide on the present challenge.

III. The admissibility of the challenge

25. Pursuant to the arbitration agreement, *"a Party who intends to challenge an arbitrator shall send written notice of his challenge […] within thirty (30) days after the circumstances giving rise to the challenge became known to that Party"*.

26. Respondent stresses several times that it is not the PO No. 10 in itself, but the arbitral tribunal's decision not to reconsider its decision expressed in its correspondence dated 4 November 2022, that gives rise to the challenge.

27. Respondent therefore appears to argue that the arbitral tribunal's unilateral decision to fix new hearing dates in PO No. 10 (on 12 October 2022) is only one event in a series of events, which are followed by the arbitral tribunal's decision not to reconsider such decision (on 4 November 2022).

28. Claimants did not file any admissibility objections to the challenge.

29. The Court therefore considers that the 30-day time limit provided in the arbitration agreement should start from the last reiteration of the criticised decision, i.e., the arbitral tribunal's decision dated 4 November 2022, and decides that Respondent's challenge filed on 2 December 2022 is admissible.

IV. The applicable rules and criteria

30. Respondent bases its challenge on the ICC Rules of Arbitration, more specifically its articles 14(1) and 11(2), and on the relevant provisions of the *lex arbitri*, being Swiss law. In that regard, Respondent relies on:

- the ICC Rules of Arbitration:
    - pursuant to Article 14(1), a challenge of an arbitrator can be brought for "*lack of impartiality or independence, or otherwise*";
    - Article 11(2) provides that the required independence of an arbitrator is to be assessed from the perspective of the parties, *i.e.*, the arbitrator must be independent "*in the eyes of the parties*";
    - challenges based on arbitrators' conduct that is manifestly improper or constitutes a serious violation of the principles of due process or of the ICC Rules are generally accepted: the parties must be treated equally and have the

opportunity to present their case, and the arbitral tribunal's decisions must be balanced and reasoned.

- the relevant dispositions of the *lex arbitri*, being Swiss law:
  - Any arbitrator has the obligation to present sufficient guarantees of independence and impartiality in the conduct of his or her duties;
  - Members of an arbitral tribunal may be challenged, inter alia, "*if circumstances exist that give rise to legitimate doubts as to his or her independence or impartiality*";
  - The challenging party's concerns ought to be objectively justified but it is not necessary to establish an effective bias of the arbitrator;
  - While procedural decisions cannot, as such, establish bias of an arbitrator, where such decisions include blatant or repeated errors, they may rise to such a level of severity as to establish the appearance of bias;
  - The arbitral tribunal must "*guarantee equal treatment of the parties and their right to be heard in adversarial proceedings*" and this includes "*the right to participate in hearings and to be represented and assisted in front of the arbitrators"* (article 182(3) PILA);
  - the importance of the parties' ability to attend hearings and be represented by counsel is part of a broader right to be heard that is recognised by Swiss courts.

31. Claimants rely on the provisions of the arbitration agreement, the ICC Rules of Arbitration and *lex arbitri*. Claimants submit that doubts about an arbitrator's impartiality must be objectively grounded and must satisfy an independent observer, which is demonstrated by the reference to equivalent and objective qualifiers in the arbitration agreement ("justifiable doubts"), Article 11(2) of the Rules ("reasonable doubts") and Article 180(1)(c) PILA ("legitimate doubt").

32. Claimants submit that:

(i) Respondent must demonstrate that the arbitral tribunal has engaged in conduct that is "*manifestly improper*" or "*constitutes a serious violation of the principles of due process or of the ICC Rules*"; and

(ii) As Respondent seeks to establish bias based on procedural decisions, it must also establish that such decisions "*include blatant or repeated errors* [which] *rise to such a level of severity as to establish the appearance of bias*".

33. The Court has taken into account the relevant standards relied upon by the parties. In particular, while the ICC Rules of Arbitration are not directly applicable to the present *ad hoc* arbitration, the arbitration agreement provide that "*The parties shall decide on any other procedural rules of arbitration, whenever and whatever it deems necessary, by mutual agreement. However, in case of disagreement or gap in such procedural rules of arbitration, the procedural rules of arbitration of the International Chamber of Commerce (ICC) shall apply."*

34. The Court's precedents establish that challenges on the basis of arbitrators' procedural decisions are rarely upheld, except when they were "*manifestly improper*", "*raised due process concerns*", "*constitute a serious breach of the Rules*", or "*demonstrate bias*". Its role is not to second guess the arbitral tribunal's procedural decisions.

35. In relation to the *lex arbitri*, the Court notes that the parties agree that an arbitral tribunal may be challenged on the basis of procedural decisions where such decisions "*include blatant or repeated errors [which] rise to such a level of severity as to establish the appearance of bias*". In addition, the Court notes that Respondent submits, and Claimants do not object, that under Swiss law, an arbitral award may be set aside if a party's right to be heard is violated.

V. The merits of the challenge

Fixing of the new hearing dates in PO No. 10

36. Respondent submits that under PO No. 1, the ICC Rules of Arbitration (particularly Article 24(3)), the *lex arbitri* and "*well-established international practice*", the arbitral tribunal had a duty to consult with the parties before deciding on modifications to the procedural timetable, including when scheduling the adjournment of the hearing from October 2022 to March 2023, provisions that the arbitral tribunal breached when refusing to reconsider the new dates for hearing it had set.

37. PO No. 1 provides that:

"8.2. After consultation with the Parties, the Tribunal shall determine the time, agenda, and all other technical and ancillary aspects of any hearing."

38. Article 24(3) of the ICC Rules of Arbitration provides:

"To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable."

39. Respondent submits that several reputable commentators consider that Article 24(3) obliges the arbitral tribunal to consult the parties before taking any decision to modify the procedural timetable (for example, Fry/Greenberg/Mazza, The Secretariat's Guide to ICC Arbitration, ICC Publication 729, 2012, p. 266, N. 3-931).

40. The relevant facts in the present case are as follows:

- The arbitral tribunal gave the parties the opportunity to express their position after the request for postponement of the October 2022 hearing was filed by Respondent;
- It accommodated Respondent's request to reschedule the hearing after having considered both parties' positions on this point;
- The arbitral tribunal confirmed the decision taken in its PO No. 10 after having received and reviewed parties' comments on PO No. 10, especially regarding the date of the hearing as shown on pages 1 and 2 of its letter of 4 November 2022;
- The arbitral tribunal gave reasonable notice to the parties in fixing the hearing 5 months after the initial date.

41. As a consequence, the parties were effectively in a position to inform the arbitral tribunal of their positions. Respondent specifically sent its comments on the request for postponement on 29 and 30 September 2022 and its comments on PO No. 10 on 5 and 28 October 2022.

42. In any event, the "*consultation*" referred to in Article 24(3) of the ICC Rules of Arbitration does not amount to requiring that there be an agreement on the hearing dates and the arbitral tribunal retains the power to adopt procedural measures or modify the procedural timetable. The arbitral tribunal therefore retained the power to modify the hearing dates even in the absence of agreement from Respondent.

43. The Court therefore considers that the parties were consulted and that the arbitral tribunal did not violate the applicable provisions.

Refusal to reconsider the March 2023 hearing dates

44. According to Respondent, the arbitral tribunal's refusal to even consider revising the hearing dates favours Claimants that were immediately able to accept the unilaterally set dates.

45. In addition, Respondent submits that considerations of efficiency and rapidity of the proceedings cannot overrule fundamental due process principles, such as the right to be heard and the equal treatment of the parties.

46. In this regard, the Court finds that neither the fixing of the hearing dates in PO No. 10 nor the decision not to reconsider the dates fixed, reveal a lack of impartiality or independence to the detriment of Respondent, as evidenced by the following elements:

- The arbitral tribunal consulted the parties before the fixing of the initial hearing dates;
- The arbitral tribunal did not enquire whether the new dates suited either of the parties. Respondent itself submits that PO No. 10 did not violate the principle of equal treatment. Claimants indicated in their correspondence that members of their defence team were not available either on the new dates but that they were going to reorganise their teams considering the circumstances;
- The arbitral tribunal did accept the original request for postponement filed by Respondent, despite Claimants' opposition to it;
- The arbitral tribunal had extended the number of days allocated to the hearing, accommodating a previous request made by Respondent;
- Respondent argues that they would have no time to instruct a new counsel to replace Mr Peter. However, the existing counsels involved on Respondent's side are numerous, from large firms, experienced in this type of dispute and should be able to substitute Mr Peter considering the considerable time remaining before the hearing;
- the mere fact that one of Respondent's counsel (albeit an important one) cannot attend the hearing on the dates now determined by the Arbitral Tribunal does not, as such, amount to a violation of Respondent's ability to attend hearings and be represented by counsel, which is the right protected by Swiss courts. One cannot derive from such right that, under any circumstance, each member of a large team of counsels needs to be present in order to fulfil the requirement of proper representation;
- The arbitral tribunal does not appear to have taken into consideration the fact that the Nowruz holiday takes place at the same period. However, the holiday only starts on 20 March 2023, and Respondent has not demonstrated that it would be impossible to organise the hearing of Iranian witnesses or experts during that period;
- The arbitral tribunal retained the only period during which it was available in a reasonably near future.

47. The Court considers that the above elements do not evidence a bias in favour of the Claimants. Indeed, the arbitral tribunal's decision to maintain the March 2023 hearing dates was taken after having considered the parties' respective positions and reasonable efficiency concerns, and was motivated. This decision is an exercise of the arbitral tribunal's discretion considering the particular circumstances of the case and does not seem to be "*manifestly improper*" or raise due process concerns, considering in particular that the arbitral tribunal agreed to postpone the October 2022 hearing at Respondent's request and despite Claimants' opposition to it.

48. In addition, the arbitral tribunal's decisions do not appear to demonstrate that it has allowed considerations of efficiency and rapidity of the proceedings to overrule fundamental due process principles, such as the right to be heard and the equal treatment of the parties.

49. The new dates for the hearing are sufficiently far away from the date of the decision so that both parties can organise themselves so as to ensure their participation in the hearing. Respondent does not effectively demonstrate that it will be impossible for it to organize its defence for the March 2023 hearing dates, namely, it does not explain if and why the members of its counsel team that are unavailable on those dates cannot rearrange their previously fixed professional engagements; Respondent does not submit any evidence in support of such

unavailability, nor does it particularize who might not be available to participate in the hearing, save for Mr Peter.

50. The right of both parties to be heard is therefore fully respected. The fact that it ultimately is less convenient for one party is not in and of itself sufficient for it to demonstrate bias in favour of the other party. Rather to the contrary, the arbitral tribunal's decision was taken to accommodate a last-minute request by Respondent itself to modify the original October 2022 hearing dates, request to which the arbitral tribunal acceded while balancing the duty to conduct the proceedings efficiently. Moreover, according to the elements on the file, the parties already exchanged voluminous submissions on the questions to be addressed during the hearing.

51. While Respondent argues that the decision to fix March 2023 hearing dates without consulting the parties beforehand constitutes an error, it makes no allegation of blatant or repeated errors. There exists no allegation as to any other indication of lack of impartiality, breach of due process or other misconduct on behalf of the arbitral tribunal.

52. As a conclusion, the Court finds that the arbitral tribunal did not behave in a manner giving rise to justifiable, reasonable or legitimate doubts as to its independence and impartiality, nor committed a blatant or repeated error. It further finds that the arbitral tribunal has not infringed the right of Respondent to be heard, nor due process.

VI. Conclusion

53. Accordingly, the Court (i) finds that the challenge is admissible, and (ii) rejects the challenge on the merits.

Yours faithfully,

Sébastien Pépin
Counsel
Secretariat of the ICC International Court of Arbitration