UNITED STATES OF AMERICA

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Both Reservations

... UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA, MAY 6, 1981

Parties: Appellant: Libyan American Oil Company (LIAMCO)(USA)
Appellee: Socialist People's Libyan Arab Republic Jamahirya, formerly Libyan Arab Republic

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HISTORY

On April 12, 1977, an ad hoc arbitral award was rendered in Geneva, Switzerland, by Dr. Sobhi Mahmassani (Lebanon) in the matter between LIAMCO and Libya[1]. Libya, in 1973 and 1974, had nationalized LIAMCO's petroleum concessions, and LIAMCO sought, inter alia, a declaration that the nationalizations were unlawful, constituting a breach of contract, as well as either restitutio in integrum, or damages.

Dr. Mahmassani decided that the Libyan nationalization was not wrongful as such, but that it constituted a source of liability to compensate LIAMCO for the premature termination of the concession agreements. Consequently, he awarded LIAMCO payment of about US$ 80,000,000.00. Libya did not participate in the arbitration.

After having obtained its award, LIAMCO started enforcement proceedings in four countries, in order to attach Libyan assets on the basis of an exequatur: France, Switzerland, Sweden and the United States.

1. In France, LIAMCO applied to the President of the Tribunal de grande instance of Paris, who granted the exequatur on February 7, 1979 (unpublished decision).

On the basis of this exequatur, LIAMCO obtained attachments on several banks and industries who owed money to Libya or to Libyan State enterprises. These attachments were, however, vacated on March 5, 1979[2], by a decision of the same Tribunal de grande instance, in summary proceedings (référé), which held that Libya should be considered as having im-

munity from execution.

2. In Switzerland, the arbitral award of Dr. Mahmassani was granted exequatur by the Geneva Court of Justice (unpublished decision). Subsequently, LIAMCO sought attachment of Libyan assets in banks in Zurich, which it obtained from the Zurich Cantonal Court, on February 13, 1979.

Against this decision, Libya lodged a so-called public law, or constitutional appeal (recours de droit public, staatsrechtliche Beschwerde), directly to the Swiss Federal Tribunal. On June 19, 1980, this Tribunal vacated the attachment [3]; it recognized the principle of restricted immunity, but held that the dispute lacked the necessary sufficient contact with Switzerland.

3. In Sweden, LIAMCO applied to the Svea Court of Appeal for enforcement. In its decision of June 18, 1980, the Svea Court held that the request for enforcement should be accepted, as the conclusion of the arbitral agreement constituted a waiver of immunity on the part of Libya [4].

4. Finally, LIAMCO sought enforcement in the United States, before the District Court for the District of Columbia (Washington, D.C.). This Court, on January 18, 1980, declined the request for enforcement [5]. It held that the arbitral agreement, indeed, did indicate that Libya had waived its immunity, but at the same time it refused to exercise its thus established jurisdiction on the ground that, in the USA, the dispute would not be capable of settlement by arbitration, as the Act of State Doctrine applied here (Art. V, para. 2, under a of the New York Convention 1958) [6].

Thereupon, LIAMCO lodged an appeal before the US Court of Appeals, District of Columbia Circuit. However, while this appeal was pending, the parties reached a settlement on March 20, 1981, and the Court of Appeals dismissed the case on the same day.

The case would have ended here, in the United States, were it not that various Amicus Briefs had been filed in support of LIAMCO, to the above mentioned Court of Appeals, requesting that the Washington District Court Order be reversed.

Three Amici Curiae presented themselves with Briefs, on June 16, 1980: the United States of America, the American Arbitration Association, and, in one Brief, the Chamber of Commerce of the United States of America, the National Association of Manufacturers of the United States of America, and the Rule of Law Committee of the National Foreign Trade Council, Inc.; being the most important, we will reproduce here an extract of the Brief of the United States of America[7)].

AMICUS BRIEF OF THE UNITED STATES OF AMERICA - EXTRACT

I. As to its interest, the United States raised the following:

> "This appeal raises important foreign relations issues which will significantly affect the United States' ability to meet its treaty obligations under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and to implement its policy in favor of arbitration of international investmant disputes. The district court's refusal to enforce the foreign arbitral award here involved is inconsistent with that treaty and its domestic implementing legislation. The district court's reliance on the act of state doctrine was misplaced. The concerns underlying that doctrine are not implicated in a judicial proceeding seeking the enforcement of an arbitral award against a foreign state."

The United States further presented the following questions:

> "1. Whether the domestic act of state doctrine bars the enforcement in the United States of an arbitral award entered against a foreign state in the territory of a state party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
>
> "2. Whether a foreign state which has agreed to binding arbitration of a dispute has implicitly waived its immunity from the enforcement jurisdiction of United States courts as regards an ensuing arbitral award rendered in the territory of a state party to the Convention."

2. The Summary of Argument of the United States' Brief is as follows:

"I. This appeal draws into issue the obligations of United States courts to enforce foreign arbitral awards entered in the territory of states that are parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Enforcement of awards is mandatory unless one of the narrow defenses specified by the Convention is established.

"The court below declined to enforce an arbitral award issued in Switzerland - one of the Convention countries - on the grounds that the award involved a Libyan nationalization which, in the view of the court, has traditionally been removed from judicial scrutiny under the act of state doctrine. The court based its holding on Article V, section 2(a) of the Convention which permits the competent authority in the country where enforcement is sought to refuse recognition and enforcement of an award if the subject matter of the difference is not capable of settlement by arbitration under the law of that country.

"The district court's analysis confuses arbitrability with justiciability. The issue under Article V, paragraph 2(a) of the Convention is not whether a United States court would be barred from adjudicating the dispute, but rather whether United States law permits two contracting parties to agree on the arbitral settlement, by an impartial arbitrator, of any disputes arising under the contract. There can be no question that international investment disputes of the type involved in the instant case are arbitrable under U.S. law. The United States has for many years pressed for effective mechanisms for the arbitration of disputes between host governments and private concessionaires. Enforcement of the arbitral award here involved is fully consonant with domestic public policy and with the foreign policy goals of the United States. It was improper for the district court to apply the act of state doctrine - a doctrine which is not required by international law or by the Constitution - to deny enforcement of the arbitral award which settled with final effect an international investment dispute.

"The act of state doctrine precludes the courts of the

United States from sitting in judgment on the public acts of a recognized foreign state committed within its territory [Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1974)]. It is a self-imposed doctrine of judicial abstention, growing out of the Judiciary's concern that its rulings may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." [Sabbatino, supra, 376 U.S. at 921]. Enforcement of the arbitral award here involved solely concerns Libya's undertaking to submit disputes under freely negotiated concession contracts to final and binding arbitration outside of its territory, and to honor any ensuing awards. In enforcing arbitral awards under such circumstances, the courts enforce a judgment to which the foreign state has consented in advance. This element of consent, coupled with the neutrality of the arbitral tribunal, removes any concern that domestic courts might venture into the political arena, or hinder the United States' pursuit of foreign policy goals.

"II. Libya's cross-appeal challenges the district court's exercise of personal jurisdiction over Libya to enforce the arbitral award. The Foreign Sovereign Immunities Act of 1976, under which this action to enforce a foreign arbitral award was instituted against Libya, permits district courts to exercise personal jurisdiction over foreign states under circumstances where foreign states are not entitled to immunity. One of the conditions defined by Congress under which foreign states may not invoke immunity from the jurisdiction of United States courts is in cases where they have waived immunity, either explicitly or by implication. The district court correctly held that Libya had implicitly waived its immunity from suit in the United States - and was, therefore, subject to the in personam jurisdiction of the court - by virtue of the arbitration clause to which it freely agreed in the concession contracts. Having waived its immunity, and thus subjected itself to the jurisdiction of United States courts, Libya may not withdraw the waiver and defeat the court's jurisdiction."

3. The United States further filed a Supplemental Memorandum, in relation to the decision of the Swiss Federal Tribunal of June 20, 1980. Libya contended that this decision set asisde or suspended the initial arbitral award of Dr. Mahmassani, so that enforcement was barred under Art. V, para.1, under e, of the New York Convention. The Supplemental Memorandum argues the views of the United States in ragard to this contention, which are, pricipally, that the Swiss judgment cannot bar enforcement in this way, as it dealt with the immunity of Libya's assets, not with the validity of the award.

First of all, the United States stated that the burden of proof under Art. V, para. 1, under e, of the New York Convention was on the party resisting the enforcement, i.e., Libya. It then brought forward that the Swiss judgment only dealt with the attachments by LIAMCO, while treating the award throughout as fully binding; furthermore, the judgment was based on municipal law.

Then the United States turned to the New York Convention:

> " The Swiss judgment does not implicate any international obligation of Switzerland and, specifically, any obligations assumed by Switzerland under the New York Convention. The judgment explicitly recites that it rests on Swiss municipal law and not on international law (Tr. Judgment 10, 12-14). Since the award was rendered in Switzerland, its enforceability in Switzerland was not governed by the Convention, which by the terms of Article I, paragraph 1 applies only 'to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.' Furthermore, in ratifying the Convention, Switzerland made a declaration as contemplated by Article I, paragraph 3 of the Convention that it 'will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.' 8/ Thus, confirmation and enforcement of this arbitral award under the Convention - in countries other than Switzerland -

is an issue which is not affected by the Swiss decision.

The negotiating history of Article V(1)(e) shows that it was not the intent of the drafters to make enforceability in third countries contingent upon actual enforcement in the country where the award was rendered. On the contrary, the conclusion clearly emerges that third countries are under an obligation to enforce an award rendered in the territory of a member state regardless of the action or inaction of the enforcement authorities in that state, except in the narrow circumstances enumerated in Article V.

The drafters of the Convention considered and rejected alternative approaches that would have established a more direct linkage between enforcement action in the state where the arbitration took place ("rendering jurisdiction") and enforcement action in other Contracting States. In particular, the drafters rejected a "double exequatur" system, that is, a requirement that the award be submitted to judicial confirmation first in the rendering jurisdiction before recognition or enforcement could be granted in another Contracting State. [9] Their clear intent was to require enforcement in Contracting States, even though enforcement had not been obtained in the rendering jurisdiction or had been denied there for reasons unrelated to the validity of the award. By rejecting the double exequatur, the drafters intended to minimize the procedural complications and delays that would result from requiring judicial proceedings in a jurisdiction where, for example, there might be no assets available for execution. [10]

Significantly, Switzerland played a major role in the evolution of the present formulation of Article V(1)(e) and the rejection of the competing "double exequatur" approach. [11] The Swiss Government commented on an earlier draft "double exequatur" formulation as follows:

> "We would therefore prefer a provision requiring only negative proof, the onus being on the party opposing enforcement. This shift of the burden of proof seems all the more justified as in his suit for recognition and enforcement, the applicant's task is in any case hard enough * * *. [Emphasis in original.]" [12]

[11] * * * * *

"The unequivocal rejection of the "double exequatur" approach by the drafters of the Convention leaves Article V(1)(e) with a clear but limited function. That provision is not triggered where a court in the rendering jurisdiction has not been asked to annul or suspend the award, or has ruled on an issue other than the binding effect of the award on the parties. Rather, it comes into play only where the validity of the award itself has been successfully challenged. In consequence, if no successful challenge to validity of the award is made in the rendering state, the award must be regarded as valid in other Contracting States.

Although, as noted earlier, Libya resisted execution on the award in the rendering jurisdiction, it did not challenge its validity there. Indeed, its failure to attack the validity of the award in Switzerland must be taken as tacit acknowledgement of the unimpeachability of the award and, hence, the inapplicability of Article V(1)(e)."

DECISION

The Court held:

"...that the aforesaid motions of amici curiae are granted and the order filed by the District Court on January 18, 1980, be and is hereby, vacated."

FOOTNOTES

(1) Full text in 1981 International Legal Materials, pp. 1-87; French translation in 1980 Revue de l'arbitrage, pp. 132-191; extracts in English in Yearbook Vol. VI(1981) pp. 89-118.

(2) 106 Journal du droit international (Clunet) 1979, pp. 859-862; see also Patrick Rambaud: "Les suites d'un différend pétrolier: l'affaire LIAMCO devant le juge français", 1979 Annuaire français de droit international, pp. 820-834.

(3) 1981 International Legal Materials, pp. 151-160, and for an extract, Yearbook Vol. VI(1981), pp. 151-154.

(4) 1981 International Legal Materials, pp. 893-896, ~~for an extract see this Yearbook, at pp. -- to --.~~

(5) 482 F.Supp. 1175 (DDC 1980); for an extract see Yearbook Vol. VI(1981), pp. 248-250.

(6) See Albert Jan van den Berg: "The New York Arbitration Convention of 1958", Kluwer, Deventer, The Netherlands (1981), pp. 371-373.

(7) 1981 International Legal Materials, pp. 161 et seq., also published extracts of the United States Amicus Brief.

(8) A similar declaration was made by the United States at the time of its accession.

(9) As one authoritative commentator has noted, "The text and the preparatory works (Part III.C -E/CONF. 26/SR. 17 and 23 especially-) make it clear that it is not necessary that the award should have been declared to be enforceable according to the law, whether local or not, under which it was made." G. Gaja, International Commercial Arbitration New York Convention Para. I.C.4 (1978) (hereafter "Gaja").

(10) In explaining the arguments against double exequatur, the Netherlands delegate said: "such an exequatur was an unnecessary complication, as it involved the requirement that an arbitral award should be operative in a country in which its enforcement had not been requested. ... The judge in the country of enforcement must be given complete latitude either to grant an exequatur immediately, if he considered that there was no reason to refuse it, or to await the outcome of proceedings for its annulment instituted in the country in which it had been made." E/CONF. 26/SR. 11, reprinted in Gaja, supra, at p. III.C.87.

(11) Gen. Ed.: referral is made to the position of the Swiss Government as expressed in UN Doc. E/2822, at pp. III A.2.5 and A.2.16, and UN Doc. E/CONF. 26/SR. 11 at pp. III.C.91 and 92. These documents are equally reprinted in Gaja.

(12) UN Doc. E/2822, see Gaja, at p. III A.2.16.