IRAN-U[redacted]NAL

دیوان داوری دعاوی ایران - ایالات متحده

928-67
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[redacted]NAL DOCUMENTS IN SAFE

Case No. 928 Date of filing: 16 MARCH 84

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of _____
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** DISSENTING OPINION of MR. MOSK
- Date 16 MARCH 84
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** OTHER; Nature of document: _____

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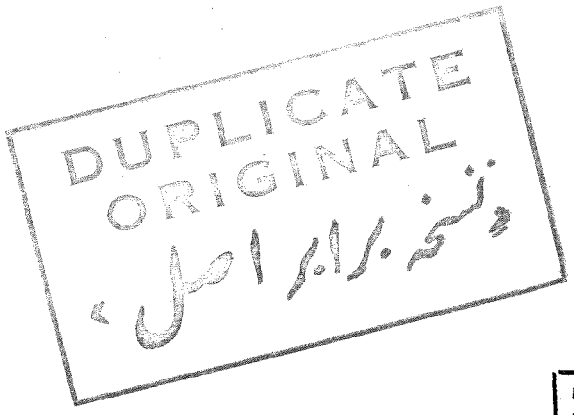

CASE NO. 928

CHAMBER THREE

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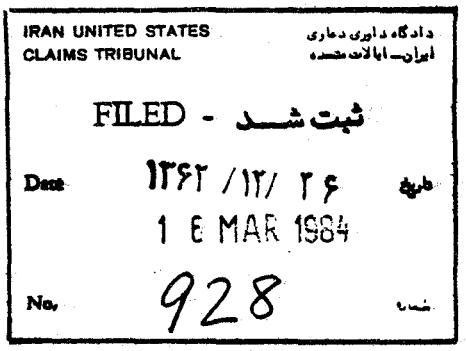

CBA INTERNATIONAL DEVELOPMENT CORPORATION,

Claimant,

- and -

THE GOVERNMENT OF IRAN,

Respondent.

DISSENTING OPINION OF
RICHARD M. MOSK

I dissent to the decision of the Tribunal dismissing the claim on the jurisdictional ground that the contract in issue contains a provision which is covered by the final exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration.[1] I adhere to my view that a forum selection clause should not divest the Tribunal of jurisdiction over any claim. See Dissenting and Concurring Opinion of Richard M. Mosk on Issues of Jurisdiction, Case Nos. 6, 51, 68, 121, 140, 159, 254, 293 and 466 (5 November 1982), 1

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[1] "... [e]xcluding [from jurisdiction] 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."

Iran-U.S. C.T.R. 305. Nevertheless, I recognize the binding authority of the Full Tribunal's decision. I do not believe that the Tribunal in the instant case has followed the Full Tribunal's decisions dealing with the application of the final exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration.

In holding that a contractual provision for arbitration does not divest this Tribunal of jurisdiction, the Full Tribunal stated:

> Therefore the Tribunal considers that even though Iranian law provides for a degree of control by the Iranian courts over the arbitral process, such limited control does not, in principle, deprive the arbitrators of their jurisdiction. The limited jurisdiction conferred by Iranian Law on the courts with regard to arbitration falls far short of the sole jurisdiction of the Iranian Courts required by Article II, Paragraph 1, of the Claims Settlement Declaration.

Dresser Industries Inc. v. Iran, Award No. ITL 9-466 FT (5 November 1982), 1 Iran-U.S. C.T.R. 280, 282. The Full Tribunal also noted in another case:

> Article II, Paragraph 1, of the Claims Settlement Declaration excludes from the jurisdiction of the Tribunal only claims arising under contracts which specifically provide for the sole jurisdiction of the competent Iranian courts. Article 21 of the contract does not contain any provision which unambiguously restricts jurisdiction to the courts of Iran. Consequently, irrespective of the contents of Article 5 of the Iranian Civil Code, this article in the contract does not with sufficient clarity fulfil the requirements laid down in the exclusion clause of Article II, Paragraph 1, of the Claims Settlement Declaration.

HNTB v. Iran, Award No. ITL 3-68-FT (5 November 1982), 1 Iran-U.S. C.T.R. 248, 250; see also T.C.S.B., Inc. v. Iran Award No. ITL 5-140-FT (5 November 1982), 1 Iran-U.S. C.T.R. 261, 263; Gibbs & Hill Inc. v. Tavanir, Award No. ITL 1-6-FT (5 November 1982), 1 Iran-U.S. C.T.R. 236.

Article 23 of the contract which is the subject of the instant case provides as follows:

> ARTICLE 23 DISPUTES
>
> The parties hereto agree that any disputes arising as result of this Contract shall be settled between the parties in an amicable manner. If, however, the parties cannot resolve any dispute between themselves, it is them [sic] agreed that final arbitration of the dispute will be carried out by an Iranian Court and the Farsi Translation shall prevail.

There was no Farsi version or translation of the contract. Since the contract in question is solely in English, one can rely only on the English interpretation of the words.

The word "arbitration" has only one meaning in English. It is "the hearing and determination of a case between parties in controversy by a person or persons chosen by the parties or appointed under statutory authority instead of by a judicial tribunal provided by law." Webster's Third New International Dictionary 110 (1976). Thus, the word "arbitration" has a specific meaning which does not include the judicial resolution of a dispute. Moreover, commercial

custom and usage indicate this definition to be the meaning understood in commercial transactions. See Gilpin, Dictionary of Economic Terms 7 (4th ed. 1977); Hanson, A Dictionary of Economics and Commerce 18 (5th ed. 1977); Black's Law Dictionary 96 (5th ed. 1979).[2]

The language of Article 23 can have several meanings. First, as the word "arbitration" was used, it can mean that the resolution of the dispute would be by arbitration, subject to normal judicial controls. The use of the word "final" is consistent with this interpretation. Generally, there are no non-final judicial proceedings. There can, however, be a non-final arbitration, such as one which permits de novo judicial proceedings. Thus, the parties provided for a "final" arbitration proceeding.

Second, the clause can refer to a judicial resolution, as suggested by the Tribunal. The use of the word "arbitration" is inconsistent with such an interpretation.

Third, the parties, by error, could have provided a clause which simply is unintelligible, just as was the

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[2] Although no Farsi text is available, Respondents argue that the Farsi word for "arbitration" has a dual meaning corresponding to "adjudication" and "arbitration" in English. No evidence of such a definition was submitted. Of course, as noted above, one cannot resort to Farsi definitions as there is no Farsi text. Moreover, that there may be two possible Farsi meanings suggests ambiguity.

clause discussed in Dresser Industries Inc. v. Iran, supra, which clause referred disputes to the Supreme Court of Iran. Since such a reference was not legally possible, the Tribunal held that the clause did not divest it of jurisdiction. In the instant case, "arbitration" in the courts of Iran is likewise not possible.

In light of these three possibilities, I cannot understand how the Tribunal could conclude that the clause in question, "unambiguously restricts jurisdiction to the courts of Iran", thereby fulfilling the requirements of Article II, Paragraph 1, of the Claims Settlement Declaration with "sufficient clarity." HNTB v. Iran, supra.

If the contract clause is ambiguous on its face, it cannot divest the Tribunal of jurisdiction. The Tribunal admits that "at first sight [the word] gives rise to confusion." The Tribunal is left with speculation as to what it believes was "likely." The Tribunal truly resupinates when it purports to construe the words in favor of the party that allegedly created the ambiguity. Even if the Tribunal could accept parol evidence on the interpretation of the Clause, none was offered. Thus, the Tribunal had no basis for interpreting an obviously ambiguous clause. That the Tribunal even acknowledges it is purporting to make sense out of the clause suggests a patent ambiguity, which, under Full Tribunal authority, is sufficient to preclude the

application of the exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration.

For the foregoing reasons, I dissent to the Award.

Dated, The Hague
16 March 1984

Richard M. Mosk