

**ALGERIA JUDICIAL AND LEGAL CONFERENCE
MARCH 23RD AND 24TH**

ENERGY SPEECH

INTRODUCTION

Good Afternoon Ladies and Gentlemen.

It's a great pleasure to be here and thank you all for the hospitality shown to me and my colleagues thus far.

This afternoon, I'm going to be giving a short talk on Energy and the importance of Energy in today's world economy with a focus on Algeria and some of the legal requirements when drafting, vetting and reviewing energy contracts. Also we have a little insight into some of the organizations that provide guidance and good practice for the hydrocarbon industry.

Please feel free to correct and put me right later, if there are is inaccuracy with any fact or set of facts. **ALGERIA consisting of 48 provinces and 1541 communes, and a population exceeding 37 million¹ is the 34th most populated country on Earth. The economy has been based on oil and energy resources, and as far as I can tell SONATRACH the national oil company may very well be the largest company in Africa.**

Hydrocarbons, is it seems the major industry and therefore has to be protected and encouraged but ensuring that the industry and economy not only survive but succeed. Yes we all hear about oil, energy, hydrocarbons, gas, by products, production of Liquefied Natural Gas. All terms I'm sure are used and heard on a daily basis within the energy sectors both private and public.

¹ Algerian Office of National Statistics – 15/9/11

The importance of all of this is that because of strong hydrocarbon (energy) revenues, Algeria seems to have a cushion in the vicinity of \$173 billion in foreign currency reserves, and also a large hydrocarbon stabilization fund whilst having a low external debt, which may be about 2% of GDP.

Consider the following:

1. Algeria reliant on petroleum (energy sector)
2. Been an OPEC member since 1969
3. Crude Oil Production stands at approximately 1.1 million barrels/day
4. Algeria is a major gas producer and exporter and has very important links to Europe²
5. Hydrocarbons are backbone of economy
6. Energy account for 60% of budget revenues
7. Accounts for approximately 30% of GDP
8. Over 95% of export earnings
9. Algeria has the 10th largest reserves of natural gas in the world
10. Algeria is the 6th largest gas exporter. **The U.S. Energy Information Administration reported that around 2005/2006 Algeria had approximately 160 trillion cubic feet of proven natural gas reserves³**
11. Algeria also ranks 16th in oil reserves
12. Although production from oil and gas sectors continues to decline the sector accounted for 98% of total volume of exports in 2011

² OPEC Bulletin 8-9/12

³ Country Comparison - CIA

and 70% of budgetary receipts or the equivalent of USD 71.4 billion.

13. **SONATRACH** plays a key role in all sectors of the oil and gas industry in Algeria and has the majority of ownership in production-sharing agreements.⁴

PROTECTION AND OPERATIONAL ETIQUETTE

PETROLEUM CONTRACTS

Having just mentioned SONATRACH and production-sharing agreements, and the importance and protection of the industry it would be a good idea to touch on Petroleum Contracts.

In short, petroleum contracts are full of requirements for the oil company to conduct its operations in accordance with petroleum “good practice” or “accepted standards”

So what are these good practice and standards? GOOD QUESTION!!!!

Contracts hardly ever specify the standards or practice that the company adhere to, so how do you know which one to apply? Well you don't!!! That's helpful isn't it? Its almost similar to not knowing how one behaves in a social situation, because what one person thinks may be acceptable may not necessarily be acceptable to another and may even annoy them.⁵

The question or assumption of the parties as to what may or may not apply as far as standards and practices (or even etiquette) can often be a point of dispute

⁴ Country Analysis Briefs – Algeria – Energy Information Agency

⁵ Oil Contracts – How to understand them.

well after the contract has been signed, and this is because the contract does not specify the applicable practice.

I STRESS THAT THE DIFFERENCE IN THE ACCEPTED PRACTICE BETWEEN PARTIES HAS PROVEN TO BE PROBLEMATIC WHERE NEW INDUSTRY PLAYERS OR NON TRADITIONAL COMPANIES ARE INVOLVED. EVEN THOUGH IT IS RARE IN CONTRACTS FOR THE APPLICABLE PRACTICE OR STANDARD TO BE SET OUT, IT SHOULD BE.

Most contracts will state that the company has to adhere to national legislation (and there are times when specific laws are stipulated) as well as applying petroleum industry good and accepted practice. Again even if the standards and practices are not stipulated most contracts would say or should say that there are **generic obligations to comply with “applicable laws” and “industry standards”**⁶

A list of various Standard Industry Organizations for completeness are set out:

- a. Global Industry Standards – Industry Associations that have developed best practice guidance. International Petroleum Industry Environmental Conservation Association (IPIECA),
- b. The American Petroleum Institute (API),
- c. The International Oil and Gas Producers Institute (OGP)

There are also regional and national petroleum associations which petroleum companies can be a member of,

- d. Regional Association of Oil, Gas and Biofuels Sector Companies in Latin America and the Caribbean (ARPEL) and
- e. Australian Petroleum Production and Exploration Association (APPEA)

⁶ Oil Contracts – How to read and understand them

Companies would often refer to the fact that they are following the guidance on social and environmental sustainability issues or following the standards and guidance under the Health and Safety, Environment and Corporate Social Responsibility.

Public Sector Standards – In addition to those mentioned above there are also some regional inter-governmental groupings which serve as a stage for oil and gas producing countries to be in a position to cooperate, work along with other companies and countries in terms of knowledge sharing, and due diligence and competences on all matters that ought to be taken into account for the sustainability of the industry, environment and country.

Please Note: None of the guidance issued by these associations are mandatory for governments to follow.

- f. African Petroleum Producers Association (APPA)
- g. International Organization for Standardization (ISO) which has developed standards for Environmental Management [which include a technical committee (TC67) which is specifically dedicated to setting standards for the Petroleum, Oil and Gas Industry regarding materials, equipment and structures], and examples are such as
 - i. ISO 14000 – Environmental Impact and Improving Performance
 - ii. ISO 31000 – Standards on Risk Management
 - iii. ISO 26000 – Guidance on Social Responsibility (not for certification)
- h. TC 67 has developed about 150 standards, which are being taken up more regularly but again on a voluntary basis.

- i. **Global Reporting Initiative** – provides a framework for companies, which they can use to report on economic, social and governance performance.

- j. **United Nations Global Compact** - developed 10 universally accepted principles from various conventions of the UN in the areas of human rights, labour, environment and anti-corruption.

These are important because with this sort of industry finance is always a key concern, making is good and losing isn't, but if and when it comes to borrowing or any kind of funding the relevant institutions such as the IFC (International Finance Corporation [being part of the World Bank Group], will wish to consider development on social and environmental baselines, impact assessments, management plans, protecting people and communities, cultural heritage, providing a safe working environment, land acquisition and resettlement, pollution control, efficient energy use, safety and security of communities.

These are important factors that all finance institutions consider including the Inter-American Development Bank (IADB) and the African Development Bank (AfDB).

LAWYERS YAMMERING ON

When negotiating on oil contracts or anything in the Hydrocarbon, Oil and Gas contract arena, one thing is for sure, there will always be a disagreement between the relevant parties. [Pineapple Jumbo Prawns].

Classic example – “The contractor will, as soon as reasonably practicable commence exploration operations...”

One party is thinking in 2020 and another is thinking 2015, there you have a simple clause, well seemingly so but giving rise to different interpretations.

There will always be matters of interpretation in oil and gas contracts, and it happens everywhere in the world.

Speakers Example - **[In 1999, involvement in the negotiations between and American Consortium and a government energy sub committee for the building of the largest ever Aluminum Smelter to be run on LNG]. The disagreement arose over the environmental incentives and tax holidays that would be provided and the negotiations collapsed due to mis-interpretation of the provisions over tax holiday.]**

NB: An important fact about Petroleum, Hydrocarbon, Oil and Gas contracts that many outside of this field may not know or may come as a shock is the amount of provisions that stipulate that require negotiations at some stage or the other.

Examples – LIBYA – *“shall proceed in **good faith to negotiate** a gas sales agreement incorporating the principles set forth in Article 13.4”* [This provision is used when the contract is essentially for oil but associated gas is produced].

AZERBAIJAN – *“SOCAR and the Contractor (Oil Company) shall diligently negotiate each such supplemental agreement (and the relevant sales agreement) in good faith”.* [in this case there were appendices of accounting procedures referred to within the main body of the contract].

The Accounting Procedure referred to above – “if any of such methods prove to be unfair or inequitable to the Contractor then the Parties will meet and in good faith endeavour to agree on such changes as are necessary to correct any unfairness or inequity”.

IRAQ – *“Discovered but undeveloped reservoirs, as defined in Annex D, may be developed and produced under this Contract but shall be subject to a separately agreed remuneration fee which the Parties undertake to, in good faith agree”.*

GHANA – “ 17.5 – If such release or pollution results from the gross negligence or willful misconduct of the Contractor, the cost of the subcontract clean up and repair activities shall be borne by the Contractor and shall not be included as Petroleum Cost under this Agreement.”

Basically lets talk about it but we don't have the information at this stage to discuss further, and in the last Ghanian Agreement there will be an issue where there is pollution or any damage because without doubt there will be disagreement over what is/was gross negligence or willful misconduct. To be fair this is very complex and there is never an easy answer.

From an environmental point of view and considering the practices and standards mentioned above, then the polluter pays principle and the aim is to make the Oil Company pay as a mere mistake will not necessarily constitute gross misconduct or negligence. Contrast and Compare with the events a few years ago [2010] in the Gulf of Mexico where the pipeline broke.

The best example is as I mentioned above gas. What does one do, how do you protect your LNG when drilling for oil and you come across an unknown reservoir of gas. Please be mindful of some of the language that is used in the various parts of an oil contract.

There are times when an ambiguity is left because there is clearly no way of resolving it at the point in time, so we use lovely placeholder language, and each party gives its own meaning to the clauses which gives rise to difficulty later and we end up with the Parties in good faith will try to reach agreement. Guess where that ends up??? – ARBITRATION.

Therefore Petroleum Contracts will always have a section that sets out the rules and regulations for how the parties should settle any differences. This may be towards the end of the contracts where mediation or arbitration is mentioned.

ARBITRATION

This is a step that is actually short of Court action, and is used in petroleum contracts for resolving disputes that have not otherwise been resolved via the discussion and good faith route. There are 2 main advantages of this and they are (1) its not normally in the court of the country that they have the dispute with, and

(2) In theory the arbitration procedures are confidential.

For completeness the typical features of an Arbitration Contract are;

- a. Provisions for the Arbitration to be conducted in accordance with the rules of a particular arbitration organization. See UNCITRAL Rules, the London Court of International Arbitration Rules (LCIA), the International Chamber of Commerce Rules (ICC) , and the rules of the International Centre for Settlement of Investment Disputes (ICSID).
- b. Provision of where the arbitration is to take place. Otherwise known as the seat of arbitration and often a neutral venue is chosen, being one which is not in the country where the contract was made, and probably not in the country where the Oil Company or its parent company is registered. Some independent venues are Paris, London and Stockholm. **This does not mean that French, Swedish or English law will be applied but the governing law of the contract shall be applied. Recently there was an Arbitration between the Government of Uganda and Heritage Oil company that was done in London as the location was specified in the Petroleum Contract.**

- c. Provision of the number of Arbitrators – usually 3.
- d. Provision for the language in which the arbitration shall be conducted.
- e. Provision on who pays for the Arbitration which is usually shared among the parties.

Example from Azerbaijan Joint Development and Production Sharing Contract:

“shall be governed and interpreted in accordance with the principles of law common to the law of the Azerbaijan Republic and English Law, and to the extent that no common principles exist in relation to any matter then in accordance with the principles of the common law of Alberta, Canada...”

These are just a few of the relevant principles that are shared globally in this energy sector when considering the terms of energy contracts. I have not touched on every aspect due to time but there are other clauses that are important such as stability or stabilization clauses, confidentiality clauses, Employment, Procurement, Social welfare and Economic Development with Economic Incentives for Sustainable Development.

Shiraz Aziz

Garden Court Chambers

22nd March 2013