IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

395-212

۳۹۵-۲۱۲

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Case No. 395 [illegible]f filing: ۶-۶-۸۵

** AWARD - Type of Award _____

- Date of Award _____

_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____

_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of & dissenting Ms. Ansari

- Date 18 July 85

10 pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

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** DISSENTING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

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- Date _____

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In the Name of God

Case No. 395
Chamber Three
Award No. ITM/ITL 51-395-3

FARSI VERSION FILED 18 JULY 1985

Component Builders Inc.,
Wood Components Company, and
Moshofsky Enterprises Inc.,

Claimants,

- and -

Islamic Republic of Iran, et.al.,

Respondents.

Dissenting and Concurring Opinion of
Parviz Ansari as to the Interim and
Interlocutory Award in Case No. 395

I. Dissenting Opinion

For the reasons stated hereunder, I dissent from the decision of the Majority on the jurisdiction of this Tribunal over the Claimants' claims, to the extent that they are based on the contract in dispute. I also dissent from the interim award ordering a stay of proceedings in the public courts of Tehran and from the procedure for establishing the Claimants' U.S nationality.

A - Articles of the contract in dispute and the Majority's conclusion

The Contract for constructing and providing buildings, concluded on 28 June 1976 (7 Tir 1355) between Claimants Component Builders, Inc. and Wood Components Co., and Respondent Bank Rahni Iran, contains articles on the "Settlement of Disputes" (Article 14) and "Jurisdiction and Service of Process" (Article 15.19). Paragraphs 1, 2 and 3 of Article 14 provide:

"ARTICLE XIV - SETTLEMENT OF DISPUTES

14.1. All disputes or differences arising out of or in connection with or resulting from this Agreement, its application or interpretation, which cannot be settled amicably will be referred to a three-man Committee composed of one representative of Owner, one representative of Contractor and a third person to be nominated by the Budget and Plan Organization of Iran. All members of the Committee shall be nominated within a period of fifteen (15) days from the date of notification that a request for a Committee hearing has been filed by Owner or Contractor, provided that, if the Budget and Plan Organization of Iran did not nominate the third person within such fifteen (15) day period, such third person shall be appointed within ten (10) days thereafter by the President of the Iranian Chamber of Commerce. In this event, such third person shall have recognized expertise in the subject matter under dispute and shall not be a past or present employee or consultant of Contractor or Owner, or any company affiliated with Contractor. The decision of the Committee shall be by majority vote. The parties hereby express the intention that the decision of the Committee shall be rendered not more than two (2) months from the date of designation of the Committee members. The Committee shall meet in Tehran, Iran.

14.2. If the dispute is not settled by the Committee or if a party refuses to accept the decision of the Committee, the dispute shall be referred to the competent courts or Iran.

14.3. The decision of the Committee, if accepted by the parties, or the decision of the courts of Iran shall be final, and judgement thereon may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the decision and an order of enforcement, as the case may be."

In view of Article II, paragraph 1 of the Claims Settlement Declaration, the above contract clause ipso facto precludes jurisdiction of this Tribunal. See: Halliburton Company and Imco Services (U.K.) Ltd., v. Doreen/Imco and the Islamic Republic of Iran, Interlocutory Award No. ITL 2-51-FT, Pt. III, 5 Nov. 1982. Also, see: in Case No. 58, GTE v. Telecommunication Company of Iran, the Order dated 18 November, 1982.

On the other hand, the Majority believes that Article 15.19, concerning jurisdiction and service of process, causes ambiguity and is inconsistent with Article 14. Article 15.19 states:

"15.19. Jurisdiction and Service of Process

Contractor agrees that any legal action or proceeding arising out of or relating to this Contract may be instituted in any competent Iranian court. Contractor irrevocably submits to the jurisdiction of each such court in any such action or proceeding. Contractor hereby irrevocably consents to service of process upon it in any action or proceeding by the mailing, postage prepaid, of copies thereof to the Contractor at the address provided for notices to Contractor under this Contract. The foregoing, however, shall not limit the right of Owner to bring any legal action or proceeding or to obtain execution of judgement in any appropriate jurisdiction."

In its decision the Majority holds, by analogy with Part II of the Interlocutory Award issued in the Halliburton Case, that Article 15.19 has given rise to an inconsistency between this Article and that dealing with the settlement of disputes, and thus that the Contract is ambiguous with respect to its settlement of disputes clause. In the view of the Majority, this ambiguity results from the fact that pursuant to Article 15.19, in fine, the Respondent is entitled to institute proceedings against the Claimants in both the Iranian judicial fora and in any other judicial fora it deems appropriate.

B - Arguments in dissent

In my view, both the argument by the Majority in this connection and its analogy with Part II of the Interlocutory Award in the Halliburton Case are invalid. In Part II of the said Interlocutory Award, which deals with a Loan Contract, it is stated that the maker of the promissory notes has submitted to the jurisdiction of the Iranian Courts, and according to the Majority of the arbitrators in the Full Tribunal:

"... 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."

In the above-cited Award, the Majority has held that since only one party has submitted to the jurisdiction of the Iranian Courts, the said provision does not meet the requirements of Article II, paragraph 1 of the Claims Settlement Declaration. However, this decision of the Full Tribunal is not to be compared and analogized with the instant case, because in the latter, both parties have, according to the explicit provisions of the settlement of disputes clause (Article 14.1 and 14.2) submitted to the jurisdiction of the Iranian Courts; moreover, the article dealing with "Jurisdiction and Service of Process" (Article 15.19) specifically reiterates their submission to such jurisdiction, as well as setting forth the procedure for service of processes during the proceedings. Article 15.19, in fine, does not, contrary to the Majority's view, grant a new right to the Respondent to institute any sort of proceeding. Rather, the said Article, in fine, in fact reiterates and extends the provisions of Article 14.3 in

respect of execution of an award, request for issuance of a court order to that effect, or other requests for protection such as attachments and interim orders, etc. The Majority's reliance on Interlocutory Award No. ITL 36-410-3 in Aeronutronic Overseas Inc., & Henkels and McCoy Inc., v Telecommunication Company of Iran, et.al., is therefore unsupportable, for the reasons set forth in the dissenting opinion in that case.

C - Method of Interpretation

The method adopted by the Majority for interpreting the terms and provisions of the Contract, is not the conventional method of interpretation of contracts. This method renders nugatory and ineffectual all the provisions of Articles 14 and 15.19. The rational way to interpret a contract, so as to discover and adhere to the common intention of the parties, is to reconcile its seemingly inconsistent clauses and correlate their meaning. ("Wherever possible, it is better to reconcile than to reject an apparently inconsistent text".)*

Where a number of Articles may seem contradictory or inconsistent, even their titles and rubrics can be a good aid in ascertaining the scope and purport of each. (A rubro ad nigrum.)

On the other hand, in comparison to the jurisdiction of municipal judicial fora, the jurisdiction of this arbitral Tribunal is exceptional and limited in nature, and the Tribunal may in no way extend its limited jurisdiction or

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* Translation of an Arabic maxim

the range of matters lying within its jurisdictional scope. Numerous awards have held that this Tribunal has an exceptional and limited jurisdiction. See, for example: The decision of the Full Tribunal in Case No. A/2, dated 21 December 1981; and Award No. 25-71-1, dated 22 February 1983, in Lillian B. Grimm v. the Government of the Islamic Republic of Iran.

Furthermore, the law which governs the Contract is that of Iran (Article 15.16). For this reason too, in view of the above, and owing to the fact that Article 14 is the sole settlement of disputes clause and is thus a special requirement; and in view of other contract clauses, inter alia Article 15.19, which should be interpreted in light of Article 14 and the Article concerning the governing law, the Tribunal should have pronounced that it lacks jurisdiction. This is because in light of Article 14, Article 15.19 has no legal bearing other than to set forth the relative jurisdiction of the equivalent municipal courts according to the laws of Iran, which govern the Contract.

D - Interim Award ordering a stay of proceedings in the Tehran Public Court

In the Order dated 10 January 1985, I have set forth my Dissent to the above-mentioned Interim Award; now, in view of the recent decision of the Majority, I hereinbelow elaborate upon the said Dissenting Opinion.

Here, too, the Majority's argument in this instance, to the effect that proceedings in the Public Court of Tehran must be stayed because a Counterclaim has been filed with this Tribunal, is invalid. In order to justify its position, the Majority invokes the decision of the Full Tribunal in the E-Systems Case (ITM 13-388-FT), and it concludes that since in the said decision the Counterclaim

also falls under the provisions of Article VII, paragraph 2 of the Claims Settlement Declaration, pursuant to which "Claims referred to the Arbitral Tribunal shall ... be considered excluded from the jurisdiction of the courts of Iran ...", therefore, the Counterclaims which have been filed in this Tribunal, and also brought in the Tehran Court as original claims, should similarly be stayed. Notwithstanding the argument as to whether the term "Claims" in Article VII, paragraph 2 of the Claims Settlement Declaration includes "Claims as well as Counterclaims", the question has, on principle, been addressed fully in the decision in the E-Systems Case, to the effect that this Tribunal does not have exclusive jurisdiction over Counterclaims:

> "The provision in Article VII, paragraph 2, of the Claims Settlement Declaration that claims referred to the Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court, is in accordance with its wording applicable only to claims that are already before the Tribunal. Consequently, it follows from this provision that once a counterclaim has been initiated before the Tribunal such claim is excluded from the jurisdiction of any other court, but it cannot be deduced from this provision that the Tribunal's jurisdiction over any counterclaim is of an exclusive nature.
>
> Consequently, the wording of the Algiers Declarations does not support the argument that the Tribunal's jurisdiction over Iran's counterclaims is exclusive. No other evidence has been submitted to demonstrate that the two Governments intended to confer on the Tribunal exclusive jurisdiction over counterclaims...
>
> Consequently, the Tribunal concludes that the Algiers Declarations leave the Government of Iran free to initiate claims before Iranian courts even where the claims had been admissable as counterclaims before the Tribunal."

By declaring its lack of exclusive jurisdiction over Counterclaims on the one hand, and by placing the Counterclaims under the scope of Article VII, paragraph 2

of the Claims Settlement Declaration on the other, the Tribunal has given rise to an odd contradiction, because the pronouncement that the Tribunal does not have exclusive jurisdiction necessarily entails that the Respondent shall be entitled to file its claims as counterclaims with this Tribunal or as original claims in any other forum. See: The Opinion of Iranian Arbitrators in the E-Systems Case, dated 16 March 1983.

On the other hand, by relying on the premise that the Parties to, and the subject of, the dispute in Claims Nos. 1 and 2 before this Tribunal and the Claim brought by the Respondent in the Tehran Public Court are identical, the Majority has held that the claim filed with the Tehran Public Court should be stayed in order to safeguard the respective rights of the Parties and to ensure the jurisdiction and authority of the Tribunal. However, an examination of the documents relating to the claim before the Public Court of Tehran, and of the Respondent's (Bank Maskan Iran as successor to Bank Rahni Iran) submissions in this regard, makes it clear that the Parties to these two Claims are not fully identical, since in the instant case there is a third Claimant, named Moshofsky Enterprises Inc., which claims ownership over the Claim but has not been a party to the Contract with Respondent. Moreover, in the claim before the Tehran Court, apart from the fact that the said Claimant is not a Party to the dispute, there is another Respondent, in addition to Wood Components Company and Component Builders Inc., namely T.C.S.B. Inc. Thus, in these cases the Parties to the dispute are not identical, in any sense which can be intended by the Majority; consequently, the subjects of the two claims brought in these two fora are also different.

In addition to the above, as repeatedly stated by the Iranian Arbitrators and numerous respondents in analogous cases, it is impossible to comply with any request by the

Tribunal for a stay of the proceedings before the Tehran Courts, because such a step would be in contravention of the provisions of the Civil Procedure Code, which governs the Iranian Courts and contains mandatory laws and regulations. Thus, Articles 290 to 298 of the Iranian Civil Procedure Code, which govern stay, prosecution and withdrawal of claims, make provision only for certain limited exceptions, and the court may not order a stay of proceedings other than in those instances set forth in the above-mentioned Articles. It is permissible, however, for the Parties to agree to hold a hearing at a later date.

Accordingly, the Government of the Islamic Republic of Iran and/or Bank Maskan Iran are legally barred from carrying out the Tribunal's request, and they would without doubt be unable to do so even if, in arguendo, they accepted this Tribunal's recommendation.

E - The U.S. nationality of Claimants

Although the Tribunal has not as yet definitively accepted the Claimants' U.S. nationality and has made such acceptance conditional upon non-presentation of rebuttal evidence on the part of Respondents, this is not the conventional method for evaluating the positive evidence, irrespective of whether or not the Iranian Respondents undertake to supply rebuttal evidence. In both this case and others like it, in order to prove their U.S. nationality, Claimants have adduced their company's Certificate of Incorporation and resorted to affidavits drawn up by the company's directors, employees or shareholders and indicating that its shares belong to certain individuals. These affidavits are nothing but the very Claim itself, which is now presented to the Tribunal as evidence. Such a method, whereby the evidence is itself the claim, can not prove any fact before the Tribunal, because the ownership of shares by natural persons of U.S. nationality must, as provided by Article VII, paragraph 1 (b) of the Claims Settlement Declaration, be certified by

the relevant public authorities, who shall also prepare the list of relevant shareholders; and this evidence should be presented to the Tribunal together with proof of the shareholders' U.S. nationality. In the present case, although the birth certificates or U.S. passports of the persons whom the Claimants allege to be the Company's shareholders have been provided to the Tribunal, no document, apart from the affidavits, has been submitted to the Tribunal in proof of the ownership of the shares of the Claimant companies by those individuals. In case No. A/20, the Government of the Islamic Republic of Iran has requested a reliable method for proving Claimants' U.S. nationality. Therefore, it is preferable that the Tribunal suspend any determination on these matters until a final decision is taken in that case.

II - Concurring Opinion

Alleging nullification of the contract in dispute, the Claimants have demanded compensation on the basis of Quantum Meruit and have based this Claim upon frustration of the settlement of disputes clause (Article 14). As set forth in the Tribunal's decision, this claim has no legal bearing; and where a valid and enforceable contract exists, a demand for compensation on the basis of the doctrine of Quantum Meruit cannot be entertained. See : Dames and Moore v. the Islamic Republic of Iran, Award No. 97-54-3; and T.C.S.B. Inc., v. the Islamic Republic of Iran, Award No. 114-140-2.

III - Conclusion

In view of the foregoing, I hold that the Tribunal lacks jurisdiction over the Claimants' claims to the extent that they relate to, and are based on, the Contract in dispute, which contains a choice of forum clause.

Ansari

Parviz Ansari