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BULLETIN

EXTRACT

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ICC Oil and Gas Cases in the MENA Region

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The MENA region contains the majority of the world's conventional oil and gas reserves and is a major producer of oil and gas in global markets. It has also produced some of the leading cases in the international arbitration world. This article reviews a sample of oil and gas arbitration awards issued by the ICC International Court of Arbitration between 1997 and 2011 where one or more of the parties were from MENA countries. They covered a wide range of oil and gas disputes, including state investment disputes, service contract disputes, construction infrastructure claims, and sales contracts for crude oil, natural gas and liquefied natural gas. The cases addressed a wide range of issues and reflected a high degree of complexity. However, the number of cases would not appear commensurate with the size of the oil and gas industry in the region.

Le Moyen-Orient et l'Afrique du Nord, qui recèlent la majorité des réserves conventionnelles de pétrole et de gaz, en figurent aussi parmi les principaux producteurs sur le marché mondial. La région est également la source de certaines des plus grandes affaires du monde de l'arbitrage international. Cet article examine un échantillon de sentences arbitrales émises entre 1997 et 2011 par la Cour internationale d'arbitrage de la CCI dans le secteur gazier et pétrolier à propos de différends intéressant une ou plusieurs parties originaires de pays de la région. Ces différends, très variés, portent notamment sur des investissements publics, des marchés de services, des projets de construction d'infrastructures et des contrats de vente de pétrole brut, de gaz naturel et de gaz naturel liquéfié. Les sentences règlent un large éventail de questions marquées par un haut degré de complexité. Le nombre d'affaires ne semble cependant pas proportionné à la taille de l'industrie gazière et pétrolière de la région.

La región de Oriente Medio y África del Norte, donde se encuentra la mayoría de las reservas convencionales de petróleo y gas, es uno de los mayores productores del mercado mundial. De ella también han surgido algunos de los casos más destacados en el ámbito del arbitraje internacional. Este artículo analiza ejemplos de laudos arbitrales relacionados con el petróleo o el gas emitidos por la Corte Internacional de Arbitraje de la CCI entre 1997 y 2011 en los que por lo menos una de las partes era de un país de dicha región. Estos laudos cubrieron una gran variedad de controversias sobre petróleo y gas, incluyendo inversiones estatales, contratos de servicios, reclamaciones de construcción de infraestructuras y contratos de venta de petróleo crudo, gas natural y gas natural licuado. Los casos abordaron asuntos muy diversos y reflejaron un alto grado de complejidad. Sin embargo, el número de casos no parece proporcional con el tamaño de la industria del petróleo y el gas en la región.

A. Introduction

The international oil and gas business invests in large, complex, capital-intensive projects that can last up to fifty years. It does so in a business environment where circumstances, economics, governments and the parties are constantly changing, which often results in misunderstandings and disputes. The consequence is that the oil and gas business and its infrastructure projects make up the largest segment of international arbitrations in the world.[1]

B. History of oil and gas arbitrations in the MENA region

The energy sector has had a lot of experience in dealing with disputes and their resulting arbitrations. Its earliest disputes had a large impact on the development of international arbitration and international investment law. Some of its most significant arbitration cases occurred

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1 By way of illustration, the annual statistical reports of the ICC International Court of Arbitration show that at least a quarter of its cases were energy or construction disputes over the last ten years. More recently that proportion has risen to approximately a third of its cases. The reports are published in the ICC International Court of Arbitration Bulletin and online in the ICC Dispute Resolution Library, www.iccdrl.com.

in a thirty-year period between the early 1950s to the mid 1980s in the Middle East and North Africa (MENA) region.[2] They included the following cases:

- *Petroleum Development* v. *Sheikh of Abu Dhabi* (1951)[3]
- *Ruler of Qatar* v. *International Marine Oil* (1953)[4]
- *Saudi Arabia* v. *ARAMCO* (1958)[5]
- *Sapphire International Petroleum* v. *NIOC* (1964)[6]
- Libyan cases *BP, TOPCO, LIAMCO* (1973–1978)[7]
- *Kuwait* v. *AMINOIL* (1982)[8]
- *Amoco International Finance* v. *Iran* (1985)[9]

These groundbreaking arbitration cases established that contracts between states and private parties can be 'internationalized' by making them subject to public international law and international arbitration. Most of these arbitrations were decided in favour of the investor claimant and against the government in question. A number of important principles emerged from these cases that are now widely accepted in the international arbitration world:

- sanctity of property and contracts;
- prohibition on unjust enrichment;
- states have the right to expropriate investments;
- however, states must compensate investors for their losses;
- legitimate expectations can be used in determining damages.

C. Role of the MENA region in the oil and gas business

The MENA region plays a significant role in the international oil and gas business. As shown in the Appendix to this article, countries in this region have the largest conventional oil and gas reserves in the world. Over the last twenty years, these countries have had anywhere between 52% to 67% of the world's crude oil proven reserves and 43% to 52% of the world's natural gas proven reserves.[10]

Since the countries in the MENA region possess the majority of the world's conventional oil and gas reserves, and collectively produce the largest volumes of oil and gas, one would naturally assume that they would generate the largest number of oil and gas arbitration cases compared to other regions of the world. One would also assume that since these countries figured prominently in the most historically significant oil and gas arbitration cases, parties from these countries would continue to be heavy users of international arbitration. However, this may not be the case.

By way of illustration, although several hundred oil and gas disputes have been submitted to the ICC International Court of Arbitration over the past twenty years, a small proportion of these cases came from the MENA region in comparison to other regions such as Europe and the Americas.[11]

D. Types of oil and gas disputes

To determine the kinds of oil and gas arbitrations generated from the MENA region during that twenty year period, a search was conducted among ICC cases using the following three criteria:

- **MENA region**: One or more of the parties were from one or more of the MENA countries.

- **Oil and gas**: The subject matter of the arbitrations related to upstream (exploration and production), midstream (processing and transportation) or downstream (marketing and refining) oil and gas operations.

- **Time period**: Awards were rendered between the years 1988 and 2012.

Extracts from a number of the cases found are published in this issue of the Bulletin and in the ICC Dispute Resolution Library.[12]

There are essentially four types of disputes found in the international oil and gas business.[13]
They are:

- **State v. state disputes**: These are primarily boundary disputes concerning oil and gas fields that cross international borders, most of which are located in maritime waters.

- **Company v. state dispute**s: These are state investment disputes, examples of which include the historical MENA cases referenced above.

2 The MENA region for the purposes of this article includes the following oil and gas producing countries: Iran, Iraq, Saudi Arabia, Bahrain, Kuwait, Qatar, UAE, Yemen, Oman, Jordan, Lebanon, Egypt, Libya, Morocco, Syria, Tunisia and Algeria.

3 *Petroleum Development (Trucial Coast) Ltd* v. *Sheikh of Abu Dhabi* (1951) 18 *International Law Reports* (ILR) 144, (1952) *International and Comparative Law Quarterly* (ICLQ) 247.

4 *Ruler of Qatar* v. *International Marine Oil Co. Ltd*, (1953) 20 ILR 534.

5 *Saudi Arabia* v. *Arab Am. Oil Co.* (*ARAMCO*), (1963) 27 ILR 117.

6 *Sapphire International Petroleum* v. *NIOC*, (1964) 13 ICLQ 1011.

7 *BP* v. *Libya*, (1979) 53 ILR 297; *TOPCO* v. *Libya*, (1978) 17 *International Legal Materials* (ILM) 3; *LIAMCO* v. *Libya*, award of 12 April 1977, (1981) VI *Yearbook Commercial Arbitration* 89.

8 *Kuwait* v. *AMINOIL*, (1982) 21 ILM 976.

9 *Amoco International Finance Corp.* v. *Islamic Republic of Iran.* AWD 310-56-3. Iran-United States Claims Tribunal, The Hague, July 24, 1987.

10 Source: 'BP Statistical Review of World Energy', June 2014, at www.bp.com/statisticalreview.

11 Although precise statistics are unavailable, this may be the case based upon correlations made between energy-related cases and geographical origins of parties at ICC.

12 www.iccdrl.com

13 A. Timothy Martin, 'Dispute Resolution in the International Energy Sector: an Overview', *Journal of World Energy Law & Business*, Volume 4, No. 4, (December 2011) at 334.

- **Company v. company disputes**: These are international commercial arbitrations, which are reflected in the ICC oil and gas cases described below.

- **Individual v. company disputes**: These run the gamut of personal injury claims, promoter and agent agreements and human rights claims.

Within the third category, international commercial arbitrations between companies, there are generally three subcategories of disputes that frequently occur between oil and gas companies.

1. The first subcategory is among existing or potential joint-venture participants in contracts such as:

- joint operating agreements
- unitization agreements
- farmout agreements
- area of mutual interest agreements
- study and bid agreements
- sale and purchase agreements
- confidentiality agreements

2. The second subcategory of disputes is between operators and service contractors or providers in the following kinds of agreements:

- drilling and well service agreements
- seismic contracts
- construction contracts
- equipment and facilities contracts
- transportation and processing contracts

3. The third subcategory includes sales contracts for goods such as crude oil, natural gas, liquefied natural gas (LNG), refined products, etc.

These disputes run the full gamut of size, complexity and financial significance.

E. ICC oil and gas cases

The eleven ICC cases reviewed for this article fall within several of the above dispute categories and subcategories. They include one state investment dispute involving a production sharing agreement. The remaining ten cases were within the company v. company category, which is where one would expect most ICC cases to occur. Within that category, there were six service contract disputes (three of which were seismic and drilling contracts and three of which were construction infrastructure claims). The final four arbitration cases dealt with sales contracts for crude oil, natural gas and LNG. Interestingly, there were no joint-venture disputes.

I. State investment disputes

Case 14108[14]

This was a claim by an American company against the relevant Ministry of a country located on the Arabian Peninsula concerning the extension of a production sharing agreement (PSA). The original PSA was for a term of twenty years that began on the date of the first commercial discovery. The parties began negotiating a five-year extension of the PSA several years before its expiry. After re-negotiating the terms of the PSA, the Claimant and the Ministry (in the person of the Minister) signed a renewal and extension agreement (REA).

Subsequent to the execution of the REA, the Claimant began investing in an exploration program. However, one of the conditions of the REA was that a partial amendment agreement (PAA) with the re-negotiated terms for the PSA extension was to be submitted to the country's Parliament for its approval. In particular, the REA stated the following: 'This Renewal and Extension Agreement signed by the Ministry and Contractor, shall be binding on the parties hereto upon exhaustion of the constitutional procedures in the State, which will give the provisions of this Renewal and Extension Agreement and its Annexes attached hereto, full force and effect. Ministry represents that it has obtained such approval of the State Council of Ministers on even date with the signing of this Renewal and Extension Agreement and covenants that there are no further approvals required by the Government in order to make this Renewal and Extension Agreement binding on the State.'

The country's Parliament subsequently refused to ratify both the renewal and the PAA. As a result, the Ministry took the position that the PSA had not been extended, it evicted the Claimant from the PSA block after the expiry date and replaced the Claimant with a state-owned oil company.

A dispute then arose between the parties over whether or not the PSA had been validly extended. The Claimant initiated an ICC arbitration with a claim equating to the volume of oil it would have been entitled to during the five-year extension. In response, the government made a counterclaim on the basis that the Claimant breached its duty to act as a reasonably prudent operator and that there was resulting environmental damage to the PSA block.

14 See 'Extracts from ICC Arbitral Awards in Oil and Gas Disputes', in this issue, page 67.

The law applied by the Tribunal to determine the merits of the case was found in the governing law clause of the PSA, which provided that: 'This Agreement for such arbitration shall be given effect and shall be interpreted and applied in conformity with principles of law common to [Respondent State] and the United States and in the absence of such common principle, then in conformity with the principles of law normally recognized by civilized nations in general, including those which have been applied by International Tribunals.'

The primary issue the Tribunal had to determine was what the parties had contemplated when they inserted the words 'exhaustion of the constitutional procedures' and what was the effect of the approval of the terms of the REA by the Council of Ministers. Even though the Tribunal accepted that the wording of that provision was very ambiguous, they found that the PSA had not been extended as the necessary constitutional procedures had not been exhausted. This conclusion was confirmed by the circumstances of the parties' negotiations.

In its August 2008 award, the Tribunal dismissed the Claimant's claim for damages for breach of the extended agreement. However, they found that the Claimant was entitled to compensation on grounds of estoppel for an amount corresponding to the exploration costs incurred by the Claimant through its reliance on the government's behaviour. The Tribunal dismissed the government's counterclaims.

Despite the ambiguity of both the governing law clause in the PSA and the extension clause in the REA, the Tribunal found in favour of the government's interpretation of the agreements. This was a different result from the early MENA arbitration cases described above.

II. Company v. company disputes

Most of the MENA cases involved disputes between companies; evenly split among oil service contracts, construction contracts for oil and gas infrastructures, and sales contracts of petroleum commodities.

1. Service contracts

Case 10302[15]

This was a fairly straightforward contract case dealing with a damage claim arising from a delay in performing seismic work. The Claimant was a contractor engaged in seismic work, which subcontracted the drilling part of the work to the Respondent. Both parties agreed that the work would start after a six-week mobilization period allowing for the necessary equipment to be brought to the site. The shipment of the equipment ran into delays, which the Respondent argued was beyond its control. The majority of the Tribunal found that the Claimant was entitled to reimbursement of expenses incurred to cover the Respondent's inadequacies as well as liquidated damages. The dissenting arbitrator considered the former should be included within the liquidated damages and subject to the cap applicable to such damages.

Case 11579[16]

This arbitration involved two drilling contracts in which the Respondent was the operator of an oil/gas concession. As a result of its financial difficulties, the Respondent failed to pay the Claimant, a drilling company, for its drilling services. The Claimant demanded payments due under the contracts and damages for breach of those contracts. The Respondent raised various defences and counterclaimed that the Claimant was in violation of the host country's law and therefore in breach of the contracts.

In this relatively straightforward contract dispute, the Tribunal found that the Claimant was entitled to demobilize its rig under the first contract since its invoices had not been paid and that the Respondent could not prevent such demobilization. However, the Tribunal refused the claim for damages to compensate the Claimant for the Respondent's unlawfully preventing the demobilization of the rig, as there was no proof that the rig would have been used profitably elsewhere. The Tribunal also found that the Claimant was entitled to suspend drilling under the second contract due to the Respondent's failure to give necessary instructions and to terminate the contract due to the Respondent's failure to pay its invoices. The Tribunal dismissed the Respondent's counterclaims.

15 Extract from final award available in the ICC Dispute Resolution Library, www.iccdrl.com.

16 See 'Extracts from ICC Arbitral Awards in Oil and Gas Disputes', in this issue, page 36.

Case 13686[17]

This case illustrates some of the difficulties encountered in international oil and gas operations and the consequences of not dealing with them properly. The Claimant was a drilling contractor that had agreed to have its existing drilling contract with another oil company (which was not party to the arbitration) assigned to Respondent through an assignment agreement.

A roadblock set up by local Bedouin tribesmen stopped the transportation of the Claimant's drilling equipment to the Respondent's drill site. To remove the blockage, the Claimant's tool pusher made an agreement with the tribe, under which the tribesmen would be paid higher rates than the Claimant's own employees. The Claimant refused to put it into effect resulting in an insecure drilling site and work stoppage. This caused the Respondent to evacuate its expatriate employees and to seek termination of the drilling contract. The oil company that had the original drilling contract refused to consent to such termination. Instead, the Respondent terminated the assignment agreement.

In its arbitration claim, the Claimant demanded payment of its outstanding invoices. The Respondent counterclaimed damages for losses suffered as a result of the road blockage. The Tribunal found that the Respondent was not justified in terminating the assignment agreement. It rejected the Claimant's claim for standby fees as the delay was largely due to its failure to provide information and rejected its claim for lost revenues, which would have put it in a better position than if the assignment agreement had not been terminated. Overall, the Tribunal accepted claims that were consistent with the parties' contractual undertakings while rejecting those not supported by sufficient evidence.

Case 13777[18]

This was essentially a construction claim for delay damages. However, the case had some interesting twists in that i) the Respondent's delay in performance was caused by the imposition of trade sanctions on its US parent and ii) the Claimant attempted to include the Respondent's US parent (which was not a signatory to the contract) in the arbitration. As a result, the Tribunal issued separate awards: one that addressed the issue of jurisdiction and another that dealt with the merits/damages of the case.

The contract in question was governed by English law and the venue of the arbitration was Geneva, Switzerland. In the first award on jurisdiction, the Tribunal reviewed a series of English cases and some US cases submitted by the Claimant on the issue of joinder. It found that there was no basis in English law to justify including the parent company as a party to the arbitration. It affirmed the basic rule under Article 2 of the New York Convention that in arbitration (unlike court proceedings) only those who are parties to the arbitration agreement expressed in writing can appear in the arbitral proceedings either as claimants or defendants.

The Claimant was a contractor for the construction of a gas injection plant in a MENA country that was subject to US trade sanctions. The Respondent, a European subsidiary of a US company, agreed to supply the Claimant with a 'bespoke and critical piece' of equipment for the plant, i.e. pressure safety relief valves (PSVs) that were used to increase the flow rate of oil wells. After the awarding of the contract, the US parent company of the Respondent commenced an investigation into possible breaches by its subsidiary companies of US trade sanction laws related to dealings with the MENA country where the plant was located. The Respondent subsequently informed the Claimant that it was unable to perform under the contract due to the possibility that its performance would place its parent company in breach of US trade sanction laws and expose its parent to serious liabilities. As a result, the Claimant had to find a replacement supplier, which caused delays and disruption to the gas injection plant, for which it was penalized under its contract with the plant owner. It claimed damages for the penalties it incurred, alleging that they were a direct result of the breach and repudiation of the PSV supply contract by the Respondent.

In its second award on the merits of the claim and the amount of damages, the Tribunal ruled on the Respondent's liability for the consequences of the delay caused by its repudiation of the contract and the reasonableness of the actions undertaken by the Claimant to mitigate its loss. The Tribunal ruled in favour of the Claimant using a classic analysis of English damages law, based upon the application of *Hadley* v. *Baxendale* principles. In doing so, it appeared to have little sympathy for the Respondent and the fallout it suffered from the application of US trade sanctions, which were not in its control.

17 See 'Extracts from ICC Arbitral Awards in Oil and Gas Disputes', in this issue, page 44.

18 See 'Extracts from ICC Arbitral Awards in Oil and Gas Disputes', in this issue, pages 48 and 50.

Case 13790[19]

The Respondent was the primary engineering, procurement and construction (EPC) contractor for the design/build of an oil refinery. The Claimant was one of its subcontractors, responsible for the design, build and supply of materials for civil works on the refinery. The Claimant sought an extension of time to complete the works and compensation for costs caused by delays and disruption, which it alleged were due to the Respondent. The Respondent accused the Claimant of breach of contract and sought liquidated damages as provided in the subcontract. It also argued that the Claimant had forfeited its right to claim for reimbursement of costs as it had failed to comply with statutory and contractual notice requirements.

This was a classic construction dispute in which the parties mutually accused each other of delays, disruptions and contractual breaches, and which was heavily dependent upon the factual records of the project. The Tribunal analysed the evidence submitted and found that both parties bore responsibility for the lack of adequate programming and for the project's delay and disruption. In its award, the Tribunal stated that any scientific assessment of the respective responsibility of each party and their individual contribution to the total damage was 'utopian'. As a result, the Tribunal determined the responsibility of each of the parties for the delay and disruption on the basis of a rough percentage allocation and the preponderance of the facts.

Case 16198[20]

This was another construction claim for damages arising out of delays and changes made in an offshore construction project. The Claimant was a contractor under an EPC contract to construct offshore oil production facilities for the Respondent. The Claimant had a long list of claims, including recovering unpaid invoices, wasted expenditures, additional expenses, liquidated damages that it alleged to have been wrongfully deducted by the Respondent, an insurance deductible for which it denied liability, and compensation for the cashing of a performance bond. The Respondent contended that it had paid all monies due and that the Claimant was responsible for the delays. The Tribunal methodically went through each of the claims and allocated responsibility and damages based upon the facts it determined.

One of the more interesting issues in the case was the Tribunal's decision on the law to be applied to the merits of the dispute. The EPC contract's governing law clause provided that: 'The construction validity and performance of this Agreement and legal relations of Parties thereto shall be governed by the laws of [state A] and/or [state B].' Given the above language, the Tribunal had to decide whether it was more appropriate to apply one body of law versus the other, or to apply both bodies of law. The expert opinions submitted by both parties made it clear that for certain issues there would be a different outcome depending on the body of law applied. Under those circumstances, the Tribunal took the view that it was necessary to decide to apply either state A law or state B law, but not both.

The civil codes of both countries had a similar principle that if the parties had different domiciles, the law of the state where the contract was concluded was applicable. The Tribunal therefore decided that the dispute should be determined in accordance with the applicable principles of the law of state A, since the contract was signed or 'concluded' in that state.

2. Sales contracts

Case 8198[21]

The dispute involved a number of identical crude oil sale contracts between the Claimant (a MENA government), as seller, and the Respondent (a West European company), as buyer. There were a number of claims and counterclaims that arose as a result of the buyer's vessels failing to arrive at the loading terminal within the agreed loading date range and therefore failing to take delivery of the oil on time. This had a number of knock-on effects on the seller, for which it claimed damages. These included storage charges and price differentials.

The Respondent argued that the date range agreed upon referred to the arrival of the vessels, not to the loading of the cargo. The Tribunal found that, regardless of the name given to the period, what was important was that the vessels arrived within the dates agreed upon. Given that the vessels did not arrive within the agreed date ranges, the Tribunal found the Respondent liable. The Tribunal also found that damage claims relating to different cargoes should be treated separately.

19 See 'Extracts from ICC Arbitral Awards in Oil and Gas Disputes', in this issue, page 55.

20 See 'Extracts from ICC Arbitral Awards in Oil and Gas Disputes', in this issue, page 78.

21 See 'Extracts from ICC Arbitral Awards in Oil and Gas Disputes', in this issue, page 33.

Case 10351[22]

This case dealt with a disagreement on the proper application of an indexation price formula for the purchase of liquefied natural gas (LNG) under a long-term LNG sales contract. The Respondent, a MENA state gas company, was the seller of the LNG and the Claimant, a West European company, was the buyer.

The parties repeatedly modified the pricing clause for the LNG in a number of contract revisions. They initially indexed the price to competing products such as natural gas, then the price of crude oil, then the price of natural gas based on an FOB breakeven price of a basket of crude oils. The last revision provided for a pricing formula that included a correction factor. It used the arithmetic average during the semester preceding the quarter for the average price per barrel of crude oils from eight different countries, as published by the Platts Oilgram Price Report. Platts subsequently modified the formula for calculating FOB breakeven prices, which resulted in higher prices. The Claimant objected to the use of a parameter based on the Platts revised formula and demanded a return to the previous formula and the refund of overpaid amounts.

Instead of issuing a final award, the Tribunal issued a partial award, ordering the parties to negotiate a revision of the correction factor within a three month period, so that the formula could properly set the price, notwithstanding the introduction of the new Platts formula. If the parties agreed, the Tribunal offered to issue an award confirming the new formula. If they failed to agree, each party was instructed to indicate to the Tribunal the points on which they differed, the reasons for their position and any other useful information, including any evidence about the amounts outstanding. Since the parties failed to agree, there were further submissions leading first to another partial award and then a final award, in which the Tribunal determined aspects of the applicable formula and the amounts to be awarded.

Case 13898[23]

This was an arbitration between two state-owned companies, one from East Europe and the other from a MENA country. The Claimant (the East European company), as a buyer, entered into a long-term gas sales contract with the Respondent (the MENA company and the seller). The contract contained a price revision clause, allowing the price to be revised in the event of an unforeseen change in market circumstances, and a price reduction clause, allowing the price to be reduced in the event that the gas delivered was not of the required quality.

The Tribunal in its award addressed i) whether the conditions for a revision of the contract price had been met and, if so, what was their effect; and ii) whether it had jurisdiction to decide on a price reduction and, if so, whether there had been a failure to meet the required quantities and quality, causing harm to the Claimant. To decide on the price revision claim, the Tribunal considered the meaning of the terms 'change of circumstances on the energy market', 'reasonable expectations of the parties' and 'change beyond the control of the parties'. The Tribunal found that i) the market conditions for a price revision were met and that ii) Claimant was precluded by the parties' agreements from claiming deficient quantity and quality.

In reaching its conclusions, the Tribunal made some preliminary decisions, including that the parties, although state-owned, were commercial organizations separate from those states and were to be treated as such in interpreting the contract and determining the award. The Tribunal also considered the law applicable to the merits of the case, which was stated as the 'relevant trade usages and general principles of law' in the governing law clause. Both parties agreed that there was no need to determine the proper law of the contract and that it was only necessary to take account of relevant trade usages and general principles of law. The Tribunal therefore interpreted and applied the provisions of the Contract (which in its opinion were sufficiently clear) in the normal way, i.e. by looking at the Contract from the point of the view of the parties and by giving the words used by them a plain and ordinary meaning so as to arrive at their presumed intentions.

Case 15051[24]

This was a dispute about the contracted volumes and applicable prices in two long-term natural gas sales contracts. The Claimant was a MENA state-owned company that was the producer/seller of the gas and the Respondent, the buyer, was a West European company. Even though there was a slight difference in the language of the two contracts, the parties agreed that they should be interpreted identically. The Arbitral Tribunal therefore determined that its reasoning on the price reviews would be the same for both contracts.

22 See extract from partial award, (2009) 20:2 ICC ICArb. Bull. 76, also available in the ICC Dispute Resolution Library, www.iccdrl.com.

23 Extract from final award available in the ICC Dispute Resolution Library, www.iccdrl.com

24 See 'Extracts from ICC Arbitral Awards in Oil and Gas Disputes', in this issue, page 72.

The Tribunal had to first decide on i) whether the stated Annual Contract Quantity (ACQ) was an annual maximum volume and whether the Claimant was not obligated to supply more, and if so ii) the price that the Claimant could charge for any additional volumes it delivered above the ACQ.

The Claimant argued that it only promised to deliver the Annual Contract Quantity on an annual basis and nothing more. The ACQ was meant to be a 'ceiling' beyond which any quantities would be treated as 'additional quantities' (or excess gas). In addition, any such additional quantities were not subject to the long-term contract price, but to the market price at the time of the sale. The Claimant therefore sought to recover the difference between the long-term price set in the contracts and the market price for those additional quantities.

The Respondent took the view that the quantities specified in the contract allowed for flexibility and were not to be considered as maximum quantities. Rather, the ACQ was to be applied as a baseline figure to calculate a Contract Hourly Rate (CHR) for the volumes of gas that the Claimant had to make available to the Respondent on an hourly basis, taking into account a load factor of 0.85, which was defined as 'the coefficient of utilization of the gas pipeline during a Contract Year'. As a result, the Respondent would not have to pay any price difference for any additional quantities.

In its award, the Tribunal first determined that the Claimant's interpretation of the ACQ was correct. The ACQ was used to establish the annual maximum quantities that the Claimant was obligated to deliver. The CHR was instead used to establish the maximum capacity of the pipeline by defining the maximum hourly volumes the seller would agree to deliver for any contractual year. This was done based on a purely mathematical computation of applying an 85% load factor to the ACQ.

In its reasoning on this point, the Tribunal noted that even though the headings of articles were inserted for convenience of reference only and were not to affect the construction of the contracts, they confirmed rather than contradicted the Tribunal's interpretation. The Tribunal also relied upon the parties' pre-contractual negotiations to further confirm its interpretation

The Tribunal then found that up to 2005, any additional quantities that were delivered above the annual maximum volume could be sold without billing a price different from the contract price, since there was little difference between that price and the market price. It then found that a price adjustment for the following three years was justified based on the Claimant's formula, which correctly reflected market developments. In doing so, it noted that the parties did not set a price for quantities above the ACQ in the contracts.

The Tribunal had to then decide whether the conditions stated in the contracts were met for i) an ordinary price review and ii) an extraordinary price review based on hardship.

The Claimant argued that it was entitled to obtain an increase of the contract sales prices in an ordinary price review, considering that the oil prices considerably increased on the international energy markets, on the European gas market for long-term contracts, and on the destination country gas market during the reference periods, The Respondent's main argument was that, as a result of the developments in the destination country market during the reference periods, the contracts became less competitive and therefore the price should be reduced.

The Arbitral Tribunal decided that i) it would consider the three markets referred to in the price review clauses without giving a preference to the destination country market evolution (as argued by the Respondent), ii) the Claimant's proposed formula was valid and reflected the market evolution, and iii) the Claimant's claim on the ordinary price review was admitted.

The Tribunal finally found that an extraordinary price review based on hardship was justified only if the changes in the Brent oil price could not be considered to have been part of the parties' shared assumptions when entering into the contract. It held that an average price differential of 24% between the benchmark price and the contractual price was not sufficient to constitute significant hardship and that the change was foreseeable and the damage suffered not sufficiently established.

F. Conclusion

The ICC oil and gas cases that were awarded over the last two decades from the MENA region covered a wide range of oil and gas disputes with a high degree of complexity. However, the number of cases does not reflect the size of the oil and gas industry in the region. This could be for a number of reasons, including i) local companies being less litigious in nature than the global industry, ii) the dominance of national oil companies in the region, which encouraged the settlement of claims rather than using arbitration, or iii) requirements to use local courts, rather than international arbitration.

Appendix

Source: 'BP Statistical Review of World Energy', June 2014, at www.bp.com/statisticalreview.

Crude Oil: Proved Reserves						
Countries	**1993**		**2003**		**2013**	
	Billion barrels	% of total	Billion barrels	% of total	Billion barrels	% of total
Middle East						
Iran	92.9	8.9%	133.3	10.0%	157.0	9.3%
Iraq	100.0	9.6%	115.0	8.6%	150.0	8.9%
Kuwait	96.5	9.3%	99.0	7.4%	101.5	6.0%
Oman	5.0	0.5%	5.6	0.4%	5.5	0.3%
Qatar	3.1	0.3%	27.0	2.0%	25.1	1.5%
Saudi Arabia	261.4	25.1%	262.7	19.7%	265.9	15.8%
Syria	3.0	0.3%	2.4	0.2%	2.5	0.1%
UAE	98.1	9.4%	97.8	7.3%	97.8	5.8%
Yemen	2.0	0.2%	2.8	0.2%	3.0	0.2%
Other ME	0.1	0.0%	0.1	0.0%	0.3	0.0%
Total ME	661.9	63.6%	745.7	55.9%	808.5	47.9%
North Africa						
Algeria	9.2	0.9%	11.8	0.9%	12.2	0.7%
Egypt	3.4	0.3%	3.5	0.3%	3.9	0.2%
Libya	22.8	2.2%	39.1	2.9%	48.5	2.9%
Tunisia	0.4	0.0%	0.6	0.0%	0.4	0.0%
Other N. Africa	0.6	0.1%	0.6	0.0%	3.7	0.2%
Total N. Africa	36.4	3.5%	55.7	4.2%	68.7	4.0%
Total MENA	698.4	**67.1%**	801.4	**60.1%**	877.2	**51.9%**
Total World	1041.4	100.0%	1334.1	100.0%	1687.9	100.0%

Natural Gas: Proved Reserves						
Countries	**1993**		**2003**		**2013**	
	Trillion m^3	% of total	Trillion m^3	% of total	Trillion m^3	% of total
Middle East						
Bahrain	0.2	0.1%	0.1	0.1%	0.2	0.1%
Iran	20.7	17.5%	27.6	17.7%	33.8	18.2%
Iraq	3.1	2.6%	3.2	2.0%	3.6	1.9%
Kuwait	1.5	1.3%	1.6	1.0%	1.8	1.0%
Oman	0.2	0.2%	1.0	0.6%	0.9	0.5%
Qatar	7.1	6.0%	25.3	16.3%	24.7	13.3%
Saudi Arabia	5.2	4.4%	6.8	4.3%	8.2	4.4%
Syria	0.2	0.2%	0.3	0.2%	0.3	0.2%
UAE	5.8	4.9%	6.0	3.9%	6.1	3.3%
Yemen	0.4	0.4%	0.5	0.3%	0.5	0.3%
Other ME	0.0	0.0%	0.1	0.0%	0.2	0.1%
Total ME	44.4	37.5%	72.4	46.5%	80.3	43.2%
North Africa						
Algeria	3.7	3.1%	4.5	2.9%	4.5	2.4%
Egypt	0.6	0.5%	1.7	1.1%	1.8	1.0%
Libya	1.3	1.1%	1.5	1.0%	1.5	0.8%
Other N. Africa	0.7	0.6%	1.0	0.7%	1.2	0.7%
Total N. Africa	6.3	5.3%	8.8	5.7%	9.1	4.9%
Total MENA	50.8	**42.9%**	81.2	**52.1%**	89.4	**48.2%**
Total World	118.4	100.0%	155.7	100.0%	185.7	100.0%

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