

## Egyptian state entity defeats US\$3 billion claim

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11 February 2020



The Damietta plant (Credit: Union Fenosa Gas)

A Madrid-seated tribunal has rejected a US\$3.1 billion claim against Egypt's state-owned gas supplier on the basis that the claimant, a joint venture between Spain's Naturgy and Italy's Eni, has already secured a US\$2 billion ICSID award.

In an award on 7 January, a tribunal chaired by Switzerland's **Pierre Tercier** said that it lacked jurisdiction over the claims by Unión Fenosa Gas (UFG), as the joint venture waived its right to pursue a commercial claim when it brought an ICSID case against Egypt.

Tercier formed a majority with Swiss arbitrator **Wolfgang Peter** in the case, which was administered by the Cairo Regional Centre for International Commercial Arbitration (CRCICA). German arbitrator **Karl-Heinz Böckstiegel** issued a dissenting opinion.

GAR understands that the unpublished award marks the first time that article 26 of the ICSID Convention has been used to block a contractual claim that allegedly relates to the same loss.

The article provides that the consent of the parties to ICSID arbitration is to the exclusion of any other remedy.

Egyptian Natural Gas Holding Company (EGAS) was represented by Shearman & Sterling, while King & Spalding acted for UFG. The firms were contacted for comment.

#### **Four claims filed**

The case is one of several arbitrations filed over the Damietta natural gas liquefaction plant on the northeast Egyptian coast, which is 80% owned by UFG. The rest is held by EGAS and another state-owned company, Egyptian General Petroleum Corporation.

The plant had produced LNG for export to Spain before Egypt cut off gas supplies in 2012 in the wake of the Arab Spring, citing energy shortages in the domestic market.

UFG filed two CRCICA claims against EGAS in 2013 under an alternating arbitration clause in the supply agreement that provided the default seat for claims would rotate between Madrid and Cairo.

In the Madrid-seated case giving rise to the latest award, UFG sought damages for shortfalls in the supply of natural gas from EGAS.

In the Cairo-seated CRCICA case, UFG brought a US\$10 million price adjustment claim against EGAS. That case also featured Tercier and Peter, this time sitting alongside New Zealand arbitrator **James Hosking** of Chaffetz Lindsey. The tribunal dismissed the claims in 2017, while also rejecting EGAS's allegations that the contract was frustrated by force majeure and that UFG acquired its stake in the Damietta plant using corrupt means.

SEGAS, owner of the Damietta plant and UFG's 80% subsidiary, also filed a US\$270 million ICC claim in 2013 against EGAS under a liquefaction contract in which EGAS paid SEGAS to reserve capacity to liquify gas at the plant.

A Paris-seated tribunal chaired by **David St John Sutton** and including **Klaus Reichert SC** and **Laurent Aynès** of Darrois Villey Maillot Brochier, dismissed the claim in 2016 after finding that UFG had assigned all of its rights under the liquefaction contract to the banks that financed the project.

In 2014, UFG filed an ICSID claim seeking US\$3.2 billion in damages from the Egyptian state over the interruption of gas supplies under the purchase contract. The tribunal, composed of **VV Veeder QC** as chair, **J William Rowley QC** and Foley Hoag partner **Mark Clodfelter**, awarded damages of US\$2 billion plus interest to UFG in 2018.

The majority award held Egypt liable for EGAS' failure to deliver gas in accordance with the gas supply contract. Egypt's argument that that the contract was procured through corruption was rejected.

Clodfelter said in a dissenting opinion that he disagreed on the corruption findings. He also said the tribunal lacked jurisdiction on the basis that the actions of EGAS were not attributable to Egypt, did not violate the BIT and that that UFG had failed to prove the damages awarded.

EGAS also instructed Shearman & Sterling in the Cairo and ICC proceedings. At ICSID, Egypt relies on Cleary Gottlieb Steen & Hamilton. King & Spalding also represented UFG in the Cairo and ICSID claims. The joint venture turned to DLA Piper for the ICC case.

### **New claim, same loss?**

In the latest award, the Madrid-seated CRCICA tribunal considered whether UFG had waived its right to bring a commercial claim against EGAS when it brought its ICSID claim against Egypt in relation to the same facts and the same loss, albeit on a different legal basis and against a different party.

Tercier and Peter formed a majority to conclude that article 26 of the ICSID Convention precluded UFG's claim and that the tribunal therefore lacked jurisdiction in the case.

In his dissent, Böckstiegel said that article 26 only precluded a claim where the cause of action and the parties were the same. This was not the case in the present dispute as the ICSID claim had been filed against a different party – the Egyptian state – and was heard under a different instrument, the Spain-Egypt bilateral investment treaty.

Prior to the latest award dismissing the US\$3.1 billion claim including interest, the tribunal had declined to allow UFG to amend its claim to seek a further US\$450 million in damages.

The majority tribunal ordered UFG to pay US\$3.4 million in costs and fees, while EGAS was ordered to pay around US\$7.3 million. The panel considered that UFG had paid the entirety of the arbitration costs and its legal fees, which totalled US\$15 million, were significantly higher than EGAS' fees, which were US\$8 million.

**Emmanuel Gaillard**, head of international arbitration at Shearman & Sterling says: “We welcome this ground-breaking decision. We are particularly happy that the tribunal found relevant and underscored that the essential problem — and the fundamental injustice — of multiple proceedings is not so much the opportunity for a party to recover multiple times, but rather the tactics of a claimant who decides to multiply its chances of success in different fora.”

**Yas Banifatemi**, co-head of international arbitration at Shearman & Sterling, adds: “This decision is a key precedent and an important addition to the toolbox at arbitral tribunals' disposal to address the phenomenon of multiple proceedings in respect of the same facts and the same loss.”

Paris-based partner, **Mohamed Shelbaya**, says the decision is important as it “restores sanity to the rules regulating the interaction between commercial claims and treaty claims.” On the arbitrations filed against EGAS, he says “our client fully prevailed in all three arbitrations and secured the dismissal of claims exceeding US\$4 billion.”

Shelbaya says that recent bilateral investment treaty models, including that of the EU, propose expressly to exclude claims by investors and their vehicles under commercial contracts where they have also sought relief under the treaty mechanism and vice versa; something which he argues was implied in prior treaties anyway.

### **Battles continue elsewhere**

In the ICSID case, Egypt filed proceedings to annul the award in January last year, thought to be based on the corruption allegations and Clodfelter's dissenting opinion. Last month, the ad

hoc committee hearing that petition lifted a stay of enforcement of the award, citing the state's failure to pay security. A hearing has yet to take place and a decision is not expected before late this year.

UFG has applied to enforce the award in Washington, DC and says it will file a motion for default judgment as Egypt has failed to respond to the proceedings.

Following the ICC award that found UFG had assigned its right to a claim, a consortium of banks led by HSBC subsequently filed its own ICC claim against EGAS in 2018.

*Unión Fenosa Gas v Egyptian Natural Gas Holding Company (EGAS)* (CRCICA Arbitration Case No. 899/2013; Madrid seat)

#### Tribunal

- **Pierre Tercier** (Switzerland) (chair)
- **Wolfgang Peter** (Switzerland)
- **Karl-Heinz Böckstiegel** (Germany)

#### Counsel to Unión Fenosa Gas

- King & Spalding

Partners **Doak Bishop** and **David Weiss**, with senior associate **Sara McBrearty** and associate **Ginny Castelan** in Houston; partner **James Castello** and senior associate **Rami Chahine** in Paris; and partners **Ed Kehoe** and **Isabel Fernandez de la Cuesta** with associates **Timothy McKenzie**, **Erin Collins**, **Julian Ranetunge** and **Viva Dadwal** in New York; partner **Aloysius Llamzon** in Washington, DC and senior associate **Sara Burns** in Atlanta

#### Counsel to EGAS

- Shearman & Sterling

Partners **Emmanuel Gaillard**, **Yas Banifatemi** and **Mohamed Shelbaya**, senior associates **Youssef Daoud** and **James Herbert**, associates **Peter Frilay**, **Chaymaa Shady** and **Omar El-Sada** in Paris; partner **Daniel Reich** in New York; and senior associate **Edward Taylor** in Hong Kong

*Unión Fenosa Gas v Egyptian Natural Gas Holding Company (EGAS)* (CRCICA Arbitration Case No. 896/2013; Cairo seat)

#### Tribunal

- **Pierre Tercier** (Switzerland) (chair)
- **Wolfgang Peter** (Switzerland)
- **James Hosking** (New Zealand)

#### Counsel to Unión Fenosa Gas

- King & Spalding

Partners **Doak Bishop** and **David Weiss**, with senior associate **Sara McBrearty** and associate **Ginny Castelan** in Houston; partner **James Castello** and senior associate **Rami Chahine** in Paris; and partners **Ed Kehoe** and **Isabel Fernandez de la Cuesta** with associates **Timothy McKenzie**, **Erin Collins**, **Julian Ranetunge** and **Viva Dadwal** in New York; partner **Aloysius Llamzon** in Washington, DC and senior associate **Sara Burns** in Atlanta

#### Counsel to EGAS

- Shearman & Sterling

Partners **Emmanuel Gaillard**, **Yas Banifatemi** and **Mohamed Shelbaya**, senior associates **Youssef Daoud** and **James Herbert**, associates **Guillermo Salcedo Salas\***, **Peter Frilay**, **Yasmine El Maghraby\***, **Chaymaa Shady**, **Omar El-Sada**, and **Rayan Keyrouz** in Paris; partner **Daniel Reich** in New York; and senior associate **Edward Taylor** in Hong Kong

*\* no longer with the firm*

*Unión Fenosa Gas, S.A. v Arab Republic of Egypt (ICSID Case No. ARB/14/4)*

#### Tribunal

- **VV Veeder QC** (UK) (chair)
- **J William Rowley QC** (Canada/UK) (appointed by the claimant)
- **Mark Clodfelter** (US) (appointed by Egypt)

#### Counsel to Unión Fenosa Gas

- King & Spalding

Partners **Doak Bishop** and **David Weiss**, with senior associate **Sara McBrearty** and associate **Ginny Castelan** in Houston; partner **James Castello** and senior associate **Rami Chahine** in Paris; and partners **Ed Kehoe** and **Isabel Fernandez de la Cuesta** with associates **Timothy McKenzie**, **Erin Collins**, **Julian Ranetunge** and **Viva Dadwal** in New York; partner **Aloysius Llamzon** in Washington, DC and senior associate **Sara Burns** in Atlanta

#### Counsel to Egypt

- Cleary Gottlieb Steen & Hamilton

Partner **Claudia Annacker**, counsel **Laurie Achtouk-Spivak** and associates **Ariella Rosenberg** and **Ellie Norton** in Paris; counsel **Cameron Murphy** in London; and senior attorney **Larry Work-Dembowski** in Washington, DC

- Egyptian State Lawsuits Authority

*Spanish Egyptian Gas Company, S.A.E. v Egyptian Natural Gas Holding Company* (ICC Case No. 19392/TO)

Tribunal

- **David St John Sutton** (UK) (chair)
- **Klaus Reichert SC** (Ireland, Germany) (appointed by the claimant)
- **Laurent Aynès** (France) (appointed by EGAS)

Counsel to the claimant

- DLA Piper

Partner **Matthew Saunders**, senior associate **Emma Martin** and associate **Amy Billing** in London\*; partner **Javier Santos** and senior associate **Samuel Rivero** in Madrid

*\* Saunders and Martin have since moved to Ashurst, while Billing is now based at DLA Piper in Sydney*

Counsel to EGAS

- Shearman & Sterling

Partners **Emmanuel Gaillard**, **Yas Banifatemi**, **Mohamed Shelbaya** (Paris) and **Daniel Reich** (New York), Paris senior associate **James Herbert** and associates **Peter Frilay**, **Yasmine El Maghraby\***, **Chaymaa Shady**, **Rayan Keyrouz** and **Ross Galvin\*** in Paris; senior associate **Edward Taylor** in Hong Kong

*\* no longer with the firm*