77

IRAN-UNITED STATES CLAIMS TRIBUNAL

INTERLOCUTORY AWARD

Case No. 121 Award No.: ITL 4-121-FT

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: George W. Drucker, Jr.,
Claimant,

and

Foreign Transaction Co.,
Insurance Company of Iran,
National Grain, Sugar and Tea Organisation,
Respondents.

Appearances: Mr. Jeffrey L. Gould,
Youngstein & Gould, London, for the Claimant,
Mr. A.W. Rovine, Agent of the United States of America.

Also present: Mr. Mohammed 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 above mentioned provision of the Claims Settlement Declaration.

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

Part II
The First Claim ("the Rice Contract")

This claim is for payment for a quantity of rice delivered by South Gulf Trading and Shipping Co. Ltd. ("South Gulf"), a company alleged by the Claimant to be sixty percent owned by him, to the Respondent Foreign Transaction Co. in early 1975. In its Statement of Defence, the Respondent objects to the Tribunal's jurisdiction, asserting that the claim arises from a contract which was entered into by South Gulf and the Respondent in June 1974 ("the Rice Contract"), which confers jurisdiction upon competent Iranian courts. The Claimant asserts that the contract is not the basis for the claim.

The Rice Contract is printed in Farsi with an English text appearing to the left of the text. Article 14 of the contract contains a provision regarding settlement of disputes. In the Claimant's Memorial filed on 1 June 1982 this article has been translated as follows:

> Any dispute arising from the execution of this agreement, if not settled amicably, shall be resolved through the Iranian legal authorities.

The Respondent Foreign Transaction Co. has, in a Memorial filed on 10 August 1982, presented the following translation of Article 14:

> Any dispute arising from the performance of this contract, not settled amicably, shall be settled by reference to the legal authorities of Iran.

The Respondent's position is that the expression "Iranian legal authorities" is equivalent to "the competent Iranian courts".

The Claimant contends that, even assuming that the claim is based on the Rice Contract, Article 14 of this contract does not constitute such an exclusion clause as described in the Claims Settlement Declaration. In support of this position the Claimant argues: The wording "Iranian legal authorities" is an extremely broad expression which describes every Iranian Government official or body, not merely the competent Iranian courts. Article 14 does not, therefore, specifically refer to the sole jurisdiction of the competent Iranian courts as required under the exclusion provision. Furthermore, for a forum selection clause to meet the standards of the exclusion provision, it is required that it apply to "any disputes" under the contract. The Rice Contract fails to meet with this requirement because by its terms it applies only to the disputes arising from the execution or performance of the contract, and not to other disputes such as disputes as to its interpretation. In addition, owing to the changes that have occurred in Iran, the forum selection clause contained in Article 14 is not "binding" as required for the application of the exclusion provision.

In the Tribunal's view, it can be assumed that the contracting parties when referring disputes to be settled by "legal authorities" intended this expression to cover such bodies or authorities that exist within the legal system for the purpose of resolving commercial disputes. Therefore, the scope of the expression "legal authorities" in the present context cannot be so wide as to cover governmental or other official bodies or agencies not dealing with disputes settlement. Nor would it be reasonable to read into Article 14 a reference to settlement through arbitration; such an interpretation would not be compatible with the word "authorities" which indicates

a body enjoying the status emanating from the State. In view of this, the Tribunal considers that "legal authorities" must be understood to have the same meaning as "courts", a term that itself includes administrative as well as judicial tribunals.

The question arises whether the wording "any dispute arising from the execution" or "from the performance" of the contract meets with the requirement under the exclusion provision that "any disputes" under the contract must come under the jurisdiction of Iranian courts. It is true that the wording here to some extent may appear to limit the scope of Article 14. It could be argued that disputes concerning the interpretation or validity of the contract were not covered by it. Such disputes would fall outside the scope of the article only if they did not arise out of performance or non-performance of the contract. It is in practice often difficult if not impossible to draw a demarcation line between disputes concerning the performance of the parties' contractual obligations, on the one hand, and the interpretation or validity of the agreement on the other hand; disputes of the former kind will often inevitably entail questions of interpretation or validity, and disputes of the latter kind usually arise from performance. Abstract questions of interpretation or validity not arising from performance might form the basis for requests for declaratory judgments, but those would hardly be disputes under the contract. In view of this, the Tribunal holds that the scope of Article 14 of the Rice Contract is sufficiently broad so as to meet the requirement of the exclusion provision in this respect.

As to the Claimant's contention that Article 14 is not "binding" as required under the exclusion provision, the Tribunal notes the following:

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 Article 14 of the Rice Contract falls within the scope of the forum clause exclusion contained in Article II, paragraph 1, of the Claims Settlement Delcaration. Consequently, the Tribunal decides that it has no jurisdiction over the claim to the extent that it is based on the Rice Contract.

The extent to which the First Claim is based on the Rice Contract, and thus outside the Tribunal's jurisdiction, and the extent to which it is based on other contracts or is not based on contract remains to be determined by Chamber Two, the Chamber to which this claim is assigned.

Part III
The Second Claim

(1) "The Cement Contract"

In June 1974 South Gulf and Respondent Foreign Transaction Co. entered into a contract for delivery of a shipment of cement ("the Cement Contract"). This claim is, inter alia, for recovery of damages arising from Respondent's alleged breach of the Cement Contract. The contract, which is printed in both Farsi and English, provides in Article 16 that in all cases the Farsi text is the controlling text. Article 12 of the contract contains a provision regarding settlement of disputes. The Farsi text of this article is identical to that of Article 14 in the Rice Contract dealt with above. The Tribunal notes, however, that the English text of Article 12 in the Cement Contract uses the expression "Iranian Judicial courts", instead of "Iranian Legal Authorities".

The parties' positions as to the clause in the Cement Contract now under consideration correspond to those taken with regard to Article 14 of the Rice Contract.

The above findings with regard to the First Claim apply equally to Article 12 of the Cement Contract.

Therefore

the TRIBUNAL holds

that this article 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 claim to the extent that it is based on the Cement Contract.

The extent to which the Second Claim is based on the Cement Contract, and thus outside the Tribunal's jurisdiction, and the extent to which it is based on other contracts or is not based on contract remains to be determined by Chamber Two.

(2) "The Cement Offer"

By a telex dated 12 October 1977 Respondent Foreign Transaction Co. offered to enter into a new agreement whereby South Gulf would deliver to it a certain quantity of cement by rail. South Gulf states that it accepted this offer ("the Cement Offer"). The telex contains the following provision regarding settlement of disputes:

> Conflicts and settlements:
> Eventual disputes must be finally and exclusively settled in Iranian courts. If the contract is concluded we require one of your senior officers to come to Tehran to sign and submit required Government of Iran affidavit. This officer must be fully authorized to so act on yr [sic] behalf.

The Respondent has not raised any objection as to the Tribunal's jurisdiction by virtue of this telex clause. Nonetheless, the Tribunal finds it appropriate in this case to consider, on its own motion, whether the clause falls within the scope of the exclusion provision in the Claims Settlement Declaration.

The clause provides that disputes between the parties shall be referred to the courts of Iran. Consequently, it fulfils the requirement of the exclusion provision of the Claims Settlement Declaration which sets forth that a claim falls outside the jurisdiction of the Tribunal if it arises under a contract between the parties "specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts".

As explained above with regard to the Rice Contract, the Tribunal does not address the question as to whether changes in Iran may have any impact on the enforceability of this forum selection clause.

Therefore

the TRIBUNAL holds

that the telex clause now under consideration 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 claim to the extent that it is based on the Cement Offer.

The extent to which the Second Claim is based on the Cement Offer, and thus outside the Tribunal's jurisdiction, and the extent to which it is based on other contracts or is not based on contract remains to be determined by Chamber Two.

Part IV
The Third Claim ("the Onion Contract") and the Fourth Claim ("the Basmati Rice Contract")

In April 1976 South Gulf and Respondent Foreign Transaction Co. entered into a contract for delivery of a shipment of onions ("the Onion Contract"). The Third Claim is, inter alia, for damages incurred by reason of the Respondent's alleged breach of this contract.

A contract between the same parties was entered into in October 1976 for the delivery of a shipment of Basmati Rice ("the Basmati Rice Contract"). Under the Fourth Claim, the Claimant seeks recovery of demurrage charges incurred as a result of the Respondent's alleged breach of the latter contract.

The Respondent objects to the Tribunal having jurisdiction over the Third and the Fourth Claim, arguing that the Iranian courts have jurisdiction since both contracts were concluded and signed by the parties in Iran and since the Respondent resides in Iran.

The Tribunal notes that it is not alleged that the claims arise under contracts containing a clause providing for the sole jurisdiction of Iranian courts.

Therefore

the TRIBUNAL finds

that there are no grounds under the Claims Settlement Declaration for excluding the Third and the Fourth Claims from its jurisdiction.

Part V
The Fifth Claim

(1) "The Wheat Contracts"

In 1975, South Gulf and Respondent National Grain, Sugar and Tea Organisation entered into two contracts for delivery of wheat to the Respondent ("the Wheat Contracts"). The Fifth Claim includes a claim for damages under these contracts.

Both Wheat Contracts contain in Article 10 a provision regarding settlement of disputes. In English translation, this article reads as follows:

> All disputes arising from interpretation and execution of this contract will be settled through friendly discussion and arbitration in this way that, after the dispute occurs,

> the matter will be discussed and examined directly in a committee composed of fully authorized representatives of both parties and an agreement will be agreed upon. In the event of the committee's discussions failing to produce a result, the interested person may nominate his own referee in an official declaration to the other side and request him to appoint his own special referee within a month of seeing the declaration and send him to the meeting for the election of an umpire, the time and date of which is mentioned in the declaration. The two sides may agree to select their umpire before this session. In the event that the two sides do not agree before the session of the special referees to select an umpire or the other side fails to nominate his own referee within a month, the selection of both referees and the umpire will take place through the law courts.

Respondent National Grain, Sugar and Tea Organisation contends that the provision for arbitration contained in Article 10 is, in effect, equivalent to a reference to the jurisdiction of the Iranian courts.

The Claimant replies that the exclusion clause is not applicable in this case because Article 10 of the Wheat Contracts confers jurisdiction over disputes on arbitrators and not on the Iranian courts.

The Tribunal notes that Article 10 lays out a procedure for settlement of disputes through arbitration. It is not specified, however, where the arbitration is to take place. Therefore, the question of jurisdiction of the Iranian courts does not arise.

Thus

the TRIBUNAL holds

that the above articles of the Wheat Contracts do not fall within the scope of the forum clause exclusion contained in Article II, paragraph 1, of the Claims Settlement Declaration. Consequently, these articles do not exclude the Tribunal from jurisdiction over claims based on the said contracts.

(2) The Insurance Policy

The Fifth Claim further contains a claim against Respondent Insurance Company of Iran for recovery under an insurance policy issued by said Respondent in October 1975, whereby one shipment of wheat was insured.

In a Memorial filed by the Respondent on 10 August 1982 it is asserted that "the arbitration section of the general conditions" of the insurance policy indicates that disputes are to be settled by arbitration and/or recourse to the courts of Iran. However, the relevant insurance policy conditions have not been submitted to the Tribunal.

In the absence of any substantiation of the allegation that disputes arising under the insurance policy are to be settled by Iranian courts, the Tribunal finds no grounds at the present stage for excluding the claim based on the insurance policy from its jurisdiction.

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

Nils Mangård

Mahmoud M. Kashani
Dissenting opinion as
to Parts IV, V and VI

In the name of God,

Howard M. Holtzmann
Concurring opinion as to Parts IV and V(1), V(2); Dissenting opinion as to Parts II and III(1), III(2)

Shafi Shafeiei
Dissenting opinion as to Parts V and VI

George H. Aldrich

In the name of God,

Richard M. Mosk
Concurring opinion as to Parts IV and V(1), V(2); Dissenting opinion as to Parts II and III

Mostafa Jahangir Sani
Dissenting opinion as to Parts V and VI