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IRAN-UNITED STATES CLAIMS TRI [redacted] دیوان داوری دعاوی ایران - ایالات متحده

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** CONCURRING OPINION of +Dissenting Mr. Mosk

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 48
CHAMBER THREE
AWARD NO. ITL 41-48-3

AMERICAN BELL INTERNATIONAL INC.,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN; MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN; MINISTRY OF POST, TELEGRAPH AND TELEPHONE OF THE ISLAMIC REPUBLIC OF IRAN; and THE TELECOMMUNICATIONS COMPANY OF IRAN,

Respondents.

CONCURRING AND DISSENTING OPINION
OF RICHARD M. MOSK ON
PRELIMINARY LEGAL ISSUES
(INTERLOCUTORY AWARD)

I concur in the Tribunal's Interlocutory Award except with respect to issues d(i) and h. I dissent from the Tribunal's conclusion as to issue d(i) that the Tribunal has jurisdiction over a counterclaim based on Contract 112, a contract which is not the subject of the claim. I also dissent from the Tribunal's decision with respect to issue h on the ground that the Tribunal should not have rendered even a tentative conclusion concerning an exception to a limitation of amount of liability clause without the parties having raised and addressed that issue. Although I concur in the decisions on the other issues, I discuss some questions concerning the Tribunal's decisions on issues d(iii), g, i and j.

Issues d(iii), g, i and j

After the Pre-Hearing Conference and various submissions by the parties, the Tribunal indicated in an order that it would resolve certain issues (referred to as "preliminary legal issues"). The Tribunal intended to delineate and possibly reduce the issues which would have to be heard at the final Hearing. For example, if the Tribunal determined the effect of the contractual limitation provisions, the parties would know whether or not they would have to produce at the Hearing voluminous evidence concerning various aspects of the project in issue. Also, a Tribunal decision on certain tax and social insurance premium counterclaims would provide the parties with notice as to whether they must be prepared for a hearing on the merits with respect to such counterclaims or portions thereof. The Tribunal, therefore, provided the parties with every opportunity to submit legal and factual material on these "preliminary legal issues." Indeed, the proceedings to date could be considered protracted.

The Tribunal has decided, in effect, that the contractual limitation periods are applicable and that thus far there is no indication that they are not dispositive. As no evidence was submitted showing any factual dispute concerning the application of the contractual limitation provisions, the effect of these provisions is an issue that is purely one of law. Unfortunately, there is some language in the Tribunal's opinion from

which it might be surmised that Respondents have yet another opportunity to submit evidence showing that the limitation provisions can be avoided. Thus, the parties may still be uncertain as to what extent they must produce evidence on contentions which would be barred by the application of the limitation provisions. Presumably, if the Tribunal is hereafter faced with an issue as to whether and to what extent it is to determine if the contractual limitation periods can be avoided, it will consider the state of the pleadings and the timeliness of the submissions of the issue and the evidence.

Also, the Tribunal should have decided whether or not it has jurisdiction over the tax and social insurance counterclaims (issue d(iii)). I firmly believe that the Tribunal does not have such jurisdiction. I have discussed this issue in my Concurring Opinion in William L. Pereira Associates, Iran and Islamic Republic of Iran, Award No. 116-1-3 (19 March 1984). Had the Tribunal held that there is no Tribunal jurisdiction over such counterclaims, the parties would not have to deal with those counterclaims at the Hearing. Furthermore, in view of the Tribunal's practice of deciding issues on the merits after avoiding the jurisdictional issue--a practice I have questioned (see Schering Corporation v. The Islamic Republic of Iran, Award No. 122-38-3 (16 April 1984) (Dissenting Opinion of Richard M. Mosk (18 April 1984))--it is curious that the Tribunal leaves undecided issue j. The Tribunal does discuss the merits of tax and social insurance premium counterclaims in issue i without having resolved the jurisdictional issue.

The Tribunal leaves open a question as to what claims for defects permitted by Articles 2.18 and 2.20 can be deemed waived under Articles 2.15 and 2.16. The relationship between Articles 2.15 and 2.16, on the one hand, and Articles 2.18 and 2.20, on the other hand is not perfectly clear from the express language of those provisions. It appears that the clauses should be interpreted so that TCI would not be able to maintain a claim based on patent defects in any of Claimant's work if that work is deemed approved under Articles 2.15 and 2.16. Articles 2.15 and 2.16 would be of little significance if TCI, by its approval, permitted Claimant to proceed with further work, and then is later able to maintain a claim based on patent defects which were or should have been discovered at the time the approval was deemed to have occurred.

If the Tribunal receives evidence which makes the resolution of this open issue necessary, the parties should consider providing material, including evidence of custom and usage, to assist the Tribunal in making such a determination.

Issue h

I do not necessarily disagree with the Tribunal's conclusion concerning issue h. Indeed, the Tribunal is correct in holding that Article 2.21 (limitation of amount of liability clause) of the contracts in question validly limits ABII's potential liability. I dissent only because the Tribunal

suggests that "gross negligence" constitutes an exception to the limitation of amount of liability clauses. Respondents argued that certain intentional acts should be an exception, but never asserted that gross negligence also constitutes an exception. Thus, Claimant did not address the issue of the latter exception. The Tribunal recognizes that the parties may hereafter file material on that issue. Therefore, I believe that in view of the circumstances, it was not appropriate for the Tribunal to come to any conclusion--not even a tentative one--with respect to whether gross negligence is an exception to the limitation of amount of liability clauses.

That a limitation of amount of liability clause is valid is supported by whatever law is applicable. Article 10 of the contracts provides that the contracts are "subject to the Laws of the Imperial Government of Iran and the United States in every respect, but however the governing law of [the contracts] is the law of Iran." It has been said that "the parties' freedom to choose the law which governs their contract seems to be so widely accepted that it must be said to be a 'general principle of law recognized by civilized nations.'" Lando, Contracts, Ch. 24, in III International Encyclopedia of Comparative Law 33 (1976). It might be that by virtue of Article V of the Claims Settlement Declaration,[1] which gives the Tribunal the power to

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[1] 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.

apply "such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances," the Tribunal can apply law other than that designated by the parties to the contract. The Tribunal has not provided much guidance as to the applicable law. As a practical matter, in many cases the choice of whether to utilize public international law, general principles of law, municipal law (past or present) or some other law will not affect the result. As to the applicable law, see Oil Field of Texas, Inc. v. Iran, ITL 10-43-FT (9 December 1982); id. (Concurring Opinion of Richard M. Mosk (10 December 1982)); Settlement of Disputes, in 1 Encyclopedia of Public International Law 130, 144, 147 (1981); A. Feller, The Mexican Claims Commissions 223 (1935).

In Iranian law, there does not appear to be any express statutory restrictions on limitation of amount of liability clauses. Article 10 of the Iranian Civil Code provides that "[p]rivate contracts shall be binding on those who have signed them, providing they are not contrary to the explicit provisions of a law" (Sabi Trans. 1973) (emphasis added). Such clauses are enforceable in many legal systems. See von Mehren, A General View of Contract, Ch. 1, in VII International Encyclopedia of Comparative Law 41-46 (1982); Limpens, Kruithof and Meinertzhagen-Limpens, Liability For One's Own Act, ch. 2, in XI International Encyclopedia of Comparative Law 133-34 (1979); A. von

Mehren and J. Gordley, The Civil Law System 815 (1977); Litvinoff, Stipulations as to Liability and as to Damages, 52 Tul. L. Rev. 258, 290 (1978).

In the instant case, the agreements were between two entities of relatively equal bargaining power. There is no indication that the contractual limitation of amount of liability clauses could be considered adhesive. It is not uncommon for a company to bargain for and obtain by contract a limitation of the amount of its potential liability when such liability for actionable conduct arising out of performance of the contract could be disproportionate to any possible profit to be derived from that contract. In many instances, without such a clause, a company would be unwilling to enter into the contract. There is no indication that the maximum amount of damages provided for in the contracts in issue was unreasonably low. As one authority has written, "parties should, for the most part, be free to allocate all risks inherent in a transaction." von Mehren, supra, at 41. Law relating to consumer goods which may cause physical injury is not relevant to the services provided in the instant case. Moreover, law relating to various exculpatory clauses may not be applicable to limitation of amount of liability clauses. In view of the foregoing, the Tribunal correctly determines that the limitation of amount of liability clauses are valid and applicable in this case.

The Tribunal cites no law in providing for an exception to the limitation of amount of liability provisions.[2] It is not unreasonable to assume that a limitation of amount of liability clause would not preclude liability for an intentional tort. The parties in this case apparently agree upon this proposition. The Tribunal has not cited the specific "law governing the contracts" for its suggestion that "gross negligence" may constitute another exception. As noted above, the Respondent never proposed any such exception, and thus none of the parties presented any argument concerning this issue. Whether or not the parties have limited or can limit the amount of liability for "gross negligence" presents an issue on which there is not unanimity around the world. See von Mehren, supra, at 41-46; Limpens, Kruithof and Meinertzhagen-Limpens, supra, at 128-34 ; A. von Mehren and J. Gordley, supra, at 813-15; F. Lawson, A. Anton & L. Brown, Amos and Walton's Introduction to French Law 191 (3d ed. 1967) (stipulations limiting liability not valid when there is an intentional breach "and perhaps also when it proceeds from gross fault on the part of the debtors or his servants" (emphasis added)). As noted above, so far as I can tell, there is no explicit Iranian statutory law on the subject. Cf. Civil Code of Iran, Arts. 10, 220 (parties bound by terms of contract and

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2 There are suggestions that under conflict of laws principles, the "law of the contract" or of the place of the wrong would govern the issues concerning "an exemption clause." J. Morris, The Conflict of Laws 212, 235, 261 (2d ed. 1980); see Ehrenzweig, A Treatise on Conflict of Laws 465-70 (1962) (rule of validation); but cf. Comment, Conflict of Laws: "Party Autonomy" in Contracts, 57 Colum. L. Rev. 553, 571 n.149 (1957); see discussion of applicable law, supra.

consequences that follow by virtue of law and practice), 230 (liquidated damage or penalty clauses enforceable).[3]

The term "gross negligence," in various jurisdictions, is almost tantamount to intentional acts, such as fraud, or is a principle applicable in cases of physical injury to persons. See Litvinoff, supra, at 279; see generally Limpens, Kruithof and Meinertzhagen-Limpens, supra, at 32-35. As the parties in the instant case had equal bargaining power, the agreements were commercial and there is no personal injury involved, if "gross negligence" is to be an exception to the limitation of amount of liability clauses, that exception should be a narrow one.

Issue d(i)

I disagree with the Tribunal's conclusion that it has jurisdiction over counterclaims based on Contract No. 112, as

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[3] The parties have not addressed these provisions or other laws which might be relevant. See also Iran Civil Code, Articles 328-31; Iran Civil Responsibility Law. One must be careful in relying upon selective quotations from treatises. Authorities do not always agree. See von Mehren, supra, at 44 n.252 and Litvinoff, supra, at 280 (referring to authorities concerning French law). Also, as noted supra, there may well be distinctions between exculpatory clauses and limitation of amount of liability clauses and between commercial cases, on the one hand, and consumer or personal injury cases, on the other hand. For discussions regarding "law" in civil law systems, see Usatorre v. The Victoria, 172 F.2d 434, 438-43 (2d Cir. 1949) (Frank, J.); J. Stone, The Province and Function of Law, 149-59 (1950); F. Lawson, A. Anton & L. Brown, supra, at 14.

Contract No. 112 is not a contract which is the subject of the claim.

Article II, paragraph 1, of the Claims Settlement Declaration gives the Tribunal jurisdiction only over counterclaims which arise "out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim."

The most logical way to read the clause in Article II, paragraph 1, referring to counterclaims, would appear to be as follows: if a claim is based on a contract, the Tribunal only has jurisdiction over a counterclaim which arises out of that "same" contract; if the claim is based on a transaction--such as one that constitutes a quasi-contractual relationship--rather than on a contract, the Tribunal has jurisdiction over a counterclaim arising out of that "same" transaction; if the claim is based on an "occurrence"--such as an expropriation of property--the Tribunal has jurisdiction only over a counterclaim arising out of that "same" occurrence. The Tribunal does not discuss this possible interpretation even though the issue was raised in this and in other cases.[4]

Article III, paragraph 2, of the Claims Settlement Declaration provides that the Tribunal "shall conduct its business

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[4] The issue was raised but not resolved in Owens-Corning Fiberglass Corp. v. Iran, ITL 18-113-2 (13 May 1983).

in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out." Article 19, paragraph 3, of the UNCITRAL Rules provides that "the respondent may make a counter-claim arising out of the same contract . . ."[5] (emphasis added). As claims before this Tribunal may be non-contractual, the Claims Settlement Declaration provides that counterclaims may also arise out of a "transaction or occurrence." Article II, paragraph 1.

There is no indication that by utilizing the words "transaction or occurrence," the parties to the Claims Settlement Declaration intended to permit a respondent to a contract claim to assert a counterclaim which does not arise "out of the same contract" upon which the claim is based.

The specific wording of Article II, paragraph 1, of the Claims Settlement Declaration does not support the Tribunal's decision to permit a counterclaim not arising out of the same contract upon which the claim is based. The phrase "contract, transaction or occurrence" is in the disjunctive. Thus, each of the words--"contract," "transaction" and "occurrence"--is in the alternative. As "transaction" is a broader term than, and

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[5] Tribunal Rule 19, paragraph 3, modifies the UNICTRAL Rule by providing that a "respondent may make a counter-claim . . . if such counter-claim . . . is allowed under the Claims Settlement Declaration.

includes, the word "contract" (Black's Law Dictionary 1341 (5th ed. 1979)), there would have been no need to include the word "contract" if a contract can be deemed to be a transaction for purposes of a counterclaim.[6]

In order to give the word "contract" any meaning, the clause in Article II, paragraph 1, must be read to limit jurisdiction over counterclaims to those which arise out of the contract that is the subject of the claim. Moreover, the word "same" also indicates that a counterclaim must arise out of the very contract which is the subject of the claim.

The separate character of contract claims and claims based on a transaction is further highlighted by that portion of Article II, paragraph 1, providing that claims and counterclaims must "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 parenthetical language would be superfluous if the word "contract" is not distinguishable from a "transaction" of which the contract may form a part.

Had the Governments intended that a counterclaim could be based on a contract which was one of a series of contracts,

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[6] In Rule 13(a) of the United States Federal Rules of Civil Procedure, the term "transaction or occurrence" (without any specific reference to contracts) is used with respect to compulsory counterclaims.

but which was not the contract that was the subject of the claim, they could have expressly so provided. Cf. Cal. Code Civ. Proc. § 426.10(c).

Limitations on counterclaims are not unusual.[7] That it might be desirable to have all disputes between Iranian and United States nationals resolved by this Tribunal, cannot override the terms of the Claims Settlement Declaration. See Iran-United States, Case A/2 (13 January 1982). On a related subject, compare E-Systems, Inc. v. Iran, ITM 13-388-FT (4 February 1983); id. (Concurring Opinion of Howard M. Holtzmann and Richard M. Mosk)(9 February 1983) (discussed precluding claims in municipal courts which should be brought as counterclaims in the Tribunal because these claims involved the same factual disputes involved in claims pending before the Tribunal)). Indeed, the Full Tribunal has noted that in the Claims Settlement Declaration, the Governments "admitted the counter claims submitted by Iran or the United States against nationals of the other State, but under restrictive conditions which are detailed in paragraph 1 of Article II of the Claims Settlement Declaration." Iran-United States, Case A/2, supra (emphasis added).

A claimant is entitled to limit the scope of the pro-

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[7] See Civil Procedure Code of Iran, Article 284 (Sabi trans. 1972) (provides for a counterclaim only when it arises "from the same cause as the original suit or if it has complete correlationship with such suit . . . A complete correlationship between the two suits exists when taking decisions on one of them is effective on the other also.")

ceedings by the nature of the claim. For example, if a claimant has rights based on several contracts, for a variety of reasons, it may have chosen to file a claim based on only one of those contracts. If a respondent can maintain counterclaims on other contracts, it might be argued that a claimant should not be allowed to amend its claim to assert claims based on those other contracts not the subject of the claim, as a plaintiff usually can do in a municipal court. See Article III, paragraph 4, Claims Settlement Declaration; Tribunal Rule 20. Thus, permitting counterclaims based on contracts which are not the subject of the claim could lead to unfairness.[8]

Iran itself has argued that the Claims Settlement Declaration should be interpreted to preclude counterclaims which do not arise out of the contract which is the subject of the claim. In its July 8, 1982 Statement of Defense to United States Counterclaim in Case B1 between Iran and the United States, Iran stated at page 3,

> Article II of the Claims Settlement Declaration only permits the submission of counterclaims which arise out of the same contract that constitutes the subjectmatter [sic] of the Claim. The Claim of Iran--as it has been stated in Statement of Claim P. 2--arises from a number of letters of offer and Acceptance (LOA) signed between the Government of Iran and the Government of the United States . . . The United States cannot, therefore, invoke 1974 Agreement because this agreement did not--and does not--constitute the subject matter of Iran's Claim.

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[8] I do not conclude that such amendments cannot or should not be permitted.

In the instant case, Contract 112 is not the subject of the claim. Thus, the Tribunal incorrectly retains jurisdiction over the counterclaim based on Contract 112.

The Tribunal suggests that its conclusion is based on the circumstances of this case. The decision should be so limited. In any event, the Tribunal indicates it would limit its jurisdiction over a counterclaim to situations in which the "subject-matters of [the] contracts were closely interrelated, within the framework of [a specific program]" and the "linkage" between the contracts is "sufficiently strong so as to make them form one single 'transaction'." If the Tribunal maintains that it has jurisdiction over a counterclaim based on a contract that is not a contract which is the subject of the claim, this test may be appropriate for determining jurisdiction over counterclaims.

I respectfully dissent from the decision of the Tribunal on issues d(i) and h. I concur in the remaining decisions.[9]

Richard M. Mosk

RICHARD M. MOSK

Dated:
31 May 1984

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[9] Although I resigned from the Tribunal in January, 1984, I have participated in this Interlocutory Award pursuant to a Tribunal Rule, as I was a member of the Tribunal at the time of the Hearing on the "preliminary legal issues."