IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

Case No. 51

Date 5 November 1982

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۵۱-۶۶

ORIGINAL DOCUMENTS IN SAFE

Award No.: ITL 2-51-FT

✓ (INTERLOCUTORY AWARD)
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IRAN-UNITED STATES CLAIMS TRIBUNAL

INTERLOCUTORY AWARD

Award No.: ITL 2-51-FT

Case No. 51

Interpretation of the expression "and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position." (Article II, paragraph 1, of the Claims Settlement Declaration.) Jurisdiction relinquished by Chamber Two to the Full Tribunal.

Parties: Halliburton Company,
IMCO Services (U.K.) Ltd.,
Claimants,

and

Doreen/IMCO,
the Islamic Republic of Iran,
Respondents.

Appearances: Mr. Lawrence W. Newman,
Mr. Charles Cummings,
Baker & McKenzie, New York, N.Y., for the Claimants,
Mr. Arthur W. Rovine, Agent of the United States of America,

Also present: Mr. Mohammad K. Eshragh, as Agent of the Islamic Republic of Iran.

Part I
Introduction

Article II, paragraph 1, of the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("the Claims Settlement Declaration") excludes from the jurisdiction of the Tribunal "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in

response to the Majlis position."

Chamber Two of the Tribunal has relinquished jurisdiction over this case to the Full Tribunal for the limited purpose of deciding whether claims therein arising out of contracts containing provisions for the settlement of disputes fall within the scope of the above-mentioned provision of the Claims Settlement Declaration.

Following orders dated 15 April and 7 July 1982 the parties have submitted Memorials addressing the jurisdictional issue referred to the Full Tribunal by Chamber Two. Furthermore, a hearing on this issue was held on 21-22 June 1982.

Part II
The Loan Agreement

Halliburton Company is an oil field service company. In 1976 Halliburton entered into a Shareholders Agreement to purchase 25% of an Iranian company, Doreen/IMCO, which is claimed currently to be controlled by the Ministry of Industries and Mines of Iran. Pursuant to the terms of this Agreement Halliburton lent Doreen/IMCO six million U.S. dollars ($6,000,000). Doreen/IMCO executed a promissory note in this sum. Under the terms of the note, Doreen/IMCO promised to pay Halliburton this sum in six annual instalments together with interest. Halliburton claims that the Respondents have failed to make any payments due under the terms of the promissory note.

Halliburton contends that it also made six cash advances to Doreen/IMCO, which executed a promissory note in favour of Halliburton for each of the advances. Halliburton asserts in the case that the amount of the cash advances remains unpaid and outstanding.

Each of these promissory notes contains the following provision:

> For all matters concerning the interpretation, compliance or judicial request for payment the maker of this Promissory Note expressly submits to the jurisdiction of the competent Courts of Iran.

Claimant contends that there is no need for Halliburton to rely on the promissory notes to obtain an award based on the advances it has made. Moreover, even were the claim based on the promissory notes, the clause contained therein does not confer on Iranian courts an exclusive jurisdiction for the settlement of all disputes arising under the promissory note. According to the Claimant, the clause merely designates Iranian courts as one of the optional courts before which the beneficiary of the promissory notes may bring its action against the maker, Doreen/IMCO.

Respondents assert that this forum selection clause fulfils all the requirements laid down in Article II, paragraph 1, of the Claims Settlement Declaration and therefore excludes claims based on the notes from the Tribunal's jurisdiction.

The Tribunal notes that Article II, paragraph 1, of the Claims Settlement Declaration excludes from the jurisdiction of the Tribunal claims arising under contracts which specifically provide for the sole jurisdiction of the competent Iranian courts. The text of the instant clause in the promissory notes makes it clear that it is only the maker of the note who submits to the jurisdiction of the Iranian courts. Thus, the borrower has agreed to waive the objections against the jurisdiction of these courts that it otherwise might have invoked, but the clause should not be understood so as to deprive the lender of its right to sue the maker of the note before any competent court outside Iran. Therefore the clause does not meet the requirements in Article II of the Claims Settlement Declaration.

For the reasons given above

the TRIBUNAL holds

that the above-mentioned clause in the promissory notes does not fall within the scope of the forum clause exclusion contained in

Article II, paragraph 1, of the Claims Settlement Declaration. Consequently, this clause does not exclude the Tribunal from jurisdiction over claims based on the promissory notes.

Part III
The Purchase Agreement

Another claim in this case arises out of a contract between IMCO Services (U.K.) Ltd., an allegedly wholly-owned subsidiary of Halliburton Company, and Doreen/IMCO for the purchase of a certain amount of barite over a two year period (the "Purchase Agreement"). Under the terms of this agreement IMCO Services agreed to prepay Doreen/IMCO for the barite. The agreement further provided that, should IMCO Services not receive shipment of the barite by 30 June 1980, the entire payment would be refunded. IMCO Services asserts that it did not receive shipment of the barite in accordance with the agreement and that, consequently, the prepayment should have, but has not, been refunded.

The Purchase Agreement contains this provision:

> GOVERNING LAW AND DISPUTES
>
> This Purchase Agreement shall be governed and interpreted in accordance with the laws of Iran. All disputes arising in connection with this Purchase Agreement not otherwise amicably settled between the parties shall be settled by submission to the Courts of Iran.

This article in the contract provides that all disputes arising in connection with the Purchase Agreement, failing amicable settlement of such disputes, shall be submitted to the courts of Iran.

Consequently, the plain wording of this article fulfils the requirements in Article II of the Claims Settlement Declaration that a claim falls outside the jurisdiction of the Tribunal if it arises under a contract between the parties "specifically

providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts". However, the Claims Settlement Declaration also provides that the contract must be "binding" and Claimant contends that the word "binding" refers to the forum selection clause in the contract. It asserts further that the relevant clause in the Purchase Agreement as well as similar clauses in all other contracts, despite their language, do not constitute binding commitments to the sole jurisdiction of the courts of Iran because of the fundamental changes that have occurred in Iran since the conclusion of the contract.

However, the Tribunal does not share this view. It is not generally the task of this Tribunal, or of any arbitral tribunal, to determine the enforceability of choice of forum clauses in contracts. If the parties wished the Tribunal to determine the enforceability of contract clauses specifically providing for the sole jurisdiction of Iranian courts, it would be expected that they would do so clearly and unambiguously. Thus, the Tribunal would be reluctant to assume such a task in the absence of a clear mandate to do so in the Algiers Declaration.

The wording of Article II, paragraph 1, of the Claims Settlement Declaration suggests that the words "binding contract" are intended to refer to the entire contract rather than to the forum selection clause. Although the word "contract" can be interpreted as referring solely to a clause in a contract, it seems likely that the parties to the agreement would have formulated the text so as to refer specifically to an enforceable forum selection clause providing for the sole jurisdiction of Iranian courts, had they agreed on such an interpretation. Thus, the wording is ambiguous, and the Tribunal is therefore obliged to look beyond the text for other evidence of party intent so as to determine whether, despite the ambiguity of the phrase in question, the parties had nevertheless agreed on its meaning.

The circumstances at the conclusion of Article II of the Claims Settlement Declaration as well as the text of the article itself indicate clearly that the provision regarding exclusion of certain claims from the Tribunal's jurisdiction represents an attempt to accommodate on the one hand a desire by the United States negotiators to minimise the scope of the exclusion clause and on the other hand a demand from the Iranian negotiators to exclude certain claims as a result of the Majlis position in regard to claims based on contracts which provide for the settlement of disputes by competent Iranian courts. However, there is not sufficient evidence that the two Governments came to an agreement as to the meaning of the word "binding".

The intent of the United States negotiators in this regard is explained in the affidavit of former Deputy Secretary of State, Warren Christopher, but that affidavit is ambiguous concerning the clarity with which this intent was made known to the Algerian intermediaries, there being no direct contact between the American and Iranian negotiators. Mr. Christopher says that he proposed adding the word "binding" on January 17, 1981 and adds:

> When I reviewed this proposal with Mr. Ben Yahia, he appeared immediately to recognize the importance of the new term included in this provision in that it would leave it open to the Tribunal to decide whether a given contractual provision was "binding" on the parties and the Tribunal, and he specifically asked whether the United States would insist on the word "binding". I replied that we would, that it was essential, and Mr. Ben Yahia made no objection.

Mr. Christopher says that Mr. Ben Yahia understood "the importance of the new term", but he does not say that the purpose of the ambiguous wording "binding contract" in relation to the enforceability of choice of forum clauses was understood and conveyed to the Iranian negotiators.

On the other hand, if the words "binding contract" were to be interpreted as referring to the binding character of the entire contract, this would leave the Tribunal with a vicious circle since, e.g., in case of a contention that the contract is invalid

as a result of fraud, the Tribunal would have to go into the merits of the case in order to find out whether it has jurisdiction but would at the same time not be entitled to go into the merits until it has been established that it has jurisdiction. Thus, neither of the two possible interpretations gives any sensible meaning to the word "binding" in the present context. Therefore, the Tribunal concludes that this word is redundant.

In these circumstances the Tribunal - which derives its jurisdiction only from the terms of the Declaration - does not reach the question as to whether changes in Iran may have any impact on the enforceability of forum selection clauses in contracts.

For the reasons given above

the TRIBUNAL holds

that the instant provision of the Purchase Agreement falls within the scope of the forum clause exclusion contained in Article II, paragraph 1, of the Claims Settlement Declaration. Consequently, the Tribunal decides that it has no jurisdiction over the claims to the extent that they are based on the Purchase Agreement.

The extent to which the claims asserted in this case are based on this agreement, and thus outside the Tribunal's jurisdiction, and the extent to which they are based on other contracts or are not based on contract, and thus within the Tribunal's jurisdiction, remain to be determined by Chamber Two, the Chamber to which this claim is assigned.

The case is referred back to Chamber Two for further proceedings.

The Hague,
5 November 1982

Gunnar Lagergren
(President)

In the name of God,

Pierre Bellet
Dissenting as to
Part II

Nils Mangård

In the name of God,

Mahmoud M. Kashani
Dissenting opinion as
to Part II

Howard M. Holtzmann
Concurring opinion as
to Part II; Dissenting
opinion as to Part III

In the name of God,

Shafie Shafeiei
Dissenting opinion as
to Part II

George H. Aldrich

In ~~the name~~ of God,

Richard M. Mosk
Concurring opinion as
to Part II; Dissenting
opinion as to Part III

Mostafa Jahangir Sani
Dissenting opinion as
to Part II