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DUPLICATE ORIGINAL
«نسخه برابر اصل»

Case No. 388

Full Tribunal

AWARD NO: ITM 13-388-FT

E-SYSTEMS, INC.,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN and BANK MELLI IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده

FILED - ثبت شد

Date ۱۳۶۱/۱۱/۲۰ تاریخ
9 FEB. 1983

No. 388 ۳۸۸ شماره

CONCURRING OPINION OF HOWARD M. HOLTZMANN AND RICHARD M. MOSK TO INTERIM AWARD RE STAY OF PROCEEDINGS BEFORE A COURT IN IRAN

This case raises the important question of whether this Tribunal, in order to protect its jurisdiction and the integrity of its awards, can take action with respect to cases brought in national courts involving issues which are already pending before the Tribunal. This question arises because after Claimant E-Systems, Inc. ("E-Systems") filed a Statement of Claim with this Tribunal alleging that the Respondent Government of Iran had breached a contract with Claimant, the Iranian Ministry of Defense commenced a lawsuit in the Public Court of Tehran alleging that

E-Systems had breached the same contract. Both the claim in this Tribunal and the lawsuit in the Iranian court involve the same basic issues of whether the contract has been breached and, if so, by whom.[1]

Promptly after being informed of the lawsuit in Iran and of an impending hearing in that lawsuit, E-Systems filed with the Tribunal a motion for interim relief to cause the Government of Iran to halt the proceedings before the Iranian court.[2] In view of the nature of the question, Chamber One, to which the case is assigned, relinquished

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[1] Respondents have sought and obtained extensions of time to respond to the claim so that they have not filed their Statements of Defence or any counterclaim and do not have to do so until February 25, 1983. Other aspects of the same dispute are also pending before the Tribunal, having been included in claims filed by an Iranian governmental party. On January 18, 1982 Bank Melli filed two claims with the Tribunal against the Bank of America and the United States Government seeking recovery by virtue of the two letters of credit provided by E-Systems which are a subject of E-Systems' claim. The letters of credit support guarantees provided by Bank Melli to Iran. Bank Melli had demanded payment from the Bank of America on the letters of credit. Relying on a United States regulation (31 C.F.R. 535.568(b)), E-Systems applied for and received a license from the United States Treasury Department authorizing E-Systems to establish a special account on its books in the name of Bank Melli, thereby allowing the Bank of America not to pay Bank Melli.

[2] The Tribunal requested, but has not received, a current report from the Government of Iran as to the status of this lawsuit in the Iranian court. The Interim Award is based upon the assumption that the Tribunal would have been informed if any further proceedings have occurred in the lawsuit after the service of the summons and petition, and upon the additional assumption that, if any further proceedings have occurred, the Government of Iran will take whatever action is necessary to comply with the Interim Award and its object.

jurisdiction over the case to the Full Tribunal solely for the purpose of deciding E-Systems' motion. The question raised is one of importance, not only in this case, but in other cases before the Tribunal.[3]

We concur in the decision of the Tribunal averting a threat to its jurisdiction and in its holding that the Tribunal has

> an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective. Not only should it be said that the award to be rendered in this case by the Tribunal, which was established by inter-governmental agreement, will prevail over any decisions inconsistent with it rendered by Iranian or United States courts, but, in order to ensure the full effectiveness of the Tribunal's decisions, the Government of Iran should request that actions in the Iranian courts be stayed until proceedings in this Tribunal have been completed.

In thus holding that the award to be rendered by this Tribunal "will prevail over any decisions inconsistent with it" rendered by an Iranian court, the Tribunal has exercised the power granted to it by the two Governments to interpret the Algiers Declarations.[4] That interpretation "may be

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[3] A number of other lawsuits have been instituted by Iran in its own courts which appear to concern the same issues raised by the same parties in claims previously filed with this Tribunal. See, e.g., Case Nos. 59,93,159,370,430, 10853,10854,10855 and 10856. In some of these cases, unlike the instant case, counterclaims have been filed before this Tribunal.

[4] Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration") and 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 ("Claims Settlement Declaration").

enforced by the prevailing party in the courts of any nation...." General Declaration, paragraph 17. See also Claims Settlement Declaration, Article VI, paragraph 4.[5] Moreover, international law supports the Tribunal's holding that a Tribunal award prevails over any decision by an Iranian court inconsistent with such an award. Selwyn Case (G.B. v. Ven.), 9 R. Int'l. Arb. Awards 381 (1903); see also C. Eagleton, The Responsibility of States in International Law 69 (1928). Indeed, a decision by an Iranian court inconsistent with a Tribunal decision or award would be a violation of Iran's obligations under international law. See International Law Commission Report on Arbitral Procedure (Scelle, rapporteur) UN Doc. A/CN.4/18 (1950) at 76, reprinted in (1950) 2 Y.B. Int'l. L. Comm'n 76, 143; Martini Case (Italy v. Ven.), 2 R. Int'l. Arb. Awards 975, 995-96 (1930); J.L. Simpson and H. Fox, International Arbitration (1959); Eagleton, supra at 71.

The Tribunal acted in accordance with established principles of international law when it found that it has "an inherent power to issue such orders as may be necessary

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[5] E-Systems, the Government of Iran and the Government of the United States have all submitted Memorials and presented arguments at an oral hearing on the questions of interpretation of the Algiers Declarations and other issues in this case. The participation of the Government of the United States was pursuant to invitation of the Tribunal in accordance with Article 15, Note 5, of the Provisionally Adopted Tribunal Rules, which permits such participation to assist the Tribunal in carrying out its task.

> to be able to decide the same, the claimant, or the person in whose interest the claim has been presented, must discontinue his proceedings before the municipal court.)

Différend S.A.I.M.I., 13 R. Int'l Arb. Awards 43, 45 (1948) (emphasis added)(translation supplied).

It is also an accepted principle of international law that, where there is an agreement to arbitrate, the parties will be referred to arbitration. See, e.g., Article II, paragraph 3, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 330 U.N.T.S. 38; see also Sumitomo Corp. v. Parakopi Compania Maritima, 477 F.Supp. 737 (S.D.N.Y. 1979), aff'd, 620 F.2d 286 (2d Cir. 1980). A party to an arbitration may be enjoined in one jurisdiction from litigating in a national court of another jurisdiction issues identical or related to those involved in the arbitration. See, e.g., Russell, Arbitration 297 (20th ed. 1982); M. Mustill and S. Boyd, Commercial Arbitration 410 (1982); Necchi Sewing Machine Sales Corp. v. Carl, 260 F. Supp. 665 (S.D.N.Y. 1966).

In this same connection, a commentator has noted:

> It is a fundamental principle of arbitration, and especially international commercial arbitration, that an arbitrator adjudicates the entire case and that a national court

The object of interim protection "is to preserve the respective rights of the Parties pending the decision" of the tribunal. Anglo-Iranian Oil Company Case (U.K. v. Iran), 1951 I.C.J. 89 (Interim Protection Order of 5 July) at 93; Oellers-Frahm, Interim Measures of Protection, 1 Encyclopedia of Public International Law 69 (1971). Interim relief is appropriate to prevent "any measure capable of prejudicing the execution of any decision, which may be given by the tribunal." Simpson and Fox, supra at 162. As one commentator has written:

> Status quo of the parties must be maintained during pendency of the litigation. The lis must be conserved against any possible danger until the final decision is rendered lest the decision should prove nugatory and inexecutable. And for all this, immediate action on the part of the tribunal is essential to "ward off irreparable injury threatened by intervening circumstances."

Mani, International Adjudication 281(1980)(citation omitted).

It is in this context that the Permanent Court of International Justice has exercised its statutory authority to grant interim relief in order to enforce what it deemed to be a "principle universally accepted by international tribunals" that "the parties to a case must abstain from any

First, the two Governments provided in the first sentence of Paragraph B of the General Principles of the General Declaration that:

> It is the purpose of both parties.... to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. (Emphasis added).

This key sentence expresses the agreement of both Governments that disputes connected with the subject matter of all authorized claims, whether such disputes are presented as claims or as counterclaims, are to be resolved by international arbitration, not in national court litigation. The term "claims," of course, includes counterclaims because a counterclaim is defined as "an opposing claim", Webster's Third New International Dictionary 519 (1976), and as "a claim presented by a defendant", Black's Law Dictionary 315 (5th ed. 1979). It is simply one type of claim. Moreover, the term "litigation" itself includes counterclaims.

At the time of the execution of the Algiers Declarations, there had been a number of civil actions in United States courts brought by American nationals against Iran. Consistent with the agreement of the two Governments to use arbitration rather than courts, Paragraph B of the General

Principles includes a second sentence[6] specifically providing for termination of all legal proceedings in United States courts involving claims against Iran. The first sentence, either alone or in conjunction with the Claims Settlement Declaration, would have been sufficient to require termination of the litigation in the United States courts.

Because of the great attention which had been focused on the litigation in the United States, however, the second sentence was added in order to include a detailed reference to that litigation. No comparable litigation had taken place in Iran, and, therefore, no additional reference to litigation in Iranian courts appears in Paragraph B. The bar to litigation in Iranian courts is expressed in the first sentence of Paragraph B and that expression is in no way lessened by the inclusion of the second sentence added in light of the particular circumstances then existing in the United States. Indeed, it cannot be assumed that the two Governments intended the anomaly that would result from removing litigation from or precluding it in a forum in the United States chosen by or available to a claimant and at the same time creating the possibility of duplicative litigation in this Tribunal and in courts in Iran.

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[6] "Through the procedures provided in the Declaration relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."

Second, the two Governments re-emphasized in Article II of the Claims Settlement Declaration their agreement to use international arbitration rather than national courts for deciding claims and counterclaims. Paragraph 1 of Article II states:

> 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 counter-claim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim ....

There is no provision anywhere in the Algiers Declarations which permits claims which can properly be made before the Tribunal to be decided in national courts. Indeed, the Tribunal was established for the express purpose of deciding such matters. In our view, the plain and ordinary purpose and meaning of the above-quoted sentence is that only the Tribunal shall have jurisdiction to decide issues arising in cases properly before it.

Third, Article IV, paragraph 1, of the Claims Settlement Declaration contains the key provision that "[a]ll decisions and awards of the Tribunal shall be final and binding." That being the agreement of the two Governments, it is the decisions and awards to be rendered by the Tribunal which determine the outcome of the issues, rather than any judgment or decision of a national court. In view of the "final and binding" character of this Tribunal's awards, it would be wasteful and useless to litigate the same issue in a national court.

Fourth, Article VI, paragraph 3, of the Claims Settlement Declaration states:

> Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws. (Emphasis added).

The courts of Iran are thereby obligated to enforce the awards of the Tribunal. It would be entirely inconsistent with that obligation for Iranian courts to make decisions on the same subject matter of a dispute which is already pending before the Tribunal. Article IV, paragraph 3, reflects an agreement that disputes are to be decided by the Tribunal and that the function of the Iranian courts is solely that of enforcement, if needed.

Fifth, the two Governments further implemented their agreement by Article VII, paragraph 2, of the Claims Settlement Agreement, which states:

> Claims referred to the arbitration 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.

That provision was designed to prevent a multiplicity of proceedings in which the same issue could be heard both in arbitration and also in a national court. Any such multiplicity of proceedings is very costly and creates the risk

of conflicting results. The two Governments recognized that a multiplicity of proceedings is highly undesirable and thus, in order to prevent it, included Article VII, paragraph 2, in the Claims Settlement Declaration. It therefore follows that this paragraph should be construed to include the initial claim and any opposing claim. A respondent could otherwise raise as the basis for a claim in a national court exactly the same issues that would constitute its defence to a claim already pending before the Tribunal.[7]

In addition, we feel it appropriate to add a few words of explanation concerning the particular wording of the portion of the Tribunal's decision which reads as follows:

> [T]he Tribunal requests the Government of Iran to move for a stay of the proceedings before the Public Court of Tehran until the proceedings in this case before the Tribunal have been completed.

One might have preferred to express the obligatory nature of the Interim Award by use of the word "orders" instead of "requests". It must be recalled, however, that this is

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[7] In the instant case, issues in the action in Iran are pending in the cases before the Tribunal. Thus, even if counterclaims are not "compulsory" as that term is understood in American jurisprudence -- an issue we do not address -- the Tribunal's Interim Award is justified.

addressed to one of the Governments which established the Tribunal by international agreement. It is to be presumed that such Government will respect the obligation expressed in the Interim Award stating what it "should" do. Accordingly, we join with those who consider that the term "requests" is adequate in this context.[8] In these circumstances we consider that a "request" is tantamount to and has the same effect as an order.

Finally, the Interim Award uses the words "to move for a stay." These words are sufficiently general to encompass whatever particular procedural steps are to be taken to halt proceedings in the Iranian court. Legal systems generally provide that a plaintiff may determine whether or not to proceed with its action and that a court may stay or postpone proceedings. See, e.g., Articles 48, 57, 127, 146, 147 298 of the Civil Procedure Code of Iran; see also, Roussel-Uclaf v. G.D. Searle & Co. Ltd. [1977] 1 Lloyd's L.R. 225, 230 ("[I]n the exercise of its inherent jurisdiction," a court may stay an action before it which is inconsistent with a pending arbitration.). Moreover, it should be

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8 See Pious Fund Case (U.S. v. Mex.), Scott's Hague Court Reports 1, 5 (1902), where the Permanent Court of Arbitration stated:

> [A]ll the parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other, and.... they all serve to render precise the meaning and the bearing of the dispositif (decisory part of the judgment) and to determine the points upon which there is res judicata and which thereafter can not be put in question....

noted that a State is responsible for acts of its judiciary in violation of international obligations.[9]

For the above reasons, we concur in the Interim Award.

Howard M. Holtzmann

Richard M. Mosk

Dated: The Hague

9 February 1983

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[9] See International Law Commission Report on Arbitral Procedure, supra; Simpson and Fox, supra at 262; Eagleton, supra at 71.