

Case No. 140

Date 5 November 1982

ORIGINAL DOCUMENTS IN SAFE

Award No.: ITL 5-140-FT

140-78  
1E. -VA

✓ (INTERLOCUTORY AWARD)

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- Other

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IRAN-UNITED STATES CLAIMS TRIBUNAL

INTERLOCUTORY AWARD

Award No.: ITL 5-140-FT

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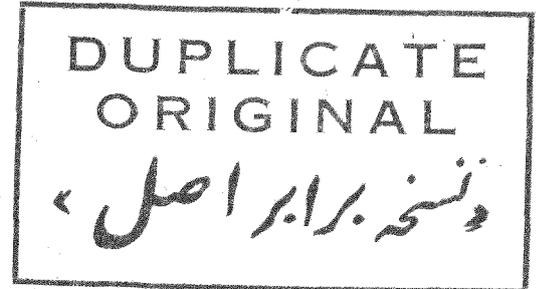
IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دماوی ایران - ایالات متحده
ثبت شد - FILED	
Date	۱۳۶۱ ۸ / ۱۴ تاریخ 5 NOV 1982
No.	۱۴۰ شماره

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: T.C.S.B., Inc.,  
Claimant,  
and  
Iran,  
Respondent.



Appearances: Mr. Stephen M. Truitt,  
Mr. Mark N. Bravin,  
Wald, Harkrader & Ross, Washington D.C., for the  
Claimant,  
Mr. Arthur W. Rovine, Agent of the United States  
of America,

Also present: Mr. Mohammad 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 scope of 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 jurisdictional issue referred to the Full Tribunal by Chamber Two. Furthermore, a hearing on this issue was held on 21-22 June 1982.

## Part II

### The Mali Abad Contract

Claimant negotiated in 1975 an agreement with the Housing Organization of Iran regarding services in connection with the construction of a planned community of apartment houses in Iran ("the Mali Abad Contract"). One of the claims in this case related to fees for services which Claimant performed under the agreement. The contract regarding these services contains a provision regarding settlement of disputes which reads as follows in our translation into English:

All disputes arising out of this contract, or the interpretation and understanding of its provisions between the parties, which cannot be solved and settled through amicable negotiations or correspondence, shall first be referred to a committee composed of three (3) representatives of the Plan and Budget Organization, the [Housing] Organization and the Consulting Engineer [T.C.S.B.]. In case no agreement can be reached or if one of the parties to the contract does not submit to the judgment of the majority of the committee, the dispute will be settled according to the laws of Iran and if necessary by arbitration or by reference to competent courts.

Furthermore, the Mali Abad Contract contains a provision which provides that "the laws of the Imperial Government of Iran" in every respect shall govern the contract.

Claimant contends that the Mali Abad Contract provides for a dispute resolution procedure by a private committee, and thus

does not refer disputes to the sole jurisdiction of Iranian or any other courts. Claimant further contends that even when a dispute may be referred to courts under this contract, Iranian courts do not have sole jurisdiction over the dispute.

Respondent asserts that the provisions of the contract concerning the governing law and the forum for settlement of disputes makes it clear that the legal fora of Iran have exclusive jurisdiction to investigate disputes between the parties to the contract. Respondent also argues that the provisions in the contract regarding a settlement procedure do not affect the conclusion that the contract confers exclusive jurisdiction on the Iranian courts, since no settlement emerging from this procedure can be enforced unless accepted by the parties to the contract.

The Tribunal notes that the Mali Abad Contract sets forth that all disputes between the parties arising out of the contract or the interpretation and understanding of its provisions, failing any settlement of such disputes, shall be settled according to the laws of Iran and if necessary by arbitration or by reference to competent courts. Thus, this article provides only that disputes, failing settlement between the parties, shall be solved through court proceedings or arbitration and that the disputes shall be subject to Iranian law.

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. The Mali Abad Contract refers to arbitration as an alternative to court proceedings and does not contain any provision which unambiguously confers jurisdiction on particular courts. Consequently, this 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.

For the reasons given above

the TRIBUNAL holds

that the instant provision of the Mali Abad Contract does not fall within the scope of the forum clause exclusion contained in Article II, paragraph 1, of the Claims Settlement Declaration. Consequently, this article in the contract does not exclude the Tribunal from jurisdiction over claims based on the said contract.

Part III  
The BHRC Contract

Another claim in this case relates to fees for services performed by Claimant under a separate contract in connection with a Research Center Project in Iran ("the BHRC Contract"). This contract contains a provision which reads:

Settlement of Disputes:

All disputes arising out of this Subcontract, or the interpretation and understanding of its provisions between the parties, which cannot be settled through amicable negotiations or correspondence, shall first be referred to a committee composed of a representative of each of the Employer, Housing Organization, and Subcontractor. In case no agreement can be reached or if one of the parties does not agree with the judgment of the majority of the committee, the dispute will be settled according to the laws of Iran by reference of it to competent courts of Iran.

Also the BHRC Contract contains a provision which provides that "the laws of the Imperial Government of Iran" in every respect shall govern the contract.

The Parties' main contentions on this point are based on the same arguments as the contentions relating to the Mali Abad Contract.

The relevant clause in the BHRC Contract provides that all disputes between the parties arising out of the contract or the interpretation and understanding of its provisions, failing

settlement of such disputes, will be settled according to the laws of Iran by reference to the competent courts of Iran.

Consequently, the plain wording of this article seems to fulfil the requirements in Article II of the Claims Settlement Declaration that a claim falls outside the jurisdiction of the Tribunal if it arises under a contract between the parties "specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts".

However, Claimant contends that this clause does not refer disputes to the sole jurisdiction of Iranian courts, since it provides for a dispute resolution procedure by a private committee. The Tribunal holds that the provision regarding the dispute resolution procedure must be understood so as to mean that any compromise solution arrived at in the course of such settlement discussion is binding on the parties only if expressly accepted by them. Thus, it does not in essence differ from any general obligation for the parties to a contract to engage in settlement discussions before referring disputes to court proceedings, and it cannot in any respect be compared with an arbitration procedure capable of bringing the contract outside the scope of the exclusion from the Tribunal's jurisdiction provided for in Article II, paragraph 1, of the Claims Settlement Declaration.

Claimant also contends that the instant clause as well as all similar clauses in other contracts, despite their language, do not constitute binding commitments to the sole jurisdiction of the courts of Iran because of the fundamental changes that have occurred in Iran since the conclusion of the Contract.

However, the Tribunal does not share this view. 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.

Furthermore, Claimant asserts that the word "binding" refers to a distinction in Iranian law between binding contracts and

revocable contracts. In this connection Claimant argues that the BHRC Contract was an agency contract under which TCSB acted as the owner's agent, and that agency contracts according to Iranian law are revocable, since they can be terminated either by the appointer or by the attorney. However, as previously concluded by the Tribunal the available evidence indicates that the word "binding" was proposed by the American negotiators in order to refer to the choice of forum clause, but it does not indicate that this intent was understood by the Iranian authorities. In any event, no evidence has been presented to demonstrate that the word "binding" was intended to refer to any specific elements in Iranian law.

Lastly, Claimant has asserted that the Islamic Republic of Iran has conceded the jurisdiction of the Tribunal over the claims asserted in this case, since the attorney for Iran in a case before a United States court regarding the instant matter by formal pleading conceded in July 1981 that the Tribunal has jurisdiction over TCSB's claims. However, as pointed out above, the Tribunal derives its jurisdiction only from the terms of the Declaration and what Iran has conceded in a litigation before a United States court does not mean that the Tribunal can take jurisdiction over the claims against the clear language of the clause in the contract.

For the reasons given above

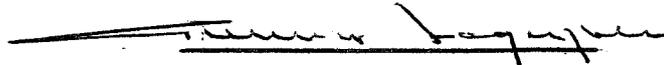
the TRIBUNAL holds

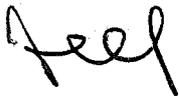
that the instant provision of the BHRC Contract falls within the scope of the forum clause exclusion contained in Article II, paragraph 1, of the Claims Settlement Declaration. Consequently, the Tribunal decides that it has no jurisdiction over the claims to the extent that they are based on the BHRC Contract.

The extent to which the claims asserted in this case are based on this Contract, and thus outside the Tribunal's jurisdiction, and the extent to which they are based on other contracts or are not based on contract, and thus within the Tribunal's jurisdiction, remains to be determined by Chamber Two, the Chamber to which this claim is assigned.

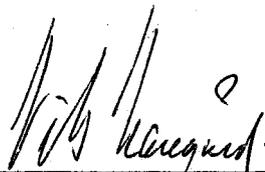
The case is referred back to Chamber Two for further proceedings.

The Hague,  
5 November 1982

  
Gunnar Lagergren  
(President)

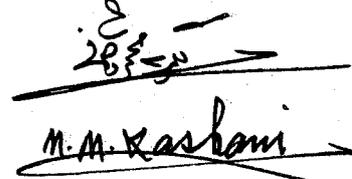


Pierre Bellet



Nils Mangård

In the name of God,

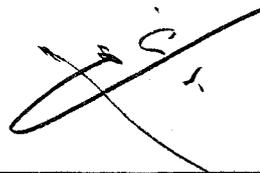


Mahmoud M. Kashani  
Dissenting opinion as  
to Part II

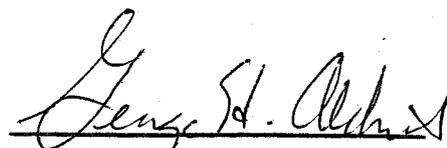
In the name of God,



Howard M. Holtzmann  
Concurring opinion as  
to Part II; Dissenting  
opinion as to Part III

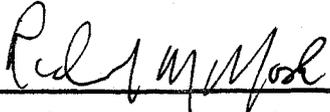


Shafie Shafeiei  
Dissenting opinion as  
to Part II



George H. Aldrich

In the name of God,



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Richard M. Mosk  
Concurring opinion as  
to Part II; Dissenting  
opinion as to Part III



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Mostafa Jahangir Sani  
Dissenting opinion as  
to Part II