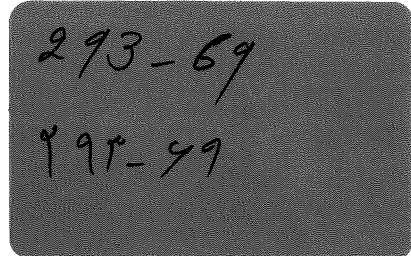


Case No. 293

Date 5 November 1982

ORIGINAL DOCUMENTS IN SAFE

Award No.: ITL 8-293-FT



✓ (INTERLOCUTORY AWARD)

- Award; No. of pages 9 Date of Award 5 November 1982

- Decision; No. of pages \_\_\_\_\_ Date of Decision \_\_\_\_\_

- Order; No. of pages \_\_\_\_\_ Date of Order \_\_\_\_\_

- Other

No. of pages \_\_\_\_\_ Date of Document \_\_\_\_\_

## IRAN-UNITED STATES CLAIMS TRIBUNAL

INTERLOCUTORY AWARDCase No. 293

Award No.: ITL 8-293-FT

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحده
ثبت شد - FILED	
Date	۱۳۶۱ / ۸ / ۱۴ 5 NOV 1982
No.	293

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 Three to the Full Tribunal.

Parties: Stone & Webster Overseas Group, Inc.,  
Claimant,

- and -

National Petrochemical Company,  
Razi Chemical Company (formerly Shahpur  
Chemical Company Limited),

Respondents.

Appearances: Mr. Anthony Leicester, Q.C.

Mr. Herbert Sears,

Mr. David P. O'Callaghan

Mr. Ian McIntosh

Kenneth Brown Baker Baker Solicitors, London  
for the Claimant,

Mr. Arthur W. Rovine, Agent of the United  
States of America

Also present: Mr. Mohammed K. Eshragh, as Agent of  
Islamic Republic of Iran

DUPLICATE  
ORIGINAL  
نسخه برابر اصل

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 contracts 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 Three of the Tribunal has relinquished to the Full Tribunal jurisdiction over this case for the limited purpose of deciding whether the 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 Three. Furthermore, a hearing was held on this issue on 21-22 June 1982.

## Part II

### The Construction Contract

In 1974 Stone and Webster Construction Limited, an allegedly wholly-owned subsidiary of the Claimant, entered into a contract with Respondent Razi Chemical Company, then named Shahpur Chemical Company Limited, which Claimant alleges is an agency, instrumentality or entity controlled by the Government of Iran. According to this contract ("the Construction Contract"), Stone and Webster Construction Limited undertook to provide certain services in connection with the expansion of a fertiliser complex in Iran. Some of the claims in this case are based on the Construction Contract.

The Construction Contract contains the following provision regarding settlement of disputes:

18.06 All disputes arising out of or in connection with this Agreement, any performance or non performance thereof, or the consequences of any of the foregoing shall be settled by a competent Court of Law of Iran.

This Article provides that all disputes arising out of or in connection with the Construction Contract shall be submitted to the courts of Iran. Consequently, the wording of the article fulfils the requirements in Article II 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".

The Claimant contends, however, that owing to the changes that have occurred in Iran, the forum selection clause contained in Article 18.06 of the Construction Contract is not "binding" within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration.

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 the 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 the instant provision of the Construction 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 Construction Contract.

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

### Part III

#### The FOB Contract and the Services Agreement

In connection with the design of the expansion of the fertiliser plant, a second contract was concluded in July 1974 between Stone and Webster Engineering Limited, another alleged subsidiary of the Claimant, and the Respondent Razi Chemical Company ("the FOB Contract"). This contract contains the following provision:

18.04 All disputes arising out of or in connection with this Agreement, any performance or non performance thereof, or the consequences of any of the foregoing shall be settled by arbitration. The arbitration shall take place in Paris. The dispute will be submitted to three (3) arbitrators, two of whom shall be appointed one by each of the parties and the third one (who shall be a national of a country other than the U.K., U.S.A., or Iran) by the former two. In the event that either of the parties, although duly requested in writing, shall fail within sixty (60) days to designate its arbitrator, or in the event that the said arbitrator shall fail within sixty (60) days to designate such third arbitrator, such arbitrator shall be appointed by the International Chamber of Commerce upon the application of either party. The arbitrators shall determine their own procedure and governing law in pursuance of the basic rules and regulations of the International Chamber of Commerce. The award to be rendered shall be final and conclusive and binding upon all the parties without any right to appellate or other review. Judgment upon the award rendered by the arbitrators may be entered in any Court having jurisdiction thereof and in any event the parties agree to submit to the jurisdiction of any court in France to enter judgment on said award. All costs relating to the provisions of this Section 18.04 shall be borne by the losing party.

In November 1978 a further contract ("the Services Agreement") was entered into between Stone and Webster Engineering Limited and the same Respondent for engineering services to be performed in Iran. The Services Agreement contains the following provision:

#### 12.0 ARBITRATION

Any disputes arising between the parties under or in connection with this Agreement shall be settled by



the parties hereto by amicable agreement. In the event of failure to achieve such amicable agreement within a reasonable time the dispute shall be finally settled by arbitration in Paris, France, under the then obtaining Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris by one or more arbitrators appointed in accordance with such rules. The arbitration proceedings and all papers sent or presented in connection therewith shall be in the applicable Language hereof. The arbitration decision shall be rendered as soon as possible and shall be final, binding on both parties hereto and judgment upon the award of the arbitrators may be entered in any court having jurisdiction thereof. The arbitration shall be in lieu of any other remedy, recourse to Courts of Law being excluded other than for enforcement of arbitral awards.

The Tribunal notes that neither Article 18.04 of the FOB Contract nor Article 12 of the Services Agreement provides for jurisdiction of the Iranian courts. On the contrary, by providing for arbitration to be held in Paris, the articles in effect exclude the jurisdiction of the Iranian courts.


For the reasons given above

the TRIBUNAL holds

that Article 18.04 of the FOB Contract and Article 12 of the Services Agreement 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.

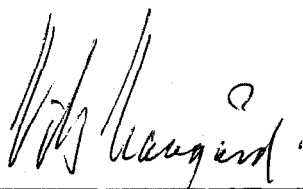
The case is referred back to Chamber Three for further proceedings.

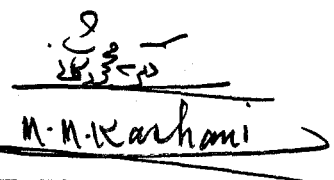
The Hague,  
5 November 1982

  
Gunnar Lagergren  
(President)


In the name of God,

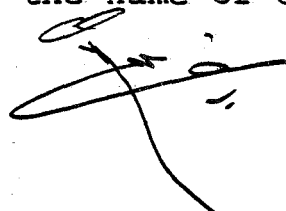
  
Pierre Bellet

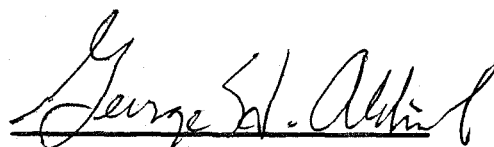
  
Nils Mangård

  
Mahmoud M. Kashani

In the name of God,

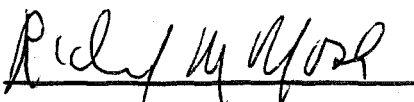
  
Howard M. Holtzmann

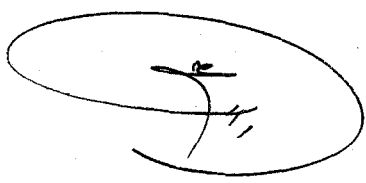
  
Shafie Shafeiei

  
George H. Aldrich

Dissenting opinion  
as to Part II  
Concurring opinion as  
to Part III

In the name of God,

  
Richard M. Mosk

  
Mostafa Jahangir Sani

Dissenting opinion  
as to Part II  
Concurring opinion as  
to Part III