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Case No. 119

SEPARATE OPINION OF MAHMOUD M. KASHANI ON THE ISSUE OF THE AWARD
ON AGREED TERMS, CONCURRING IN PART AND DISSENTING IN PART

The Parties' representatives in case No. 119 and Claimant's representatives in case No. 501 reached settlement on all their claims and possible counterclaims and made mutual undertakings detailed in seven paragraphs and three enclosures. They jointly submitted the settlement and requested the arbitral tribunal to accept and record their settlement as an award on agreed terms, whereby terminating the proceedings in both cases.

The arbitral tribunal having become satisfied of its jurisdiction in case No. 119 accepted the settlement, recorded it as an award on agreed terms and simultaneously terminated the proceedings in case No. 501. But in so doing the majority apparently condemned one of the arbitrating parties, declared it obligated to pay Claimant in case No. 119 a sum of money and requested the President of the Tribunal to order the Escrow Agent to make that payment to Claimant.

I concur with the majority in acceptance and recording of the settlement in case No. 119 and termination of the proceedings in case No. 501. But I dissent from the majority as to the format of the Award on Agreed Terms in this case and to the provision for its enforcement.

1. As to its format the settlement decree has been transformed into a contentious resolution of the disputes by the majority. It has condemned one of the arbitrating parties in favour of the other. In principle, where parties choose conciliation and settlement in the course of the arbitral proceedings, they intend

to avoid continuation of contested proceedings and issuance of contested awards. They have several motives for this and the mutual undertakings that they make in the settlement. Our contested proceedings "is simply an alternative to the direct settlement of such disputes between the parties."*

The Provisionally Adopted Tribunal Rules Article 34(1) also points to duality of the procedures in contested and settlement cases. The Article provides for no action by the arbitral tribunal but recording of the settlement if accepted and issuance of a settlement decree.**

* Free Zones, (1929) P.C.I.J. Series A, No. 22 at 13; see also Adede, Settlement of Disputes Arising under the Law of the Sea Convention, 69 Am. J. Int'l L. 798 (1975).

** Iranian Code of Civil Procedure Articles 629 and 630 under Chapter 7, Settlements, provide for the same procedure, which as a proper measure is notable:

Article 629:

Where a compromise is reached outside the court and the deed of compromise is unofficial, the parties are required to appear in the court and verify its authenticity. Verification of the parties shall be recorded in a proces-verbal and signed by the judge of the court as well as by the parties.

In case of non-appearance of the parties in the court without mentioning a plausible excuse, the court shall, without any regard to the purport of the said deed of compromise, continue the court proceedings.

Article 630:

Contents of the deed of compromise made according to the foregoing two Articles shall be valid and applicable to the parties and their heirs and successors, and shall be executed like the judgments of a court of justice whether the subject of compromise was related particularly to the case under consideration or it included other suits or matters.

In his commentary on UNCITRAL Arbitration Rules with regard to Article 34 which has been maintained unchanged in our Provisionally Adopted Tribunal Rules, Sanders states that "(a)s a rule, however, the arbitrators will be prepared to incorporate the settlement into an award signed by them. To this award on agreed terms paras. 4 to 7 of Article 32 apply, as well as the provisions of para. 2: the award is final and binding on the parties and will be carried out by them without delay. If not carried out voluntarily, the settlement incorporated in the award on agreed terms can be enforced like any other arbitral award." *

Article 34(1) further provides that "(t)he arbitral tribunal is not obliged to give reasons for such an award."

Nevertheless, in formulation of the settlement decree, the arbitral tribunal has applied the form of a contested award, presented its holding by stating: "For the foregoing reasons, THE TRIBUNAL AWARDS AS FOLLOWS:...." and thereby practically refused the provision of Article 34(1) referred to above and in the operative part condemned "the remaining Respondents, THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN and BANK MELLAT (as) ... obligated to pay to the Claimant, NCR Corporation, the total sum of Two Hundred Fifty Thousand United States Dollars (U.S. \$250,000.00)...." Such a resolution is wholly outside the mutual intention of the parties wishing to avoid issuance of a contested award by recourse to settlement procedure.

2. As to its enforcement procedure the settlement decree is also of serious defect, for it has mixed the acceptance and recording of the settlement with that of its enforcement, which are two different matters. Decisions of judicial authorities in the form of contested judgments create rights for one party against the other, but in settlement decrees the duty of the tribunals is merely acceptance of settlement of the parties and declaration of its binding nature. At no time may a judicial authority on its own motion provide for enforcement of its decisions. Enforcement stage of a decision entirely differs from its stage

* Sanders, Commentary on UNCITRAL Arbitration Rules, 1977 Yearbook, Commercial Arbitration 172,212.

of making and issuance. Enforcement has its own separate rules and formulations envisaged in codes of civil procedures of all countries. With regard to arbitral awards also there exist particular procedures. Provisionally Adopted Tribunal Rules Article 32(7) in that respect provides for compliance by the arbitral tribunal with requirements of arbitration law of the country where the award is made. Article 34(3) of the same Rules has restated such requirement for awards on agreed terms. The Claims Settlement Declaration Article 1V(3) requires enforcement of "any award ... against either Government" by recourse to "the courts of any nation in accordance with its laws." (Emphasis added.) The procedure under the Dutch arbitration law is depositing of the award with the court local to the place of arbitration. And in order that the award be enforced, in case one of the arbitrating parties refuses voluntary enforcement, is obtaining of an exequatur from that local court according to the Dutch Code of Civil Procedure Article 642. Considering the existence of such provisions for enforcement of arbitral awards, the arbitral tribunal is principally relieved from enforcement procedures for its awards, and such matters must be left to the arbitrating parties or the authorities competent for enforcement of the awards. Based on the foregoing, the dispositive part of the award where it states that "THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN and BANK MELLAT, are obligated to pay to the Claimant, NCR Corporation the total sum of Two Hundred Fifty Thousand United States Dollars (U.S. \$250,000.00) which obligation shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria, dated 19 January 1981. The Tribunal hereby submits this Award to the President for notification to the Escrow Agent", is outside the competence and duties of the arbitral tribunal. Therefore in spite of my agreement with acceptance and recording of this settlement in the form of an award on agreed terms I dissent from the majority decision as to these defects.


Mahmoud M. Kashani