IRAN-375-94 MS TRIBUNAL

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دیوان داوری دعاوی ایران - ایالات متحده

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** DECISION - Date of Decision _____
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** CONCURRING OPINION of Mr. Holtzmann
- Date 8 June 84
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 375

CHAMBER ONE

AWARD NO. ITM 40-375-1

BENDONE-DEROSSI INTERNATIONAL,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

CONCURRING OPINION OF HOWARD M. HOLTZMANN TO INTERIM AWARD

The Tribunal has issued an Interim Award denying the request of the Government of the Islamic Republic of Iran for an interim measure of protection in this case. I agree with that conclusion, but I must respectfully disagree with the reasons for it expressed in the Interim Award.

The Government of Iran requested the Tribunal to issue an interim measure of protection to stay an attachment which the Claimant had obtained from a Regional Court in the Federal Republic of Germany. The Interim Award denied that request on the incorrect ground that it does not appear, prima facie, that the Tribunal has subject matter jurisdiction over the claim in this case. In my view, a sufficient prima facie showing of jurisdiction has been made and, therefore, the interim measure of protection should not have been refused on jurisdictional grounds. Nevertheless, I believe that the interim measure of protection was properly

denied, because an attachment such as the one obtained by the Claimant is contemplated by, and compatible with, the Tribunal Rules. Accordingly, there is no basis for staying such an attachment.

I.

The legal standards which govern the granting of provisional measures, such as interim measures of protection, have been described recently by the International Court of Justice:

> [O]n a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded. 1

Judge Schwebel, writing in the same case, explained the rationale for this principle:

> It is beyond dispute that the Court may not indicate provisional measures under its Statute where it has no jurisdiction over the merits of the case. Equally, however, considerations of urgency do not or may not permit the Court to establish its jurisdiction definitively before it issues an order of interim protection. Thus the Court has built a body of precedent which affords it the authority to indicate provisional measures if the jurisdiction which has been pleaded appears, prima facie, to afford a basis on which the Court's jurisdiction might be founded. 2

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[1]Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U. S.), 1984 I.C.J. 169,179 (Provisional Measures, Order of 10 May).

[2]Id. at 206-207 (Dissenting Opinion of Judge Schwebel).

Judge Schwebel cogently noted that "the nub of the matter" appears to be that the Court, when deciding whether it has jurisdiction to grant interim measures, gives "the benefit of the doubt" to the existence of jurisdiction.[3]

The decisions of the International Court of Justice on its jurisdiction to grant interim measures are, of course, based on its Statute and the precedents established thereunder. The basic concepts which the Court has developed provide, nevertheless, valuable guidelines for this Tribunal in deciding similar issues.

II.

In applying the principles enunciated by the International Court of Justice to the circumstances of this case, I emphasize that since the Interim Award deals only with a request for an interim measure of protection, the standard to be applied now is whether the documents before us provide, prima facie, a basis on which jurisdiction might be founded. The definitive answer to whether the Tribunal does, or does not, have jurisdiction will come only at a later stage of the proceedings, after the issue has been fully briefed by the parties. In expressing my view that there is a sufficient showing that a basis for jurisdiction might exist, I do not in any way prejudge the ultimate resolution of the question of the Tribunal's jurisdiction.

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[3] Id. at 207.

The Claimant in its Statement of Claim sets out its position concerning the subject matter of the claim and the jurisdiction of the Tribunal 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. Jurisdiction over such a claim is specifically provided for by the Claims Settlement Declaration. Article II, paragraph 1 of the Claims Settlement Declaration states: "An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims ... if such claims ... are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights ...." The Award establishing the existence and validity of this amount owing by Respondent to Claimant was outstanding on January 19, 1981, the date of the Claims Settlement Declaration; accordingly, this Tribunal has subject matter jurisdiction over Bendone-DeRossi's claim for the amount owing to it by Respondent as established by the said Award.

The Claimant's position reflects the widely recognized principle of commercial arbitration that an arbitration award creates a contractual basis for a legal action. While in many countries legislation or treaties provide summary procedures by which a national court may enforce arbitral awards by issuing orders of exequatur or by other special means, many legal systems at the same time recognize that such summary enforcement procedures are not the exclusive method for obtaining payment of an arbitral award. Accordingly, the laws of many countries provide for the alternate procedure for securing payment of an unpaid award by a suit for breach of contract.

Writers on the English law have described this concept with great clarity. Thus Mustill and Boyd in their recent treatise have said:

> A valid award confers on the successful claimant a new right of action, in substitution for the right on which his claim was founded. 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. 4

These authors go on to point out that

> there are two different methods of enforcement. The first is to bring an action in the High Court, founded on the promise implied in every arbitration agreement, to honour the award of the arbitrator. This action proceeds in the same way as any other action ....
>
> The other method of enforcement takes the shape of an order for summary relief 5

Similarly, 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 than any agreement made between the parties."[6]

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[4] M. Mustill & S. Boyd, The Law and Practice of Commercial Arbitration in England 27 (1982).

[5] Id., at 30.

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

Russell quotes with approval the analysis of a Scots commentator, Bell, who wrote that

> 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 7

Russell goes on to cite the "classical expression" of this principle by Lord Justice Fletcher Moulton:

> In effect the parties have agreed that the rights of the parties in respect of that dispute shall be as stated in the award, so that in essence it partakes of the character of 'accord and satisfaction by substituted agreement.' 8

That description of the nature of an arbitral award appears to be closely akin to the theory of the Statement of Claim in this case, which seeks "an amount owing, or a debt, by Respondent to Claimant as established by the Award which was issued by the ICC Court of Arbitration."

Russell, like Mustill and Boyd, confirms that, while statutory proceedings for summary enforcement of arbitral awards may exist and are often more convenient, they are not the exclusive procedure available. Parties may choose,

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[7] Treatise on the Law of Arbitration in Scotland para. 742 (1877), quoted in Russell, supra note 6, at 358.

[8] Doleman and Sons v. Ossett Corpn. [1912] 3 K.B. 257, 267, quoted in Russell, supra note 6, at 358.

instead, to sue for breach of the contract represented by the award:

> An award may be enforced by action, as of right .... "The submission is an actual mutual promise to perform the award of the arbitrators." Thus non-performance of the award is a breach of the agreement under which the arbitration took place. It is normally more convenient to proceed [for summary relief under the statute] than to sue upon the award [as a contract], but there are cases even of awards upon English arbitrations in which action [on the contract] is the only remedy, and for enforcing foreign awards it is usual to proceed by action. 9

The principles described so well by authoritative English commentators are also found in the laws of other common-law and civil-law systems. Professor Lorenzen, an American commentator, states that "an action upon an award is an ordinary common law action upon a contract."[10] Similarly, Professor Domke in his leading treatise points out that an "award which is not confirmed 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." [11] Significantly, Professor Domke adds that in such a court procedure an award "may be used as evidence of an obligation." [12]

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[9] Russell, supra note 6, at 360 (footnotes omitted) (quoting Holt C.J. in Purslow v. Baily (1705) 2 Ld. Raym. 1039 at 1040). The authors apparently refer to arbitral awards as to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) does not apply.

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

[11] M. Domke, The Law and Practice of Commercial Arbitration 322 (1968).

[12] Id. 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).

A leading Dutch arbitration authority, Professor Schultsz, has noted "the possibility of commencing in The Netherlands a claim out of contract in a new procedure based, so to speak, on the foreign award."[13] In Sweden the law recognizes that a party may choose to bring an action on the award rather than applying for a summary order of enforcement.[14]

The widespread recognition of this concept is well illustrated in The Art of Arbitration, a recent collection of essays by a group of arbitration experts, no fewer than three of whom -- one from Italy,[15] one from The Netherlands,[16] and one from the Soviet Union[17] -- discuss different aspects of securing payment of arbitral awards based on their contractual character.[18]

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[13] 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).

[14] See Stockholm Chamber of Commerce, Arbitration in Sweden 175 (1977).

[15] M. Ferrante, "About the nature (national or a-national, contractual or jurisdictional) of ICC awards under the New York Convention," in The Art of Arbitration 129, 130-131 (commenting on a Swedish court decision).

[16] J.C. Schultsz, supra note 13, at 296.

[17] S. Lebedev, "How long does a foreign award stay enforceable?," in The Art of Arbitration 213, 218 (Prof. Lebedev was not commenting specifically on Soviet law).

[18] See also H.M. Holtzmann, "Arbitration and the Courts: Partners in a System of International Justice," in VI International Arbitration Congress of the International Council for Commercial Arbitration 193, 215-217 (1978) and cases cited therein.

A party's contractual right to performance of an arbitral award in its favor is particularly clear when, as in this case, the award has been made under the ICC Rules. Article 24 of those Rules provides explicitly that

> 1. The arbitral award shall be final.
>
> 2. By 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 19

The Interim Award appears to base its conclusion that the Tribunal does not have jurisdiction to grant an interim measure of protection in this case on the incorrect assumption that the Claimant is asking us to "act as a court issuing exequatur," or to provide some other summary procedure for enforcement. A reading of the Statement of Claim reveals, however, that this is not an accurate description of the action here. The Claimant does not ask the Tribunal to issue exequatur or to order other summary enforcement pursuant to a national statute or an international treaty. Rather, the Claimant explicitly bases its claim on an alleged breach by the Respondent of its contractual obligation to honor the debt arising from the ICC Award. In view of the widespread recognition in so many legal systems of such an action for breach of contract -- independent of and

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[19] Dr. Ferrante comments on a Swedish court case construing this language and ruling on its effect on an award. See M. Ferrante, supra note 15, at 129-131.

different from exequatur or other summary enforcement procedures -- the documents before the Tribunal provide, prima facie, a basis on which the subject matter jurisdiction over this claim might be founded.

In my provisional view, the basis for the Tribunal's jurisdiction in this case is essentially the same as for any other claim for breach of contract. Article II, paragraph 1 of the Claims Settlement Declaration establishes the Tribunal for the purpose of deciding claims which, inter alia, arise out of "debts" or "contracts." As Professor Lorenzen put it, a claim such as is brought in this case is "an ordinary common law action upon a contract,"[20] and, as Russell emphasizes, it "is no more and no less enforceable than any agreement made between the parties."[21]

III.

In view of my conclusion that the Tribunal has prima facie jurisdiction for the purpose of granting an interim measure of protection in this case, it is necessary to consider whether the particular measure requested by the Respondent should be granted.

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[20] Lorenzen, supra note 10.

[21] Russell, supra note 6.

On the basis of the documents before the Tribunal, the measure sought by the Government of Iran appears to be the stay of an attachment of certain assets said to be located in the Federal Republic of Germany and owned by the Respondent, particularly shares of stock in two German corporations. The attachment was issued by a Regional Court in Frankfurt am Main in an order dated 9 June 1983. While a translation of the German court order has been furnished to the Tribunal by the Respondents, neither Party has provided a German legal opinion concerning the precise legal effect of that order. The text of the order does not refer to any other action in Germany relating to the ICC Award, and the parties have not indicated the existence of any other such action. Accordingly, on the basis of the information currently in the record, it can only be assumed that the attachment is ancillary to the claim in this case before the Tribunal.

Article 26, paragraph 3 of the Tribunal Rules -- which is unchanged from the UNCITRAL Arbitration Rules -- 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.

I would have denied the stay requested by the Respondent on the ground that Article 26 of the Tribunal Rules makes it clear that the Claimant, in obtaining an order of attachment from the German Court, did not do anything "incompatible" with the proceedings before this Tribunal.

Moreover, Respondent has made no showing of urgency justifying the issuance of interim relief: the court order was entered in June 1983, ten months before Respondent sought a stay.

It is to be noted that in Case No. A-5 the Government of Iran has requested the Tribunal to cancel attachments obtained in Germany by seven Claimants in other cases before the Tribunal. That case, which is pending before the Full Tribunal, may well raise issues similar to those raised by the request for interim relief in this case. Case No. A-5 has not yet been heard; however, the Government of Iran's petition for interim relief in the present case requires consideration of relevant questions without delay. In view of the pendency of Case No. A-5, my views expressed herein relate only to the present case; I reserve my ultimate opinion on any similar issues in Case No. A-5 until after the Full Tribunal's Hearing and deliberations in that case.

Dated, The Hague
8 June 1984

Howard M. Holtzmann