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S CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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R/12

CASE NO. 375
CHAMBER ONE
AWARD NO. 352-375-1

BENDONE-DEROSSI INTERNATIONAL,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

CONCURRING OPINION OF JUDGE HOWARD M. HOLTZMANN

The Award in this Case dismisses the counterclaims of the Respondent. Although I agree with this result, I fundamentally disagree with the reasoning by which this conclusion is reached. The Award errs when it fails to recognize that a commercial arbitration award issued pursuant to the Rules of the International Chamber of Commerce ("ICC") imposes a contractual obligation upon the losing party to pay the amount awarded. Because the issue involved in this Case relates to important aspects of the legal character of arbitral awards, I write separately to explain my views.

I.

A brief review of the factual and procedural background of the Case is necessary in order to understand the issues posed at this stage of the proceedings.

Bendone-DeRossi International ("Bendone") is a clothing manufacturer. In early 1978 it entered into a contract with the Iranian Air Force to sell 70,000 uniforms (the "Contract"). Bendone was engaged in manufacturing and delivering the uniforms when the Iranian Revolution occurred in early February 1979. Within a few weeks, the Islamic Republic of Iran ("Iran") informed Bendone that the Contract was suspended pending the new government's review of purchasing from United States companies, and that no further payments would be made under the letter of credit required by the Contract. In the following months, Bendone made repeated requests to Iran for instructions on how to proceed under the Contract. Finally, having received no further word or payments, on 30 July 1979, Bendone notified the Air Force that it considered the Contract terminated.

The Contract provided for the submission of any disputes arising thereunder to arbitration under the ICC Rules. Bendone promptly initiated an ICC arbitration on 7 August 1980 -- some five months before this Tribunal was established. A sole arbitrator was appointed to decide the dispute, and representatives of Bendone and the Iranian Air Force signed Terms of Reference, pursuant to the ICC Rules. After that, however, the Air Force did not participate in the arbitral proceedings. In the circumstances, pursuant to the ICC Rules,[1] the arbitrator considered the case and on 15 December 1980 issued a detailed award holding that the Air

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[1] Article 15, paragraph 2, of the ICC Rules states as follows:

> If one of the parties, although duly summoned, fails to appear, the arbitrator, if he is satisfied that the summons was duly received and the party is absent without valid excuse, shall have the power to proceed with the arbitration, and such proceedings shall be deemed to have been conducted in the presence of all parties.

Force had breached the Contract and was obligated to pay Bendone damages of $940,705 plus 14.5% interest running from the date of the award.

The Air Force, however, did not pay the award. As a consequence, following the establishment of this Tribunal, Bendone filed a claim here for the amount of the unpaid ICC award, plus interest and its costs of arbitration before this Tribunal. Iran filed a Statement of Defense and made several counterclaims alleging failure by Bendone to perform the Contract properly.

Several years after filing its claim with this Tribunal, and while the Case was still pending here, Bendone located Iranian property in Germany and commenced an attachment proceeding there. Iran then requested this Tribunal to order Bendone to stay its action in Germany. The Majority refused to do so, stating that before it could issue such an interim measure of relief it must be satisfied that there was a prima facie showing of our jurisdiction. See Bendone-DeRossi International and Government of the Islamic Republic of Iran, Interim Award No. ITM 40-375-1, pp. 3-4 (7 June 1984), reprinted in 6 Iran-U.S. C.T.R. 130, 131-32. The Majority observed that it "cannot escape the impression that what [Bendone] is in effect seeking from the Tribunal is the enforcement of the ICC arbitration award" and concluded that it "does not consider it a reasonable interpretation of the Algiers Declarations that [the Tribunal] should act as a court issuing exequatur or that it should otherwise be empowered to enforce arbitral awards of other, independently constituted arbitral tribunals." Id. at p. 5, reprinted in 6 Iran-U.S. C.T.R. at 132-33.

I wrote separately to express disagreement with that approach. I pointed out that Bendone was not requesting this Tribunal to act as a court issuing exequatur, or to provide some other summary procedure for enforcement, but

rather "explicitly bases its claim on an alleged breach by the Respondent of its contractual obligation to honor the debt arising from the ICC Award." Concurring Opinion of Howard M. Holtzmann to Interim Award, Interim Award No. ITM 40-375-1 at p. 9, reprinted in 6 Iran-U.S. C.T.R. at 139. I concluded that, prima facie, we had subject matter jurisdiction over such a claim under the Algiers Declarations.[2]

While the Case continued pending in the Tribunal, Bendone collected the amount owed under the ICC Award through the German attachment proceeding. Bendone's claim here thus became moot, and Bendone requested that it be withdrawn. Bendone also requested the Tribunal to dismiss Iran's counterclaims, asserting that the Tribunal does not have jurisdiction over them. Iran opposed dismissal of its counterclaims.

The present Award dismisses the counterclaims on the basis that the Tribunal does not have jurisdiction over the main claim and therefore, under well-settled Tribunal precedent, the counterclaims must also be dismissed. See, e.g., William Bikoff and George Eisenpresser and Islamic Republic of Iran, Award No. 138-82-2, p. 11 (29 June 1984), reprinted in 7 Iran-U.S. C.T.R. 1, 7. In reaching this

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[2] I nevertheless would have denied the stay reasoning that the attachment sought by Bendone in Germany was "contemplated by, and compatible with, the Tribunal Rules." Concurring Opinion of Howard M. Holtzmann to Interim Award, Interim Award No. ITM 40-375-1 at p. 2, reprinted in 6 Iran-U.S. C.T.R. at 133. In this connection, I cited Article 26, paragraph 3 of the Tribunal Rules -- which is unchanged from the UNCITRAL Arbitration Rules -- and provides that

> A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Id. at p. 11, reprinted in 6 Iran-U.S. C.T.R. at 140.

conclusion, the Award essentially adheres to the analysis expressed in the Interim Award that the Tribunal is not empowered by the Algiers Declarations to enforce an award issued by another arbitral body. The Award rejects the argument that the ICC Award created contractual or debt obligations and concludes that there is no "basis to support a finding of jurisdiction over the claim." See Award at para. 15.

I disagree with that reasoning. As discussed below, I consider that the claim before us arises out of a contractual obligation to pay the amount awarded by the ICC, and that we, therefore, have subject matter jurisdiction over it. We must, however, dismiss the counterclaims because they do not arise out of the same contract as the claim and are thus excluded from our jurisdiction by the specific terms of the Claims Settlement Declaration.

II.

Any analysis of the Tribunal's jurisdiction must begin with an examination of the terms of the Claims Settlement Declaration. Article II, paragraph 1, establishes the Tribunal's jurisdiction over, inter alia, claims that "arise out of debts [or] contracts" that were outstanding on 19 January 1981. Bendone invoked that jurisdictional grant in making its claim here. Thus, in the Statement of Claim filed with the Tribunal, the Claimant described the claim as follows:

> The subject matter of this claim is an amount owing, or a debt, by Respondent to Claimant as established by the Award which was issued by the I.C.C. Court of Arbitration on December 15, 1980.

This approach raises the issue of whether the ICC Award created a basis for a claim arising out of a "debt" or "contract," within the meaning of the Claims Settlement Declaration.

This Tribunal has consistently held that the Algiers Declarations constitute a treaty under international law and should therefore be interpreted in accordance with the Vienna Convention on the Law of Treaties. See DEC 32-A18-FT, pp. 14-15 (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 251, 259. Our task therefore is to interpret the phrase "arising out of a debt [or] contract" in accordance with the rule laid down in Article 31 of the Vienna Convention which requires that treaty terms be given their "ordinary meaning . . . in their context and in the light of [the treaty's] object and purpose." See id. (citing U.N. Doc. A/CONF. 39/27, 23 May 1969, reprinted in 8 I.L.M. 679 (1969)); see also I. Sinclair, The Vienna Convention on the Law of Treaties 114-58 (2d ed. 1984).

The terms "contract" and "debt" are broadly inclusive and their ordinary meaning covers all such obligations regardless of their source. A fundamental legal characteristic of commercial arbitration is that it arises from an agreement between the parties to submit their dispute to a decision by arbitrators.[3] Implicit in an agreement to arbitrate is the further agreement that the parties will

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[3] See, e.g., K. Carlston, The Process of International Arbitration 62 (1946); W. Craig, W. Park, and J. Paulsson, International Chamber of Commerce Arbitration § 28.01, Part V, p. 1 (1984).

abide by the result of that arbitration.[4] That obligation arises from the agreement to arbitrate and creates a debt.

Moreover, in an arbitration under the ICC Rules, which were expressly made applicable to this Case by the Contract between the Parties, as well as the Terms of Reference, the inherent agreement to pay the award is explicitly set forth. Article 24 of the ICC Rules provides that "[b]y submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay . . . ."[5] Thus, the Terms of Reference and ICC Rules can each be viewed as expressly creating an obligation by the parties to abide by the results of the arbitration.

In considering the ordinary meaning of the terms "contract" and "debt" as used in a treaty between the United States and Iran, it is relevant that the laws of both countries recognize that arbitration agreements create contractual obligations to pay the award, and provide for enforcement thereof through ordinary causes of action based on the award. Thus, as I noted in my Concurring Opinion to the Interlocutory Award,

> Professor Lorenzen, an American commentator, states that an "action upon an award is an ordinary common law action upon a contract."[6] Similarly, Professor Domke in his leading treatise points out that an "award which is not confirmed

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[4] See A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration 313 (1986) ("It is an implied term of every arbitration agreement that the parties will carry out the award.").

[5] For a discussion of this Rule see W. Craig, W. Park and J. Paulsson, International Chamber of Commerce Arbitration § 22.03, Part III, pp. 135-38 (1984).

[6] Lorenzen, Commercial Arbitration, 45 Yale L.J. 56 (1935).

> by a judgment in the usual summary procedure may nevertheless serve as a cause of action, to be enforced in ordinary court procedure, as an action on the award."[7] Significantly, Professor Domke adds that in such a court procedure an award "may be used as evidence of an obligation."[8]

Concurring Opinion of Howard M. Holtzmann to Interim Award, Interim Award No. ITM 40-375-1 at p. 7, reprinted in 6 Iran-U.S. C.T.R. at 137.

Iranian law appears to reach the same result. The fact that arbitration agreements create contractual obligations to comply with the award has been recognized by at least one noted Iranian legal scholar. Dr. Naser Katouzian states:[9]

> If we accept that a contract is binding upon, and has the force of law in, the relations between the parties, then naturally when two persons of their own free will submit to arbitration by an individual, they are obliged to comply with his award.

Moreover, as in United States law, although statutory provisions provide the most common method of enforcing arbitral awards in Iran,[10] they are not the exclusive means.

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[7] M. Domke, The Law and Practice of Commercial Arbitration 322 (1968). This treatise has been updated in the period since I wrote my concurrence to the Interim Award, however, the substance remains the same. See G. Wilner, Domke on Commercial Arbitration § 37.01, p. 495 (1985) ("[T]he nonstatutory enforcement of an arbitration award . . . is accomplished by bringing an action for judgment on the award.").

[8] M. Domke, The Law and Practice of Commercial Arbitration at 322. Domke cites, inter alia, a California court opinion holding that "the award is binding as a contract," Doyle v. Giuliucci, 43 Cal. Rptr. 697, 401 P.2d 1 (1965).

[9] N. Katouzian, E'tebár-e Qaziyyeh-ye Mahkúmun bihá [Res Judicata] 98 (1347 [1968]) (translated from Farsi).

[10] See Civil Procedure Code of Iran, Art. 662 (translated from Farsi).

Rather, successful arbitral parties can also bring an action based on the award.[11] When such an action is brought, "the arbitrators decision [is] merely invoked as evidence on behalf of the claim."[12] The legitimacy of this approach has been upheld by the Iranian Supreme Court sitting en banc.[13]

Iran and the United States are not the only states whose laws recognize that arbitration agreements create contractual obligations to comply with the arbitral award. Concerning the general issue of enforcement of foreign awards under domestic laws, a noted commentator states:[14]

> The enforcement of foreign awards under domestic law is, in principle, not limited to actions based on specific statutory provisions. A possible action outside the statutory provisions may be the actio ex contractu. Under this action the award is considered as a contract between the parties. A variant of this action is to base it on the obligation assumed under the arbitration agreement to carry out the arbitral award.

I need not repeat here the discussion of the laws of several other countries that appeared in my Concurring Opinion to the Interim Award. Suffice it now to recall that Russell, a standard English treatise on arbitration, emphasizes that an arbitral award "represents an agreement made between the parties, and is no more and no less enforceable

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[11] J.J. Langaroudi, 5 Dánishnámeh-ye Hoqúqí [Legal Encyclopedia] 96-98 (1358 [1979])(translated from Farsi).

[12] See id. at 97.

[13] See id. at 98.

[14] A. J. van den Berg, The New York Arbitration Convention of 1958 89 (1981); see also A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration 315 (1986) (One possible enforcement method "is to sue on the award as evidence of a debt, on the basis that the arbitration agreement constitutes a contractual obligation to perform the award.").

that any agreement made between the parties."[15] Russell states further that "non-performance of the award is a breach of the agreement under which the arbitration took place"[16] and quotes with approval a Scots commentator, Bell, who wrote that[17]

> the award has precisely the force of a written contract. If, therefore, either party refuses to fulfil his obligation in terms of his contract, by implementing the award, the other party may found an ordinary action upon it . . . .

As noted in my earlier Concurring Opinion, this concept is also found in the Netherlands[18] and Sweden.[19] In addition, the International Handbook on Commercial Arbitration provides examples of a number of other states whose law

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[15] A. Walton & M. Vitoria, Russell on the Law of Arbitration 358 (20th ed. 1982) (hereinafter "Russell").

[16] Russell, id. at 360; see also M. Mustill & S. Boyd, The Law and Practice of Commercial Arbitration in England 27 (1982) ("Every submission to arbitration contains an implied promise by each party to abide by the award of the arbitrator, and to perform his award. It is on this promise that the claimant proceeds, when he takes action to enforce the award."); Steyn, [National Report on] England, 8 Y.B. Com. Arb. 3, 27 n.54 (1983) ("A failure to honour an award is a breach of the arbitration agreement.").

[17] Russell, supra note 16 at 358 (quoting Treatise on the Law of Arbitration in Scotland para. 742 (1877)).

[18] J.C. Schultsz, "Recognition and enforcement of foreign arbitral awards without a convention being applicable," in The Art of Arbitration 295, 296 (J.C. Schultsz and A.J. van den Berg eds. 1982). Prof. Schultsz cites as authority for this proposition Kosters-Dubbink, Algemeen Deel van het Nederlands Internationaal Privaatrecht 836 (1961). It is my understanding that this has not been changed by the new Dutch Arbitration Act which became effective on 1 December 1986.

[19] See Stockholm Chamber of Commerce, Arbitration in Sweden 175 (1977); Holmbäck & Mangård, [National Report on] Sweden, 3 Y.B. Com. Arb. 161, 180 (1978).

recognizes that arbitral awards create contractual obligations. Such states include Australia,[20] Hong Kong,[21] and Indonesia.[22] Moreover, other countries, including India,[23] Israel,[24] Norway,[25] Pakistan,[26] and Syria,[27] permit the enforcement of arbitral awards through actions based on the award. The extent to which the award is given binding effect in such proceedings varies among countries.

As noted above, the Award reasons that we do not have jurisdiction in this Case because we have no authority under the Algiers Accords to "act as a court issuing exequatur." See Award at paras. 12, 14. By thus focusing on one of the procedures employed to enforce arbitral awards, rather than on the substantive basis for the enforcement, the Award fails to recognize that the subject matter of such summary

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[20] See Goldring & Christie, Australia, p. 5 in 1 International Council for Commercial Arbitration, International Handbook on Commercial Arbitration (P. Sanders ed. Dec. 1987) ("[T]he law in all Australian jurisdictions regards arbitration as a matter of contract.") (hereinafter "Handbook").

[21] See Greig & Kaplan, Hong Kong, pp. 26-27 in 1 Handbook (action can be brought upon the parties implied agreement to "perform a valid award").

[22] See Subekti, [National Report on] Indonesia, 5 Y.B. Com. Arb. 84, 96 (1980) ("A party seeking enforcement of a foreign award must base his request on the obligation assumed by the other party in the arbitration agreement to abide by the terms of the award."); see also Guatama, Indonesia, pp. 28-29 in 1 Handbook.

[23] See Krishnamurthi, India, p. 20 in 1 Handbook.

[24] See Ottolenghi, Israel, p. 20 in 1 Handbook.

[25] See Eckhoff, Norway, pp. 20-21 in 2 Handbook.

[26] See Jaffer & Osmany, [National Report on] Pakistan, 5 Y.B. Com. Arb. 114, 139 (1980).

[27] See El-Hakim, [National Report on] Syria, 7 Y.B. Com. Arb. 35, 53-54 (1982).

proceedings remains the enforceable debt and contract obligations created by the arbitral award. One of the basic requirements for the enforceability of any arbitral award is that it was entered into pursuant to a valid agreement to arbitrate.[28] It is this agreement to arbitrate and to abide by the results of that arbitration which forms the basis for the enforcement action, and the basis also of our subject matter jurisdiction. The mere fact that municipal laws may permit special procedures such as exequatur to facilitate the enforcement of these obligations does not alter the jurisdiction of this Tribunal over them.

III.

Although I would, for the reasons expressed above, find that the Tribunal has jurisdiction over the claim in this Case, I would nevertheless hold that we lack jurisdiction over the counterclaims.

The Claims Settlement Declaration limits the Tribunal's jurisdiction over counterclaims to those that arise "out of same contract, transaction or occurrence that constitutes the subject matter of . . . [the] claim." See Article II, paragraph 1. In this Case, as we have seen, the subject matter of the claim is the contractual obligation created by the Parties' agreement to arbitrate in the ICC and to abide by the results of that arbitration, as expressed in the 1980 ICC Award.

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[28] See, e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, Art. V(1)(a); Uncitral Model Law on International Commercial Arbitration, 21 June 1985, Art. 36(1)(a)(i) reprinted in Uncitral, p. 11 in 2 Handbook; Zivilprozessordnung (German Code of Civil Procedure), Book X, para. 1041 §1(1), reprinted in Glossner, Federal Republic of Germany, Annex I-3 in 1 Handbook.

The counterclaims, however, arise under the original 1978 Contract for the sale of uniforms. These counterclaims allege breaches by Bendone of its contractural obligations and relate only to that sales transaction. Thus the counterclaims do not arise from the same "contract, transaction, or occurrence" as that upon which Bendone's claim was based, and they are therefore outside the Tribunal's jurisdiction.

On this last point, I have no disagreement with the Award. Thus, I join fully with the Award when it states:

> Further, the counterclaims in the present Case are based squarely on the underlying contract between the Parties, while the claim, as formulated, clearly does not arise out of that contract, but out of the ICC arbitral award. Thus the necessary relationship required by Article II, paragraph 1, of the Claims Settlement Declaration is lacking, and the counterclaims must fail in any event.

Dated, The Hague
10 March 1988

Howard M. Holtzmann