



30 April 2024

Oryx Energies SA

OILCOM Arbitration

Summary of the current position following the arbitral award dated 30 November 2023

1. ARBITRAL PROCEEDINGS AND FINAL AWARD

On 30 November 2023 an *ad-hoc* arbitral tribunal seated in Dar Es Salaam (Tanzania) issued a final award in the arbitration proceedings lodged in 2020 between Oilcom Tanzania Limited ("**Oilcom**" or the "**Claimant**") on one side, and Oryx Energies S.A. ("**Oryx Energies**"), and/or Oryx Energies Tanzania Limited ("**Oryx Tanzania**", together with Oryx Energies, "**Oryx**" or "**Respondents**", and together with Oilcom, the "**Parties**") on the other side, in favour of the Claimant ("**Arbitral Award**").

In the arbitration proceedings, the Claimant, represented by Tanzanian counsel, claimed around USD 173 million of damages (while in a formal notice sent by the Claimant to the Respondents in May 2019, before the start of the arbitration, the amount claimed was around USD 5 million), arguing that Oryx had breached a framework agreement ("**Framework Agreement**") signed in 2016 and subsequent ancillary agreements entered into for the purpose of (i) allocating to Oilcom, for transportation in Tanzania, 48,000 m3 volumes per year of Oryx's oil products ("**Local Transportation Agreement**"), (ii) allocating a minimum of 40% of a reference volume determined by Oryx's indicative total volumes for their regular customers in transit as listed ("**Transit Transportation Agreement**"), (iii) allocating the storage of Oryx's oil products to Oilcom's facilities in Tanzania and Rwanda ("**Hospitality Agreements**"), and (iv) sharing with Oilcom the profits from Oryx's sale of its products in the petrol stations leased to Oryx by Oilcom ("**Profit Sharing Agreement**").

By way of counterclaim, the Respondents, officially represented by Tanzanian counsel, claimed the rescission of the Framework Agreement and subsequent contracts on account of misrepresentation and around USD 3.7 million as indemnification for the losses and damages suffered for the breaches of the Framework Agreement or, alternatively, USD 4.9 million for losses and damages suffered and USD 5.7 million for the expected losses and damages for the period from 2021 to 2032.

The arbitral proceedings were conducted under the Tanzanian Arbitration Act, CAP 15 [R.E. 2020] (the "**Arbitration Act**"). The Arbitration is seated in Tanzania, the applicable law to the merits of the case is Tanzanian law and the proceedings are also governed by Tanzanian law.

After numerous procedural incidents and recusal of members of the Tribunal, the Tribunal was finally composed of two retired Tanzanian Judges, Dr. Kileo (Chair of the Tribunal), and Mrs. Wambura (Respondents' appointee), and Prof. Assad (Claimant's appointee) (the "**Tribunal**"). Oryx challenged Prof. Assad's appointment and an application for his removal was lodged before the Tanzanian High Court, however this was dismissed on 18 October 2022 for lack of merit. Oryx filed an appeal against the Tanzanian High Court's decision and these proceedings are still pending as further explained below in Section 3. The Tribunal refused to discontinue the arbitration proceedings pending the determination of the appeal.

The Tribunal awarded to the Claimant around USD 132 million in damages for breach of the Transit Transport Agreement (for which the Claimant claimed around USD 147 million in damages) and around USD 20 million for the breach of the Local Transport and Profit Sharing



Agreements (for which the Claimant claimed around USD 13 million) and for the "*opportunity costs of alternative investments*", i.e. a total amount of USD 152 million. It dismissed the Claimant's claims based on the Hospitality Agreement. The Tribunal granted interest on the above awarded amounts at a rate of 5% per annum from the date of the claim to the date of the Arbitral Award, and thereafter, an interest of 3% per annum from the date of the Arbitral Award to the date of full satisfaction of it. The Tribunal also awarded to the Claimant the costs of the arbitration proceedings.

The Tribunal dismissed all the counterclaims.

2. **PRELIMINARY ANALYSIS OF THE ARBITRAL AWARD**

First, these arbitration proceedings have been stained by various very surprising and completely unexpected procedural decisions, including:

(i) the dismissal of Oryx's request to suspend the proceedings pending the decision before the Tanzanian Court of Appeal regarding the recusal of one of the arbitrators. Please note that, according to local counsel, should the ongoing appeal be successful; the arbitral proceedings and related Arbitral Award will be annulled;

(ii) the dismissal of Oryx's request to postpone the final hearing by only a few weeks due to the unavailability of Oryx's witnesses in the first half of August;

(iii) the exclusion of Oryx's independent quantum expert's report at the beginning of the hearing on the merits in August 2023, preventing Oryx from presenting its quantum arguments according to which, Oilcom's damages should have been zero and, even following Oilcom's own position, the damages would have been far less, i.e. between around USD 10.8 million and USD 13.4 million rather than USD 173 million. The report, which was 182 pages long, contained detailed annexes of the analysis of the calculation and was prepared by Juliette Fortin, an international recognised expert working at FTI Consulting with significant experience in this kind of matters and in international arbitration proceedings. After such decision, Oryx was not given another opportunity to present its arguments in relation to quantum matters. It could only briefly refer to some arguments in that respect in its final submission on 30 October 2023. The result is that Oryx could not present its defence on quantum matters and with an expert of its choice, creating, in our view, a **serious irregularity in the proceedings violating Oryx's right to be heard and thus due process**; and

(iv) the Tribunal's refusal to nominate (at least) a local expert to examine the quantum matters, as requested by Oryx (as an alternative to an international quantum expert).

Second, the Arbitral Award itself is very poorly drafted: (1) the document is extremely short (only 25 pages) for a case of this magnitude, (2) it contains errors in the presentation of the Parties' position and facts, and (3) throughout the Award, the presentation of the arguments is very superficial. The conclusions of the Tribunal are either not well motivated or not motivated at all. Certain counterclaims raised by Oryx were not addressed in the Arbitral Award with the justification that they were brought late in the final submission, although they were raised in previous submissions and during the hearing, and of course in more detail regarding quantum in the expert report, which was excluded.

Third, by way of example of the most surprising conclusions in the Arbitral Award: (1) in relation to the main claim based on the Transit Transportation Agreement, the Arbitral Tribunal's first finding is based on a wrong assumption that the Parties agree on the interpretation of the terms of the clause regarding the allocation of a minimum of 40% of Oryx's indicative total volumes for their regular customers in transit. This is completely false, as it transpired from the Parties' submissions in the proceedings; (2) the decision on the claim based on the Profit Sharing Agreement is not supported by any evidence in the file as Oryx's sales of its products in the petrol stations never reached the total annual volumes that



were required to trigger the sharing of profits obligation; (3) the Tribunal's calculation of damages has no basis: (i) notwithstanding the fact that the Tribunal recognized that a revenue based calculation (as the one used by Oilcom) is not the correct one, it awarded 90% (including 60% for fixed costs and 30% profit margin) of the amount claim for the transit transportation claim (USD 132 million in damages for the breach of the Transit Transport Agreement rather than USD 147 million as requested); (ii) even if the Tribunal considered that the USD 13 million damages requested for the breach of the Local Transportation and Profit Sharing Agreements were not proved under specific damages, it awarded USD 20 million based on its discretionary calculation of general damages. On all those quantum matters, Oryx could have had a strong defence if its expert report had not been unfairly excluded and/or if Oryx could have been given another opportunity to present its quantum arguments.

3. **ONGOING PROCEEDINGS BEFORE TANZANIAN COURTS IN RELATION TO THE FINAL AWARD**

As a preliminary note, we are not Tanzanian qualified lawyers and all local proceedings have been carried and are being carried out by local counsel. Therefore, the below presentation on the ongoing proceedings is based on the local counsel's explanations and on the Tanzanian court's decisions relevant to this case that we could review.

On 15 December 2023, the Arbitral Tribunal filed the Final Award in the High Court, Dar Es Salaam Sub-Registry for recognition and enforcement. Such proceedings have been attributed the number **Misc. Civil Cause No. 27821 of 2023** and have been assigned to Madame Justice Maghimbi, J. Oryx raised preliminary objections which were dismissed on 12 April 2024. On 22 April 2024, Oryx filed a notice of appeal against this decision before the Court of Appeal. These proceedings are still pending.

Based on the Arbitration Act, on 19 January 2024, Oryx also filed a petition objecting to the recognition and enforcement of the Final Award, **Misc. Civil Cause No. 1017 of 2024**. On 12 April 2024, the High Court dismissed Oryx's petition. On 22 April 2024, Oryx filed a notice of appeal against this decision before the Court of Appeal. These proceedings are still pending.

We understand that following the High Court's dismissal of Oryx's petition in Misc. Civil Cause No. 1017 of 2024, proceedings Misc. Civil Cause No. 27821 of 2023 is scheduled for orders on 3 May 2024.

Meanwhile, the proceedings **Misc. Civil Cause No. 4015 of 2024** following which Oryx, the petitioner, is requesting the High Court to set aside the Final Award, are still pending. Please note that this case has been assigned to the same judge, i.e. Judge Maghimbi, at the Dar Es Salaam Sub-Registry of the High Court.

It should be noted that an application filed by Oryx before Judge Maghimbi requesting to stay the proceedings in Misc. Civil Cause No. 27821 of 2023 and in Misc. Civil Cause No. 4015 of 2024 pending the outcome of the Civil Appeal No. 47 of 2024 (see below) is also pending before her (**Misc. Civil Application No. 8288 of 2024**) and we are still expecting a decision in that regard.

Finally, and as briefly explained above in Section 1, Oryx challenged the arbitrator appointed by Oilcom, Prof. Assad, as soon as Oryx became aware of its lack of impartiality and independence for his tight links with Oilcom. This case was decided before the High Court and dismissed on 18 October 2022 (Misc. Civil Cause 138 of 2022). Oryx immediately requested a leave for appeal, and, after significant procedural delays, Oryx could only file its appeal against the High Court's ruling on January 2024 (**Civil Appeal No. 47 of 2024**). On 9 April 2024 the Court of Appeal dismissed Oilcom's application to strike out the appeal for lack of merit. The appeal is therefore admissible, and the proceedings are still pending.



Please note that in the event this appeal is successful, the removal of the arbitrator will result in the quashing and setting aside all the orders and awards issued by the Arbitral Tribunal, including the Final Award.

We understand that Oryx recently filed an application before the Court of Appeal to stay the proceedings before the High Court pending the outcome of the following appeals: Civil Appeal No. 47 of 2024, appeals against the High Court's rulings issued on 12 April 2024 in Miscellaneous Civil Cause No. 27821 of 2023 and in Miscellaneous Civil Cause No. 1017 of 2024.

We understand that a further memo will be provided by Tanzanian counsel with a more detailed description of the ongoing local proceedings.

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