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Note of Dissent

Ref: Ad-hoc UNCITRAL Arbitration Huntington Ingalls Incorporated v/ Ministerio de la Defensa de la República Bolivariana de Venezuela

My colleagues in the Arbitral Tribunal hearing the present case are issuing by majority a Final Award (the "Award") in this arbitration. Since I do not agree with parts of the reasoning and accompanying decisions regarding delay claims and the counterclaim, I am forced to dissent as follows:

1. **Delay /Extended Labor Costs Claims -Overhead Claims**

The Claimant's expert on delay claims, George H. Householder, has carried out a critical path analysis as a result of which Mr. Householder concludes that facts not attributable to the Claimant have led to 1095 days of delay. He broke down his analysis into three periods. According to him, the dominating delay factor in Period I was the Work Definition Conferences ("WCSs"); in Period II the force majeure events; in Period III, for Frigate F-21 the gas turbines, for Frigate F-22 the Dardo System.

During the hearing, in cross-examination, counsel to the Respondent attempted to undermine the credibility of Mr. Householder's analysis[1]. But the only specific part of this cross concretely addressing his analysis was aimed at showing that, when estimating the 90-day delay for Period I, he failed to take into account that the first payment for the Contract price was delayed for reasons not attributable to the Respondent [2]. Mr. Householder was not cross-examined on his analysis or conclusions regarding Periods II and III.

Seemingly in part on that basis, the Award (para. 1591) accepts Mr. Householder's delay analysis and conclusion regarding Period II and Period III, which leads to accepting 1,005 delay

[1] Transcript at 968-1057, Vol. 5.

[2] Transcript at 1048-1049, Vol. 5.

days. It should be noted that the force majeure reasons giving rise to Mr. Householder's Period II analysis are undisputed; it is only his assessment of facts and their impact on the work schedule that is apparently subject to challenge without any expert evidence or analysis supporting such challenge. As far as gas turbine/Dardo claims are concerned[3], it should be also noted that they have been granted under the Award as Contract Clause 59 Claims, a factor that militates in favor of accepting Householder's Period III analysis.

Based on Mr. Householder's delay report, Ms.Cheryl A. Lee Van, Claimant's damage expert, calculated the delay damages and came up with specific figures quantifying the Claimant's damage entitlement.

However, the Award decides that (1) since it is impossible to identify with certainty the percentage participation of each Party in the delay, responsibility for delay damages corresponding to Support/Service Labor and Materials and other Costs is allocated on an equitably determined parity basis to both Parties (resulting in granting Claimant compensation amounting to US$ 16,755,862.50 (Award, paras. 1614, 1616)); and (2) rejects the Unabsorbed Overhead claim and any other claim susceptible of being characterized as a claim for compensation of consequential or indirect damages.

I disagree with both decisions.

As to (1), the Award dismisses the conclusions of Householder's expert report on this specific point without any contrary expert report or meaningful cross-examination challenging his opinion in that respect, which would have permitted to determine in an informed and concrete way if there was concurrent responsibility for delays and, if such was the case, the allocation to each Party , on the basis of a causation analysis, of such responsibility and ensuing damages and respective quantification. It is precisely because a rebuttal expert report has not been provided that it is not possible to dismiss Mr. Househoder's conclusion by determining concurring delay and cost impact exclusively attributable to the Claimant. The absence of such specific and particularized evidence cannot be substituted for an equitable estimate leading to such a substantial reduction of the Claimant's delay damages claims.

As to (2), the Award rejects the unabsorbed overhead Claimant's claim by characterizing it as an indirect and consequential damages and loss of profit claim.

In support of this view, the Award refers to the existence of a practice in all construction contracts and considers that the liquidated damages provision in Clause 9 par. 7 of the Contract, exclusively limiting the amount of delay penalties payable under the Contract pursuant to this Clause, sets forth a general principle implicitly excluding a claim for indirect/consequential damages/loss of profit, which would reflect such practice..

In this respect, it should be pointed out first that Clause 9 clearly and exclusively applies when the Contractor is in default; it does not apply when the Owner (Respondent) is in default or when the Owner is in breach of contract.

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[3] Rea 1, Rea 2,Rea 3, Rea 91.

Further, I disagree with the Award's interpretation, which introduces new and non-existing wording into the Contract in a scenario in which what is at stake is the Owner's, not the Contractor's, contractual breach. On the other hand, such argument or interpretation has not been advanced by the Respondent and, in any case, the Claimant has not had the opportunity to address it, and the existence of the contractual practice referred to in the Award has not been raised by any Party nor is part of the evidence in this arbitration.

Moreover, as expressed by the Respondent, the Contract meticulously governs all the details of the legal relationship between the Parties and is a sophisticated document which is the outcome of meticulous negotiations covering in a detailed way the different aspects pertaining to its subject-matter[4]. It should be narrowly construed without reading in it wording the Parties have not included in its carefully negotiated text.

As the Award properly finds, Ms. Lee Van's expert reports are reliable. In her first report[5] - as the Award accepts – the daily cost delay rate (for every single day of the frigate program delay) is US$ 33,345.00, which multiplied by 1005 days yields a compensation for delay costs corresponding to Support, Service, Labor and Materials and other Costs equal to US$ 33,511,725.00 that should be granted to the Claimant.

I do not see any argument to deny the Claimant compensation for its overhead claim proportionate to the delay costs. Ms. Lee Van has in Table 12 of her 6 March Report persuasively established a daily overhead for the Claimant of US$ 28.26, which multiplied by 1005 days of delay yields an unabsorbed delay overhead of US$ 29,004,300.00, that should be also granted to the Claimant (the criticism of Ms. Lee Van basis for calculating delay overhead by Mr. Bello is unconvincing).

However, I do not find sufficient support for the Claimant's claims regarding disrupted and inefficiency/impacted contract lost opportunity and acceleration premium costs, also calculated by this expert.

2. **Counterclaims**

In his Supplemental Report, an expert witness on Venezuelan law, Mr. Luis A. Ortiz Alvarez, gave an opinion in support of the Claimant's allegation that the statute of limitations had run out in respect of the counterclaims. In cross-examination in the hearing this expert was not meaningfully cross-examined on his testimony in this respect, nor evidence was examined in the hearing to rebut his testimony in such regard[6].

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[4] Respondent's Answer and Counterclaim Memorial of 4 July 2014, pars.22, page 6; 49, page.15.

[5] 6 March 2014 Report, at 36.

[6] Transcript day 5, at 884 & fol.

Further:

1. It is undisputed that the applicable statute of limitations is 10 years (Article 1977 Venezuelan Civil Code). Undoubtedly, statute of limitation provisions are mandatory (public policy).

2. The Respondent alleges that it was tolled as a result of service of process on the Claimant's attorneys-in-fact of a Venezuelan court order to compel the Claimant to arbitrate pursuant to the Contract. The Respondent's position is that it was unclear that such individuals had ceased to be Ingalls's representatives with the concomitant implication that by serving process on those persons, process was properly served on the Claimant and, therefore, that the statute of limitations period was tolled.

3. However, even assuming that a claim to compel the Claimant to arbitrate can be equated with the filing of an arbitration request actually fleshing out the Respondent's counterclaims (which is very doubtful), unchallenged evidence shows that the order was issued on 28 April 2005 and served on the Claimant's presumptive representatives on 14 June 2005. Unchallenged evidence also shows that on 9 June 2004, as registered by a Notary public in Venezuela, the said mandate had been waived[7].

4. Thus, by the time process was served on these individuals, they no longer represented the Claimant and process served on them could not have had the effect of interrupting the statute of limitations period. It should be noted that the above are public documents, with full effects *erga omnes* , in respect of which there is no evidence that they were challenged or successfully attacked as to their form or substance.

5. Also, according to the Respondent's statements, the ten year statute of limitations period in connection with the different counterclaims that according to the Claimant would be time-barred started to run, as the case may be, as from 16 May 2002, 25 October 2002, 16 May 2003 and 25 October 2003[8]. But it is undisputed that by the time the Respondent filed its counterclaim of 4 July 2014, the ten year statute of limitations had already ran out if computed, as the Respondent claims, from such dates. The Respondent's argument that this is not the case because one should take into account the date of the filing of the arbitration request in 2011 *by the Claimant*, and not of the counterclaim, *filed by the Respondent* in 2014, is unwarranted[9].

6. In any case, the right of the Respondent to benefit from a reduction or allocation of penalty payments based on an interpretation of Venezuelan law regarding Clause 9 of the

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[7] Exhibits J-1903 and J-1910.

[8] Réplica a la Constestación a la Reconvención, paras. 430-432.

[9] *Ibidem*, at para 433.

Contract (as set forth in the Award paras.1667 & fol.) has not been raised in the arbitration, and the Claimant has not had the opportunity to address it.

7. Moreover, if both Parties are deemed responsible for delays (as the Award posits), no delays can be the source of penalties on the Contractor since Contract Clause 9 exclusively applies to situations in which the Contractor is solely responsible for the delay. As already expressed, the Respondent has not discharged its burden of proof in such regard. It is on that exclusive basis (all delays are attributable to the Claimant) that the Counterclaim has been pleaded by the Respondent. If there is shared responsibility for the delay, Clause 9 does not apply. As already said (and recognized by the Respondent), the Contract is sophisticated and has been carefully negotiated by the Parties. There is then no room for creative interpretations of Clause 9 not originated in any Party and not raised in the arbitration.

8. For the above reasons the Counterclaim should be rejected.

9. Since the Claimant has prevailed on a substantial part of its claims, the Respondent should pay for 80 % of the Claimant's arbitration and legal representation cost and fees. Since the Respondent had to resort to arbitration to assert its rights and paid for most of the costs and fees of the arbitrators without the contribution of the Respondent, including those pertaining to the Counterclaim, the Respondent should reimburse the Claimant all sums paid by the Claimant for arbitrators' fees and costs and the administrative charges of the ICC.

19 February 2018.