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STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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In the Name of God

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CASE NO. 375
CHAMBER ONE
AWARD NO. 352-375-1

BENDONE-DEROSSI INTERNATIONAL,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

CONCURRING OPINION OF ASSADOLLAH NOORI

I. Introduction and General Considerations

1 - On 18 January 1982, the Claimant filed a Statement of Claim with the Iran-United States Claims Tribunal ("the Tribunal"), wherein it requested that the Tribunal enforce an award of $940,705 rendered on 15 December 1980 by a sole arbitrator of the International Chamber of Commerce ("ICC"), together with interest accruing thereon from 15 December 1980 until the date of satisfaction of the arbitral award, and that without entering into the merits, it direct that the amount awarded in that arbitration be paid out of the

Security Account established pursuant to Paragraph 7 of the Algiers Declaration.

In the Statement of Claim, the Claimant also set forth the underlying disputes arising out of the contract dated 15 January 1978, under which it was to provide 70,000 military uniforms to the Air Force of the Islamic Republic of Iran.

The Claimant appended the ICC's arbitral award to its Statement of Claim. The seventh and ninth paragraphs of the preamble to that award indicate that the award was rendered in absentia, despite a justified and timely request for postponement of the final Hearing.

Paragraph 1 of the arbitral award sets forth the sole arbitrator's first decision, to the effect that:

> "1. The counterclaims presented by the Defendants will not be taken into consideration, because of their failure to deposit the requested sum with the ICC..."

2 - On 4 January 1984, the Respondent filed a Statement of Defence with the Tribunal, in which, while objecting that this arbitral Tribunal was established to adjudicate claims and counterclaims, and not to enforce the awards of other arbitral fora, it also argued that given the Claimant's awareness of how this Tribunal was established and of the nature of its jurisdiction, in reality it was seeking adjudication of the claims arising out of the underlying contract, notwithstanding the guise in which it was presented. For this reason, the Respondent filed its own counterclaims as well, based on breach of the underlying contract for the sale of uniforms.

3 - On 4 April 1984, the Respondent informed the Tribunal that on 9 June 1983, the Claimant had sought to enforce the award rendered by the sole ICC arbitrator in the Frankfort-am-Main

Regional Court, against certain property owned by the Respondent. The Respondent requested that the Tribunal issue an Order preventing those enforcement measures by the Claimant, in view of the fact that the Case was pending before the Tribunal, and also because Article VII, paragraph 2 of the Claims Settlement Declaration provided that claims were excluded from the jurisdiction of any other court once filed with this Tribunal and, finally, because the Security Account was established for the payment of Tribunal awards.

4 - As the final Award states, in its Interim Award the Tribunal unfortunately went no further than to express doubt and reservations as to its jurisdiction over the underlying claim (the Claimant's claim), and did not make a final determination on whether it had jurisdiction over that principal claim. Moreover, rather than issue an Order which would at least stay the enforcement measures before the Frankfort-am-Main court, it regrettably denied the request for interim measures of protection, merely on the pretext that it "is not at present satisfied that it appears, prima facie, that there exists a basis on which it can exercise jurisdiction...", stating however, in the same Interim Award, that this decision would be without prejudice to its "final decision."[1]

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[1]This action on the part of the Tribunal is highly surprising, in view of the irreparable damage which the enforcement measures would ultimately cause the Respondent. In my opinion, justice, equity and logic would all have dictated that the Tribunal address and decide the issue of its jurisdiction at the same time as it took up the request for interim measures of protection, so that it could deal with the request for interim measures more decisively. In terms of the volume of work involved, the Parties' subsequent exchange of pleadings shows that the Tribunal could have made a final and conclusive resolution of the issue of its jurisdiction in a very short time by holding a Hearing lasting only a few hours.

5 - On 31 October 1986, the Claimant filed a withdrawal of its claim, stating that it had enforced the award rendered by the sole ICC arbitrator through the Frankfort-am-Main Regional Court, and had received the judgment sum. Vis-à-vis the Claimant's request for a withdrawal of claim, the Respondent requested that proceedings on the counterclaims continue.

6 - In its Award dated 11 March 1988, the Tribunal concluded, after addressing the Parties' arguments, that:

> "... the Tribunal is not persuaded that there is any reason to depart from the view initially expressed in the Interim Award as to the essential nature of the claim. Even if it were to be demonstrated that certain national legal systems afford the possibility of a suit in contract or debt based on an arbitral award, this would fall short of establishing, as a matter of comparative analysis, that such a cause of action is sufficiently widespread to amount to a 'principle of commercial and international law' of the type envisaged by Article V of the Claims Settlement Declaration..."

While accepting the principle that "Once a jurisdictionally sound counterclaim is pending before the Tribunal, the withdrawal of the principal claim does not divest the Tribunal of its jurisdiction over the counterclaim"[2], it then dismissed the Respondent's counterclaims, in view of the abovementioned conclusion, on the grounds that the Tribunal had lacked jurisdiction over the underlying claim from the very outset[3].

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[2] In this connection, the Tribunal has taken into account the precedent set by its Awards in Computer Sciences Corporation and The Government of the Islamic Republic of Iran, et al (Award No. 221-65-1); and Behring International, Incorporated and The Armed Forces of the Islamic Republic of Iran, et al (Award No. 52-382-3).

[3] Here, the Tribunal has taken the Award in William Bishoff and George Eisenpresser and The Islamic Republic of Iran (Award No. 138-82-2) as precedent for its decision.

7 - I concur in the Tribunal's finding that since it lacked jurisdiction over the underlying claim from the outset, it could not take up the counterclaims, either. I also hold not only that it has not become an accepted principle of law under various national legal systems to treat an arbitral award as constituting an enforceable contract or debt requiring no enforcement formalities, but also that neither the circumstances of the Algiers Declarations nor the nature of this arbitral Tribunal allows us to put forth the interpretation that the awards of other tribunals can be paid out of the Security Account.

II. Legal examination

8 - It should perhaps be noted, by way of introduction, that if there were even the slightest glimmer of truth to the assertion that arbitral awards (especially foreign arbitral awards) could be regarded as a cause of action founded on a contract or debt, and that this idea had become an established principle in diverse national legal systems, then there might no longer arise any need to execute all those bilateral and multilateral agreements or international conventions, and neither states nor international fora would find such measures necessary. It is significant that all of these conventions and agreements contain provisions and conditions for recognizing and enforcing foreign awards. Because arbitral awards have had, and continue to have, an uncertain fate, and since there is no unanimity in the approach taken by the various fora with respect to the recognition of awards, or in the control exercised by the courts where the arbitral awards are rendered or to be enforced, it is pure sophistry to assert that such awards can, by mere virtue of having been rendered, constitute a cause of action based on a debt or contract, so that they can be stamped with the seal of approval without having to pass through the sieve, or channels, of the provisions contemplated for the enforcement of domestic awards.

Perhaps there could have been room for this proposition in the writings of professional arbitrators and publicists in the pro-capitalistic countries prior to the time when the many agreements, conventions and laws dealing with the enforcement of arbitral awards were drafted and signed, as an idealistic theory advanced by the international arbitration community in order to justify taking cognizance of the claims in the municipal courts. Nowadays, however, in view of the great changes experienced by international arbitration law through bilateral or multilateral agreements, conventions and municipal laws, putting forth such a proposition amounts to no more than philosophical argumentation. The fact of the matter is that nowadays, the nations of the world do not recognize or enforce any arbitral award until it is transformed into an enforceable judgment after being dealt with in accordance with the municipal regulations of the state in which its recognition and enforcement have been sought. In their municipal laws, states have laid down regulations pertaining to the recognition or rejection of arbitral awards, and they are by no means willing to sacrifice those laws and regulations for the sake of theories which may, in part, have been invented for the purpose of evading those provisions.

In almost all cases where writers have asserted that in certain states, the arbitral award itself can be regarded as a debt or contract and made a cause of action based thereon, they have had to accept, being caught in a circular argument, that an arbitral award must be recognized by the municipal courts and transformed by them into a judgment.

> "However, the plaintiff in such an action must prove that the award was duly made under a valid arbitration agreement; and this gives the losing party the opportunity to challenge the validity of the award. If the application for enforcement is successful, the court will give judgement in the terms of the award;

> the successful party may then enforce this judgment against the losing party." (emphasis added)[4]

Therefore, bearing these facts in mind, it is entirely comprehensible why the Tribunal ruled in its Award, and also in its Interim Award dated 4 June 1984, that:

> "Though it is also presented as a debt owed by the Respondent to the Claimant, the Tribunal cannot escape the impression that what the Claimant is in fact seeking from the Tribunal is the enforcement of the ICC arbitration award through the medium of the Security Account..."[5]

In Systems Based on the Common Law

9 - In the course of the proceedings in this Case, in making this assertion the Claimant placed the greatest weight on United States and British law. It does not appear, however, that the actual practice of the courts of those two states is as simple and straightforward as alleged.

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[4] Alan Redfern & Martin Hunter, Law and Practice of Int'l Commercial Arbitration (1986), p. 355.

[5] It is worth noting that the works of nearly all of the writers resorted to in order to prove the assertion that in some systems, an arbitral award can be taken as evidence of a debt and made a cause of action thereon, do not hold that the award has all the characteristics of a debt, and are of the opinion that a set-off or counterclaim based on the award cannot be allowed, even if the arbitral award was issued in a state which has subscribed to the convention, and been invoked in another state which is a signatory thereto as well:

> "Recognition of an award under the convention would be less certain in the case where the award is invoked as a set-off or counterclaim." (Albert Jan van den Berg, The New York Arbitration Convention of 1958 (1981) p. 244.

See also Redfern & Hunter, op cit (footnote no. 4, supra), pp. 337-38.

10 - A brief look at certain recent judgments of the United States courts reinforces the opinion that the Tribunal's decision was sound.

In Copal Co. Ltd. v. Fotochrome Inc., the United States Court of Appeals ruled that the filing of an arbitral award in a bankruptcy proceeding constituted insufficient evidence of the existence of a debt, or that the successful party in that award should be included amongst the creditors. In that proceeding, the Court of Appeals counselled the petitioner to begin by requesting the District Court to issue a judgment upon the arbitral award[6]. This ruling shows that an arbitral award does not automatically take on the nature or quality of a debt until the United States courts render a judgment or enforcement order converting that arbitral award into a court judgment, whether we regard that judgment or order as a judgment on the arbitral award, or else take it to be an enforcement order or judgment (exequatur).

In a detailed article explaining the present place of arbitral awards within the United States legal system, Mr. Howard M. Holtzmann, my American colleague in Chamber One, states under the heading of "Enforceability of Arbitral Awards" that:

> "The Federal Arbitration Act provides that, at any time within one year after an award is made, any party may apply to a federal court for an order confirming the award. This procedure results in transforming the

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[6] Copal Co. Ltd. v. Fotochrome Inc. (2nd Cir.), May 29, 1975, 377 Fed. Supplement (1974) p. 26; 517 Fed. Reporter Second Series (1975) p. 512. See also the judgment in Cunard Steamship Company Ltd. v. Salem Reefer Service A. B., 773 F. 2d 452 (2nd Cir. 1985).

> award into a judgment of the court and is commonly called 'entering judgment on the award'."[7]

After examining the power of the United States courts to intervene and set aside an arbitral award, and discussing the procedure for enforcing arbitral awards covered by a convention, he takes up foreign arbitral awards which are not covered by a convention. Without mentioning the existence of any principle whereby an arbitral award can be taken as evidencing a debt or contract and serve thereby as an independent cause of action, he concludes his discussion of the enforceability of arbitral awards as follows:

> "There are decisions in federal and in some state courts which enforced arbitration even where no convention or bilateral treaty applies. It is of interest to note that these decisions have generally not required reciprocity as a condition for enforcing an agreement or an award." (emphasis added)[8]

The United States courts have even refused to recognize and enforce an arbitral award which was transformed into a judgment by the British courts, and have likewise refused to accept, even as evidencing a debt, an arbitral award transformed into a judgment[9].

11 - Under British law, the situation is apparently not as clear as alleged, either. In view of the judgment in Merrifield Ziegler & Co. v. Liverpool Cotton Association, it has long been accepted under this legal system that before it can be agreed to enforce an arbitral award as constituting a contract, it must be proved that such a basis has also been

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[7] Howard M. Holtzmann, United States, Yearbook of Commercial Arbitration (1977), Vol. II, p. 116 at 135-139.

[8] Howard M. Holtzmann, loc cit.

[9] Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B. No. 83-1517 (RLC) U.S. District Court, S.D.N.Y.

accepted in the state where that award was rendered. In that judgment, Judge Eve ruled that:

> "The obtaining of an enforcement order is the only method known in practice for enforcing an award in Germany, and there seems some ground for the proposition that it is the only legal method..."[10]

Then, after concluding that the respondent had failed to establish that the German legal system recognized the enforcement of arbitral awards on grounds of being a "contract," he refused to enforce the award as constituting a cause of action founded on contract.

Moreover, the authority to oversee and control arbitral awards as exercised by the British courts is so extensive that they can even remove an arbitrator or set aside the arbitral award, or else refer the subject of the dispute to another arbitrator or arbitral panel for readjudication, as the case may require.[11]

12 - The judgment in East India Trading Co. v. Carmel Exporters & Importers demonstrates that the assertion that an arbitral award constitutes a cause of action, is really no more than a highly ambiguous theory. In that case, the Supreme Court of India ruled that a claim founded upon an arbitral award (an arbitral award as constituting a cause of action) cannot be enforced until finalized and confirmed by a judgment of

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[10] 105 L.T. 97 (Ct. App. Ch. Div. 1911). See also Lorenzen, Commercial Arbitration, 45 Yale L.J. (1935), pp. 52-53.

[11] Steward C. Boyd, The role of national law and the national courts in England, published in Dr. Julian D.M. Lew, Contemporary Problems in International Arbitration, p. 149 at 151.

the court within whose jurisdiction the award was rendered (in that case, the courts of New York).[12]

And at any rate, according to Indian law, an arbitral award:

> "... has executory force after it is filed in court and judgment obtained in terms of the award. On the judgment so pronounced, a decree will follow, and that decree can be executed as any other decree of the court." [Krishnamurthi, India, Handbook on Arbitration, vol. I, p. 16]

13 - Finally, it is clear from all these legal articles and works, that the approach of resorting to an arbitral award as a cause of action has long since fallen into abeyance, owing to the emergence of better and more satisfactory avenues in modern law[13]. And in any event, the slight acquaintance with the Common Law gained so far from a perusal of the available sources shows that in cases where an arbitral award is made a cause of action founded in debt or contract, the merits of the dispute -- which had ostensibly been settled by the arbitral award -- are readjudicated[14]. It can thus be concluded that the

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[12] See: M. Domke, On Commercial Arbitration (Revised Edition April 1958) p. 611; and Krishnamurthi, India, International Handbook on Commercial Arbitration (1987), vol. I, p. 20, hereinafter referred to as the "Handbook on Arbitration."

[13] See: Lorenzen, op cit, p. 54.

[14] "The fourth is to sue on the award as evidence of a debt, on the basis that the arbitration agreement constitutes a contractual obligation to perform the award. This last method is cumbersome, and frequently leaves it open for the losing party to re-open by way of defence the issues already determined by the arbitral tribunal..." (Redfern & Hunter, op cit, p. 315).

See also: Ronald Bernstein, Handbook of Arbitration Practice (1987) p. 152; M. Domke, op cit, p. 495; Albert Jan van den Berg, The New York Arbitration Convention of 1958 (1981) p. 89.

allegation that an arbitral award is agreed to constitute a cause of action is a circular argument, because it is enforced only when it has been minutely dealt with by a court and transformed into a court judgment -- ie., as if, in effect, no award existed.

In Other Legal Systems

A. The Eastern Bloc

14 - In the absence of a bilateral or multilateral agreement providing for the recognition of foreign arbitral awards, such awards are unenforceable in Bulgaria, Poland and, to an extent, Rumania[15]. In the other states of the Eastern bloc, arbitral awards can be made enforceable, in the absence of a bilateral or multilateral agreement, through a judgment rendered by the municipal courts[16].

It has been said that judgment debtors in China voluntarily enforce arbitral awards where they are not inconsistent with China's policies and laws (which is a broad and ambiguous statement) in the interest of developing its foreign trade. Nonetheless, in China too, the way to enforce such awards is to seek recourse to the relevant state authorities, the China Council for Promotion of International Trade or -- in

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[15] Werner Melis, Enforcement of Arbitration Awards in Eastern Europe, Published by Dr. Julian D. M. Lew, Contemporary Problems in International Arbitration (1986) p. 332 at 337.

[16] See Melis, op cit (footnote no. 15, supra). In the German Democratic Republic an enforcement order must be issued for arbitral awards; and in that Republic, foreign arbitral awards must be enforced through an exequatur in the same way as East German municipal arbitral awards, after they have been made enforceable by the court within whose jurisdiction they were issued. Prof. Heinz Strohbach, German Democratic Republic, Handbook on Arbitration (1987), vol. I, pp. 17, 20.

order to obtain an enforcement order or judgment -- the Chinese courts[17].

B The Arab States[18]

15 - In Saudi Arabia[19], Oman and Qatar, it is almost impossible to enforce foreign arbitral awards -- let alone treating an arbitral award as evidence of a debt or contract.

In Syria[20], Kuwait[21], Iraq[22], Jordan, the United Arab Emirates and North Yemen, where there are regulations

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[17] Jen Tsien-Hsin and Liu Shoo Shan, People's Republic of China, Yearbook Comm. Arbitration (1978), vol. III p. 153 at 159-160.

[18] For a better and fuller acquaintance with the positions taken by the states of the Arab Middle East, see : Samir, Saleh, The recognition and enforcement of foreign arbitral awards in the States of Arab Middle East, article published by Dr. Julian D.M. Lew, op cit (footnote no. 15 above), p. 340 et seq.

[19] While Saudi Arabia apparently promulgated new regulations relating to arbitration in 1983, there would seem to remain ambiguities concerning the recognition and enforcement of awards (especially foreign arbitral awards) in that country; and in any case, an exequatur must be issued by the municipal courts before arbitral awards can be enforced. See the article by Albert Jan van den Berg, Saudi Arabia, Yearbook Comm. Arbitration (1984), vol. IX p. 7 et seq. It is also to be noted that Saudi Arabia acceded to the Washington Convention only in 1980, and that it apparently did not become a member of the New York Convention until very recently. (See van den Berg, ibid; also Samir, op cit (footnote no. 18, supra).

[20] Generally speaking, under Syrian law an arbitral award "is enforceable only after an exequatur ... has been issued..." (Prof. Jacques El-Hakim, Syria, Yearbook Comm. Arbitration (1982), vol. VII p. 35 at 48). Although in Syria an exequatur must be issued in the case of foreign arbitral awards as well, a protracted and multi-stage adjudicative process

(Footnote Continued)

pertaining to the enforcement of arbitral awards, the arbitral award is enforced only if it has been transformed into a court judgment. In Kuwait, Bahrein and Syria, enforcement is conditional upon the rule of reciprocity.

Under the laws of Libya, an arbitral award is unenforceable until an exequatur has been issued thereon[23]. As for Egyptian law, the exequatur must be sought from the judge of the court with which the arbitral award was deposited for enforcement, and an exequatur must also be requested in the

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(Footnote Continued)
must be pursued in the civil courts before the exequatur is issued. For this reason, the summary proceedings which ordinarily apply for the enforcement of arbitral awards are not applied in connection with foreign arbitral awards in Syria (Ibid, p. 54). In addition, the rule of reciprocity is observed in connection with enforcing an arbitral award in that country (as in Kuwait, Egypt and Bahrein), and an order for the enforcement of the arbitral award must have already been issued by the court in whose jurisdiction the award was rendered. See: van den Berg, op cit (footnote no. 18, above), p. 341.

[21]In Kuwait too, an arbitral award becomes enforceable from the time the exequatur is issued, provided that the award is enforceable in the country where it was rendered. Dr. Fuad S. Abu Zayyad, Kuwait, Yearbook Comm. Arbitration (1979), vol. IV p. 139 at 145-72.

[22]Only foreign court judgments are recognized as enforceable under Iraqi law, and arbitral awards must be confirmed by the competent Iraqi courts before they can be enforced. Prof. Dr. Akram Yamulki, Iraq, Yearbook Comm. Arbitration (1979), vol. IV p. 104 at 112.

[23]Dr. A. Buzghaia, Libya, Yearbook Comm. Arbitration (1979), vol. IV p. 148 at 157. In that legal system too, an exequatur needs to be issued by the competent courts in connection with the arbitral award, once a number of rules and regulations have been met, inter alia the rule of reciprocity. (Ibid, p.160).

case of foreign arbitral awards, provided that reciprocity is observed[24].

C. The West European Nations

16 - In order to show the position taken by the law in the West European countries, it will perhaps suffice to quote the following statement by Professor Lorenzen, who concludes after an exhaustive study that from the very beginning, those countries have given no recognition to the theory that an arbitral award may be taken as a new cause of action:

> "On the continent, a foreign judgment is not enforced by an action on the judgment as a new cause of action, but by an execution-procedure to declare it executory (to provide it with an exequatur). In some countries the only mode of enforcing foreign awards is by having them declared executory in the home state, and then enforcing them as foreign judgments." (See Lorenzen, op cit (footnote no. 10, supra), p. 443.

17 - Not only did Judge Eve reach the conclusion, in his judgment in 1911 in Merrifield Ziegler & Co. v. Liverpool Cotton Association [25] that :

> "... no authority is cited in support of this opinion [that the ground upon which the German court enforces the foreign award is that the court implies in the submission a contract to be bound by and to carry out the award], nor is it to be found advanced in any German commentary or textbook, and its soundness is emphatically disputed by the plaintiff's experts,"

but this theory has not found acceptance in the law of the Federal Republic of Germany in the present time, either :

> "The enforcement (Zwangsvollstreckung) of the award can only take place after the court has declared the award

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[24] Prof. Mohsen Chafik, Egypt, Yearbook Comm. Arbitration (1979), vol. IV p. 44 at 55, 58-9.

[25] See footnote no. 10, supra.

enforceable." (Vollstreckbarerklarung, leave for enforcement, Sect. 1042).[26]

Moreover, pursuant to Section 1044.1 of the Civil Code of Procedure of the Federal Republic of Germany, foreign arbitral awards are disposed of in the same way as are domestic arbitral awards (ie., as set forth above)[27].

18 - Under Italian law, not only is it necessary to issue an exequatur in connection with arbitral awards, but in the process, regulations are applied which are more stringent than those normally prescribed for enforcement of domestic arbitral awards, even if the foreign arbitral award is covered by a convention, such as the New York Convention or the Geneva Convention. Under Italian law, not only must the exequatur be issued by the Court of Appeals, but the judgment of the Appeals Court granting the exequatur can be challenged before the Italian Supreme Court (Corte di Cassazione)[28].

Having subscribed to this view for a long time, the Italian courts have rejected the possibility of an actio ex contractu[29].

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[26] Dr. Ottoarndt Glossner, Federal Republic of Germany, Yearbook Comm. Arbitration (1979), vol. IV, p. 60 at 75.

[27] "A foreign award which has become binding (Verbindlich) under the law applicable to it shall... be enforced in accordance with the procedure applicable to domestic awards." (See Glossner, op cit (footnote no. 26, supra), p. 79).

[28] Prof. Avv. Giorgio Bernini, Italy, Yearbook Comm. Arbitration (1981), vol. VI, p. 24 at 55 et seq.

[29] See: Decision dated 30 May 1973 of the Bari Court of Appeals (Corte di Appello di Bari) in Casulli v. Tradax England Ltd., 10 Rivista di Diritto Internazionale Privato et Processuale (1974) p. 285; 13. See also : Albert Jan van den Berg, The New York Arbitration Convention of 1958, (1981) p. 89, n.227.

In certain cases, the Italian courts are even empowered to take up foreign decisions on the merits.

In its Decision of 30 June 1976 in Societa la Naviera Grancebacu S.A. v. Italgrani, the Naples court concluded that where permitted by Article 798 of the Code of Civil Procedure, Italian courts are not precluded, even in the case of foreign arbitral awards coming under the New York Convention, from entering into the merits of the claim before issuing an exequatur [30].

19 - Under French law too,

> "An arbitral award only acquires executory force through an exequatur (leave for enforcement) of the Tribunal de Grande Instance..." [31]

Moreover, in the case of foreign arbitral awards, it is necessary for the exequatur to be issued by a French court[32].

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[30] See: Albert Jan van den Berg, ibid (footnote 29), p. 239; 14 Rivista di Diritto Internazionale Privato et Processuale (1977) p. 839, 18; and generally, Prof. Avv. Giorgio Bernini, op cit (footnote no. 28, supra), p. 24 et seq.

[31] Yves Derians, France, Yearbook Comm. Arbitration (1981), vol. VI, p.1 at 18-19.

[32] Derians, ibid, pp. 19, 22-23. As he had promised on page 2 of his 1981 article, Derians wrote a further article in Yearbook Comm. Arbitration (1982), VII p. 3, which provides the most up-to-date information on enforcement of international and foreign arbitral awards under French law:

> "Under the same conditions as those applying to recognition, the award may be enforced through an exequatur (ordered by the Judge in charge of enforcement within the Tribunal de Grand Instance...)" (Yearbook Comm. Arbitration (1982), VII p. 3 at 14).

20 - In the Netherlands, arbitral awards are made enforceable by means of an exequatur issued by the President of the District Court [33]:

> "To obtain executory force, the award needs an exequatur, an order of the President of the District Court with which the award was deposited" (Article 642). [34]

Under Dutch law, an exequatur must be issued before a foreign arbitral award can be enforced; a request for enforcement is made to the District Court within whose jurisdiction the respondent has his domicile, or in whose jurisdiction enforcement can take place.[35].

21 - The position of the law in the Scandinavian countries supports my opinion, although the regulations of each country differ in some respects:

Under Norwegian law, a foreign arbitral award not covered by a convention becomes enforceable only through the issuance of an exequatur [36].

In Danish law, a domestic arbitral award is enforced by means of a request for an exequatur, while in the case of a

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[33] Dr. Albert Jan van den Berg, The Netherlands, Handbook on Arbitration (1987), vol. II p. 27.

[34] Prof. Pieter Sanders, The Netherlands, Yearbook Comm. Arbitration (1981), p. 60 at 79. In connection with domestic arbitral awards, van den Berg holds that the District Court within whose jurisdiction the award was rendered has authority over issuance of an exequatur. van den Berg, op cit. (footnote no. 33, supra), p.27.

[35] See: Sanders, op cit (footnote no. 34), p. 84; or van den Berg (footnote no. 33, supra), p. 35.

[36] C.F. Echhoff, Norway, Yearbook Comm. Arbitration (1980), vol. V p. 97 at 113.

foreign arbitral award, a court judgment must be rendered before it can be enforced[37].

Under Finnish law, an exequatur is required in order to enforce an arbitral award (whether domestic or foreign)[38]. And finally, under Swedish law, an arbitral award is made enforceable by an exequatur[39].

22 - In Greece, too, a domestic or foreign arbitral award must be accompanied by an enforcement order issued by a municipal court[40].

23 - While domestic arbitral awards are said to become enforceable immediately upon issuance in Switzerland (apparently, just as are judgments by the municipal courts), in the case of a foreign award an enforcement order

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[37] Dr. Jur Jorgen Trolle, Denmark, Yearbook Comm. Arbitration (1980), vol. V p. 28 at 37, 40; Allan Philip, Denmark, Handbook on Arbitration (1987), pp. 21-24.

[38] Prof. Heikki Jokela, Finland, Yearbook Comm. Arbitration (1978), vol. V p. 41 at 52-56.

[39] "An award is not immediately enforceable as is a judgment of a court of law. If the losing party does not comply voluntarily an application must be made to the Chief Execution Authority (Overexekutor) for an enforcement order (exequatur)." (Dr. Ulf. Halmback and Nils Mangard, Sweden, Yearbook Comm. Arbitration (1978), vol. III p. 161 at 176).

In connection with the enforcement of arbitral awards (whether domestic or foreign), this article states that an action may be brought in court on the award, but the article comments that this procedure "is not often resorted to" (p. 176), or "is rarely done" (presumably, because in this event the underlying claim is adjudicated on the merits before the lower court, the Appeals Court and the Supreme Court).

[40] See the article by Dr. Angheles C. Foustoucos dealing with Greek law, in either of the following publications: Handbook on Arbitration (1987), p. 22, 27-28; and Yearbook Comm. Arbitration (1980), p. 57 at 76-77, 81-82.

conforming to the regulations of the Canton where its enforcement is sought must be issued.[41].

C. The Asian Nations

24 - We have already examined the law of most of the Asian nations under those sections dealing with the Arab nations and, in part, in the sections dealing with the Eastern Bloc and Common Law countries. We have also set aside a separate section on Iranian law, due to Claimant's references to Iranian law in the instant Case. Therefore, in this section, we shall only take a brief look at the law of certain other Asian countries.

25 - In Japan, a domestic arbitral award becomes enforceable only when the courts recognize it as being enforceable, pursuant to an exequatur.[42] Japan has no statutes which explicitly and directly authorize the recognition and enforcement of foreign arbitral awards, and so the actual enforcement of such foreign awards, particularly those not covered by a convention, is highly ambiguous and uncertain[43].

26 - In the Republic of Korea, when the party adjudged against in the arbitral award fails to carry it out voluntarily, it is necessary to seek a judgment of execution by a court; and in the process of its leave for enforcement, the losing party

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[41] Dr. Robert Briner, Switzerland, Handbook on Arbitration (1987), vol. II, pp. 18, 25.

[42] Prof. Teruo Doi, Japan, Yearbook Comm. Arbitration (1979), vol. IV, p. 115 at 133.

[43] Ibid, p. 138; also, van den Berg, op cit (footnote no. 29 above), pp. 239-40.

will be given an opportunity to give its views[44]. Since it would appear that no foreign arbitral award has ever been submitted for enforcement in Korea[45], it is uncertain just how the Korean courts would presumably proceed, vis-à-vis a request for enforcement of a foreign arbitral award. It would seem, however, that where the award is not covered by a convention, the court in whose jurisdiction the arbitral award was rendered must issue an enforcement order, before the Korean courts can issue an exequatur.[46].

27 - In Indonesia, an arbitral award becomes enforceable when the President of the court with which the award was deposited issues an enforcement order in connection therewith. Unless an enforcement order is issued, the arbitral award does not become enforceable[47].

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[44]Dong-Won Cho, The Republic of Korea, Yearbook Comm. Arbitration (1982), vol. VII p. 16 at 31.

[45]Ibid, p. 34.

[46]Prof. Song Kun Liew, The Republic of Korea, Handbook on Arbitration (1987), vol. II, pp. 17-18, 22.

[47]Professor R. Subekti, Indonesia, Yearbook Comm. Arbitration (1980), vol. V, p. 84 at 93; also, Professor Sudargo Gautama, Indonesia, Handbook on Arbitration (1987), vol. I, p. 22.

Although expressly stating that an exequatur must be issued in order to enforce arbitral awards, in connection with foreign arbitral awards not covered by a convention these two writers comment, in a very short and ambiguous sentence (p. 96 of the former article, and p. 28 of the latter) that in order to enforce a foreign arbitral award the interested party can request its enforcement based on the obligation undertaken in the agreement to arbitrate. Apart from the broad nature of this statement, and the uncertainty as to whether or not the writers meant that the arbitral award may be brought as a cause of action, at any rate what is important to note here is that both writers

(Footnote Continued)

D. Law in the Latin American countries[48]

28 - Under Argentine law, although a domestic arbitral award becomes enforceable upon issuance, where the party adjudged against fails to carry out the award voluntarily the court must issue an enforcement order so that the award can obtain executory force[49]. Foreign arbitral awards are also, like foreign court decisions, enforced by means of an enforcement order[50].

It has been said that foreign arbitral awards can be invoked for three purposes in the Argentine courts: (1) to be enforced, (2) for recognition of their status as res judicata in another action, and (3) as evidence. It is definitely necessary to issue an exequatur in order to enforce an arbitral award. And to make use of the award as evidence:

(Footnote Continued)
agree that this approach entails ordinary adjudicative proceedings (including, presumably, entering into the merits) in their various stages. These same ambiguities, and this virtually dualistic approach to domestic and foreign arbitral awards, can be seen in the following source dealing with Pakistani law: Mr. Mohamed J. Jaffer & Mr. Sarmad J. Osmany, Pakistan, Yearbook Comm. Arbitration (1980), vol. V, p. 114 at pp. 132-33, 139.

[48] According to M. Domke:

> "In other countries, particularly in Latin America, parties seeking the enforcement of agreement to arbitrate still face difficulties." (M. Domke, On Commercial Arbitration (Revised Edition April 1985), p. 567.

[49] Horacio A. Grigera Naon, Argentina, Handbook on Arbitration (1987), vol. I, pp. 20-21; Dr. Jaime Malamud, Argentina, Yearbook Comm. Arbitration (1978), vol. III, p. 17 at 27.

[50] Dr. Jaime Malamud, ibid (footnote no. 49, supra), pp. 29-30.

> "...the foreign arbitral award is invoked as a mere piece of documentary evidence, whose persuasive effects are to be evaluated by the judge or arbitrator in Argentina before whom it is brought in the light of all other evidence forwarded to him according to the general applicable rules on evidence."[51]

29 - Under Brazilian law, a domestic arbitral award must be homologated by a competent municipal court, after which the award will gain the effect of an enforceable court judgment[52]. In connection with foreign arbitral awards, the Federal Supreme Court is competent to confirm the award -- once, of course, the award has met certain conditions, inter alia that an exequatur has been issued in respect thereof by the court within whose jurisdiction the award was rendered[53].

30 - Under Mexican law, an arbitral award becomes enforceable as soon as an exequatur has been issued[54], while foreign arbitral awards obtain executory force pursuant to an exequatur from the competent Mexican courts only after they have met several conditions, inter alia reciprocity, and that the award is submitted to the Mexican courts together with a leave for enforcement issued by the court within whose jurisdiction the award was rendered [55].

31 - Under Venezuelan law, both domestic and foreign arbitral awards are given executory force by means of an exequatur,

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[51] Horacio A. Grigera Naon, op cit (footnote no. 49, supra), pp. 27-28.

[52] Prof. Vicente Marotta Rangel, Brazil, Yearbook Comm. Arbitration (1978), vol. III, p. 31 at 42.

[53] Rangel, ibid (footnote no. 52, supra), p.44.

[54] Humberto Briseno Sierra, Mexico, Yearbook Comm. Arbitration (1978), vol. III, p. 94 at 103.

[55] Sierra, ibid (footnote no. 54, supra), p. 105.

and for the enforcement of foreign arbitral awards, the courts consider the rule of reciprocity as well.[56]

E. Iranian law

32 - In order for an arbitral award to obtain executory force, it is essential that a municipal court render it enforceable.

Article 662 of the Iranian Civil Procedure Code is dispositive of this issue, expressly providing that:

> "If the judgment debtor does not voluntarily execute the award within ten days after service thereof, the court which referred the claim to arbitration, or else the court which has jurisdiction over the original suit is required, upon a request by the interested party, to issue a writ of execution [exequatur] in accordance with the arbitrator's award."

33 - In view of the fact that Iran adheres to a system of written laws, it is out of place to invoke the opinions of jurists, except for the sake of interpretation or to eliminate ambiguities. Nonetheless, noted Iranian legal scholars have confirmed this point in their works. Prof. Dr. Nasser Katouzian writes that:

> "Just as the arbitrator's decision has, ipso facto, no executory force, it is useless to speak of its validity. It is the writ of the court, and the decision of the public court judge, that makes the arbitral decision enforceable and gives it the validity of a res judicata".[57]

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[56] Dr. Gonzalo Pana Avanguren, Venezuela, Yearbook Comm. Arbitration (1978), vol. III, p. 133 at 147, 149.

[57] Prof. Dr. Nasser Katouzian, E'tebar-e Qaziyyeh-ye Mahkumun biha dar Omur-e Madani ("Res Judicata in Civil Matters") (1347/1968), p. 98. In the footnote to this page, Prof. Dr. Katouzian relies upon French jurisprudential sources, which are of the opinion that "the arbitral award is valid if it has been issued in accordance with legal provisions, and if it is possible to ascertain through the writ of enforcement

(Footnote Continued)

Next, Prof. Dr. Katouzian gives brief attention to cases where the law (Articles 664 ff. of the Civil Procedure Code) gives the judge control and supervision over arbitral awards, and whereby he is empowered to take up the arbitral award and to quash, overturn or nullify it wholly or in part. Prof. Dr. Katouzian then goes on to write that:

> "... It should not be supposed that the court lacks the right to examine the conditions for the award's validity sua sponte . Directly upon a petition by the winning party, the courts issue a writ for enforcement of the arbitrator's award, leaving it to the initiative of the judgment debtor to take measures relating to nullification of an invalid award. This procedure, however, is open to criticism.
>
> As noted above, the arbitrator's award is not ipso facto enforceable; it is necessary for the court to recognise its enforceability once assured that the award has the necessary procedural and substantive qualifications." [58] (The author's footnote has been omitted).

34 - The Claimant has invoked a decision by the Supreme Court of Iran, as constituting Iranian judicial precedent which would support accepting an arbitral award as being an independent cause of action. This invocation, made without concern for the facts of the matter, has apparently given rise to certain misconceptions [59], and it is therefore necessary to give a brief and simple explanation of the background to this practice.

(Footnote Continued)
that those provisions have been observed." In an article published in the Yearbook of Commercial Arbitration, Dr. Jalal Abdoh explicitly states that under Iranian law, an exequatur must be issued in respect of an arbitral award before it can become enforceable. (Dr. Jalal Abdoh, Iran, Yearbook Comm. Arbitration (1979), vol. IV, p. 81 at 99.

[58] Prof. Dr. Nasser Katouzian, op cit, p. 100.

[59] Page 9 of the Concurring Opinion of Judge Howard M. Holtzmann, in the present Case.

In a dispute which arose between a contractor and employer in Iran, the parties agreed to abide by the decision of the engineer (the expert). The expert thus appointed determined and stated a certain sum to be the debt owed to the contractor. Because the employer did not voluntarily pay the sum set by the expert, the contractor filed a statement of claim, wherein he brought a complaint against the employer and sought compensation for the works performed (ie. the subject of the expert's estimates); and in so doing, he submitted the expert's decision as evidence in proof of his claim. The Supreme Court of Iran overturned the decision by the lower courts (one of which sustained an earlier appellate decision), which had held that the expert's work amounted to arbitration and that the matter in dispute thus constituted a res judicata. The Supreme Court ruled that in this proceeding, the expert's (or arbitrator's) decision was merely evidence in support of the claim, and that the court must therefore adjudicate the underlying dispute and issue its decision, whether affirmative or negative, and in light of the evidence -- inter alia the expert's opinion. The Supreme Court ruled that there was no justification for describing the decision of the expert (or arbitrator) agreed upon by the parties, and invoked in support of the claim, as constituting a res judicata.[60]

35 - The discussion to this point has related to the enforcement of domestic arbitral awards. Iran is not a party to any convention on the recognition and enforcement of arbitral awards; nor is it a signatory to any bilateral or

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[60] Dr. Jafar Jafari Langaroudi, Danishnameh-ye Hoquqi ("Legal Encyclopedia") (1358/1979), vol. V, pp. 96-98. This ruling by the Supreme Court of Iran is consistent with the opinion of Prof. Dr. Katouzian set forth in para. 33 above, as well as that of Dr. Abdoh in footnote no. 62, supra.

multilateral agreement in this connection [61]. Therefore, foreign arbitral awards are not enforceable in Iran, until and unless transformed into a foreign court judgment and recognized as such under Iran's municipal laws.[62]. If a foreign arbitral award which has been transformed into a court judgment can be regarded as a foreign judgment for the purposes intended in Articles 971-975 of the Civil Procedure Code and Article 169 of the Law on Enforcement of Civil Awards (1977), then that court judgment will be deemed to be enforceable in Iran if it conforms to the conditions set forth in the aforementioned laws -- inter alia the condition of reciprocity, the requirement that the court judgment be final, binding and enforceable in the eyes of the foreign court where it was issued, lack of any connection between the dispute settled by the award and immovable properties located in Iran, and so forth. At any rate, however, an exequatur has to be issued before the judgment can be enforced [63].

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[61] See lists of bilateral and multilateral agreements and treaties published by Iran's Ministry of Foreign Affairs; also, Dr. Jalal Abdoh, op cit, p. 101.

[62] Dr. Jalal Abdoh, op cit, p. 102. At the same time, on pages 102-103 of his article Dr. Abdoh seems to evince doubt as to whether a foreign arbitral award can be enforced, even after it is transformed into a foreign court judgment; he states that if the municipal courts do not issue an exequatur with respect to a foreign court judgment, perhaps the foreign court judgment may be used as a document, since it was issued and confirmed by foreign official authorities. In such an event, the courts might include it among the other evidence, and either accept it in evidence or reject it when weighing and comparing it with the other evidence, in the process of reaching its decision.

[63] See Articles 971-975 of the Civil Procedure Code; Article 169 of the Law on Enforcement of Civil Awards; and Dr. Abdoh, op cit, p. 102.

III. The Tribunal's Jurisdiction According to the Algiers Declarations

36 - In my opinion, there was no need whatsoever to embark on a comparative study of the municipal laws of the various nations of the world so as to become acquainted with their position on the recognition and enforcement of domestic or foreign awards. Nor was there any need for the Tribunal to reach the conclusion that relying on an arbitral award as a cause of action is not sufficiently widespread to amount to a "principle of commercial and international law". Instead, the Tribunal could have relied upon the fact that pursuant to the Algiers Declarations, the two Governments vested this special arbitral Tribunal with jurisdiction to settle claims and counterclaims through proceedings on the merits, and earmarked the Security Account for payment of the claims litigated in this arbitration, and also that this arbitral body has not been delegated the duty of enforcing the awards of other fora (whether arbitral or judicial). It could thus have rested with the argument that it is not "a reasonable interpretation of the Algiers Declarations that it should act as a court issuing exequatur or that it should otherwise be empowered to enforce arbitral awards of other, independently constituted arbitral tribunals." Otherwise, as we have seen, if it had found even the slightest glimmer of truth in the Claimant's contention that an arbitral award can be used as a cause of action, or that an award can be used as evidence in proof of a debt, then it should have accepted its competence to take up the underlying claim on the merits by unveiling the Claimant's claim, and thereby adjudicated the counterclaim as well, and issued an award.

37 - A glance at the Algiers Declarations makes it clear that it was the intention of the two Governments to vest this arbitral Tribunal, with its special composition with jurisdiction over particular kinds of disputes and in

observance of pre-ordained terms and provisions. It is an established and irrebuttable principle, that such an intention must be interpreted restrictively.

In General Principle "B" of the Declaration of the Government of the Democratic and Popular Republic of Algeria, the two Governments stated that in establishing this arbitral Tribunal, it was their purpose to "bring about the settlement and termination of all such claims through binding arbitration."

In view of the intention of empowering this arbitral body to adjudicate and settle claims on the merits, the two Governments agreed "to terminate all legal proceedings in United States courts... to nullify all attachments and judgments obtained therein... and to bring about the termination of such claims though binding arbitration."

Therefore, due regard for this same Principle "B" suffices to make clear that this Tribunal has jurisdiction over the underlying claims and disputes. If such were not the case, there would have been no need to terminate and nullify the writs and judgments previously issued, and the two Governments could have vested the Tribunal with authority to enforce the judgments already rendered.

38 - In making provision for the Security Account, Paragraph 7 of the General Declaration provides that "All funds in the security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claims settlement agreement [and not claims which have been settled by other arbitral fora]." Moreover, these funds shall be maintained in the Security Account until such time as the President of the Tribunal "has certified... that all arbitral awards against Iran have been satisfied in accordance with the claims settlement agreement."

The two Governments have not -- either by any of the provisions of the Algiers Declarations or by any other instrument -- authorized awards by other fora to be paid and satisfied from the Security Account.

39 - Article II, paragraph 1 of the Claims Settlement Declaration also reveals the purpose and intention of the two Governments:

> "An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim..."

And for the same reason that this Tribunal was vested with the authority to adjudicate, and decide on the merits, all claims and counterclaims which were outstanding on the date when the Declarations were signed, so too all claims pending before the United States courts -- including even those which had already been finalized and a judgment entered thereon -- were stayed and readjudicated on the merits before this Tribunal.

40 - Finally, Article IV of the Claims Settlement Declaration states that the decisions and awards of this arbitral Tribunal are final and binding, and it recognizes Tribunal awards against Iran as being payable from the Security Account. The two Governments have authorized the President of the Tribunal to notify Tribunal decisions to the Escrow Agent for payment out of the Security Account.

IV. Conclusion

41 - Based on what has been set forth in the preceding sections, I concur in the finding that this Tribunal is not competent to enforce judgments by other fora (whether arbitral or

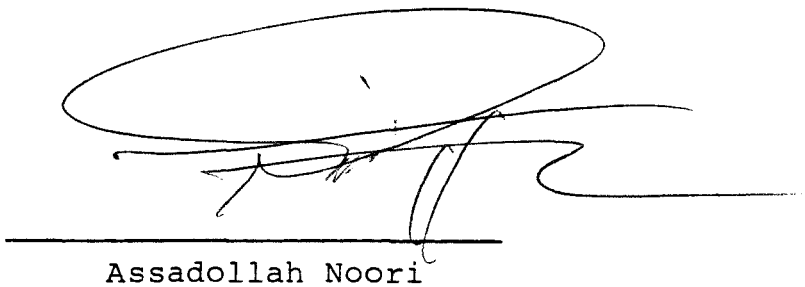
judicial), and that since the Tribunal lacked jurisdiction over the underlying claim from the beginning, it does not have jurisdiction over the Respondent's counterclaims, either.

It is not clear how and why the obiter dictum, to the effect that:

> "... the counterclaims in the present Case are based squarely on the underlying contract between the Parties, while the claim, as formulated, clearly does not arise out of that contract, but out of the ICC arbitral award. Thus the necessary relationship required by Article II, paragraph 1, of the Claims Settlement Declaration is lacking, and the counterclaims must fail in any event,"

has been added to the Award. Moreover, in my opinion, that dictum is not necessary for the decision and finding reached by the Tribunal, for I do not believe that "the counterclaims must fail in any event" (emphasis added). In my opinion, it is only in the special circumstances of the case, and because the underlying claim was brought before this Tribunal specifically in its present form, that the counterclaims must be dismissed. Otherwise, if the underlying claim had been filed with the Tribunal in a manner whereby the Tribunal enjoyed jurisdiction over it or if, in arguendo, the Tribunal had found itself competent to entertain the underlying claim in its present form, then it would inevitably have had to adjudicate the Respondent's counterclaims as well. For the arbitral award rendered by the ICC, which was issued after proceedings in absentia,

expressly states that the counterclaims were not taken up, merely because of nonpayment of court costs.[64]



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[64]There have been instances where courts taking up a request for issuance of an exequatur with respect to an arbitral award have considered the losing party's set off or counterclaim as well. See: Landgericht of Hamburg, March 27, 1974, affirmed by Oberlandesgericht of Hamburg, March 27, 1975, OLG and LG: Yearbook II (1977) p. 240; Jugometal v. Samincorp. Inc., U.S. District Court of New York, S.D., April 21, 1978 (Case No. 77 Civ. 5569-CLB): Yearbook IV (1979) p. 334; and van den Berg, op cit, p. 241.