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UNITED STATES SUPPORTS IRANIAN ARBITRATION OVER PUBLIC POLICY AGAINST TRANSACTING WITH IRAN

Megan Hill*

I. INTRODUCTION

Cubic's dispute with Iran goes back to 1977, when it entered into a contract to sell and service an Air Combat Maneuvering Range for use by the Iranian Air Force. Like other military items, however, the system went undelivered after the Iranian revolution of 1979.¹ The ICC awarded compensation to the Ministry of Iran. The Ministry subsequently filed a motion for prejudgment interest covering the period between the ICC's final award and the district court's confirmation.² The district court held that the ICC's arbitral award was valid but denied the motion for attorneys fees and prejudgment interest.³ The United States has a strong public policy toward the confirmation of foreign arbitration awards that outweighs current restrictive trade policies with Iran. Also, prejudgment interest and legal fees are available in an arbitration confirmation award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴

II. FACTUAL BACKGROUND

A. Contractual History

On October 23, 1977, Cubic International Sales Corporation, predecessor in interest to appellant Cubic Defense Systems, Inc. ("Cubic"), a United States corporation, contracted with the Ministry of War of the government of Iran, predecessor of appellees Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("Ministry"), for sale and service of an air combat maneuvering range for use by Iran's military.⁵ The Contracts provided for progress payments upon completion of specified portions of work, pursuant to which Iran paid Cubic \$12,608,519 under the Sales Contract and \$302,857 under the Service Contract as of October 4, 1978.⁶

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¹ Kenneth Ofgang, *Ninth Circuit Upholds Arbitration Award in Favor of Iran*, METROPOLIAN NEWS-ENTERPRISE (Dec. 16, 2011), <http://www.metnews.com/articles/2011/iran121611.htm>.

² Ministry of Def. & Support v. Cubic Def. Sys., 29 F.Supp.2d 1168, 1172 (S.D. Cal. 1998).

³ Ministry of Def. & Support v. Cubic Def. Sys., 2011 U.S. App. LEXIS 24839 at *5 (9th Cir. Cal. Dec. 15, 2011).

⁴ Steve Cox, *Ministry of Defense of Iran v. Cubic Defense*, WILLIAMETTE UNIVERSITY COLLEGE OF LAW (Dec. 15, 2011), <http://willamettelawonline.com/2011/12/ministry-of-defense-of-iran-v-cubic-defense/>.

⁵ Ministry of Def. & Support v. Cubic Def. Sys., 2011 U.S. App. LEXIS 24839 at *3 (9th Cir. Cal. Dec. 15, 2011).

⁶ Ministry of Def. & Support v. Cubic Def. Sys., 29 F.Supp.2d 1168, 1171 (S.D. Cal. 1998).

In 1978 and early 1979, political unrest and revolution developed in Iran, resulting in the Shah's departure from Iran and the return from exile of Ayatollah Ruhollah Khomeini.⁷ The former Shah of Iran, Mohammed Reza Pahlavi, ruled the Imperial Republic of Iran from 1953, when he assumed control of the government, until shortly before his death in 1979.⁸ Unrest developed and intensified in Iran during the Shah's rule and the Shah appointed the Prime Minister to head a regency council and left the country.⁹ Meanwhile, exiled religious leader Ayatollah Ruhollah Khomeini returned and brought about the collapse of the Prime Minister's regime. The Ayatollah was then vested with the final authority to rule and established the Islamic Republic of Iran.¹⁰ The Iranian Revolution resulted in the nonperformance of the contracts.¹¹

Ministry alleged that Cubic breached both Contracts by removing its service specialists from Iran and by failing to deliver the military system and equipment.¹² Cubic alleged that in February and March of 1979, Cubic sent Ministry notices of completion of Milestone 3 of the Sales Contract and demanded payment of \$5,403,651. According to Cubic, Ministry did not respond to these notices, accept delivery, or make payment. Ministry then claimed that after the Iranian Revolution in 1979, Cubic sold the goods to a third party, retained the sale proceeds, and failed to notify Ministry of the possibility of resale on August 3, 1979.¹³ Consequently, the parties agreed in 1979 that the contracts would be discontinued and that Cubic would try to resell the equipment, with a later settlement of the accounts and in 1981, Cubic sold a modified version of the equipment to Canada.¹⁴

In 1982, the Ministry filed breach of contract claims against Cubic with the Iran-United States Claims Tribunal at the Hague.¹⁵ In 1987, the tribunal issued an order stating that it lacked jurisdiction to hear the matter.¹⁶ Pursuant to the Sales and Service Contracts, in 1991, the Ministry filed a request for arbitration before the International Court of Arbitration of the International Chamber of Commerce (ICC).¹⁷ Article 15 of the Sales Contract and Article 18 of the Service Contract both state that "[a]ny controversy, dispute or claim arising out of or relating to [these contracts] or breach thereof shall be settled by arbitration in the City of Zurich, Switzerland, in accordance with the laws of the Government of Iran in effect as of the date of [these contracts]."¹⁸

Ministry and Cubic appointed their respective Arbitrators in 1992, and the ICC appointed a Panel Chair on May 6, 1993. On July 14, 1993 the Parties attended a pre-hearing conference at which the Terms of Reference for the Arbitration were decided.¹⁹ The ICC ordered bifurcation of the dispute, deferring the issue of quantification of the claim and counterclaim. A hearing was then held on all issues except for the quantification pursuant to the ICC's previous Order.²⁰ In

⁷ *Id.*

⁸ *Ministry of Defense of Islamic Republic v. Gould, Inc.*, 887 F.2d 1357 (9th Cir. Cal. 1989).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Ministry of Def. & Support*, 2011 U.S. App. LEXIS 24839 at *4.

¹² *Ministry of Def. & Support*, 29 F.Supp.2d at 1171.

¹³ *Id.*

¹⁴ *Ministry of Def. & Support*, 2011 U.S. App. LEXIS 24839 at *4.

¹⁵ *Ministry of Def. & Support*, 29 F.Supp.2d at 1171.

¹⁶ *See Ministry of Nat'l Def. of the Islamic Republic of Iran v. Gov't of the United States*, 14 Iran-U.S. Cl. Trib. Rep. 276, 1987 WL 503814 (1987).

¹⁷ *Ministry of Def. & Support*, 29 F.Supp.2d at 1171.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

1995, the ICC Tribunal issued an Order finding that the Ministry's claim for reimbursement and Cubic's counterclaim were not time-barred by the Iranian statute of limitations and that the bifurcation of the proceedings was no longer applicable.²¹ The ICC made a final award in May 1997. The final award makes a net award of \$2,808,519 plus pre-award interest in favor of the Ministry. The ICC also directed Cubic to reimburse the Ministry \$60,000 for arbitration costs.²² The ruling was issued by the Panel Chair, with dissents from both Arbitrators. One Arbitrator dissents on the ground that Ministry is entitled to more relief than awarded and the other Arbitrator dissents in judgment finding for Cubic.²³

In June 1998, after Cubic failed to pay, the Ministry filed a petition in federal district court to confirm the ICC's award under the New York Convention.²⁴ The district court issued an order granting the Ministry's petition. The Ministry subsequently filed a motion for prejudgment interest covering the period between the ICC's final award and the district court's confirmation. The motion also requested attorney's fees based on Cubic's alleged failure to comply with the ICC's decision.²⁵ The district court denied the motion, concluding that prejudgment interest and attorney's fees were unavailable in an action to confirm a foreign arbitration award under the Convention.²⁶

The district court entered judgment in August 1999. Cubic appealed confirmation of the award and the Ministry cross appealed denial of prejudgment interest and attorney's fees.²⁷

B. Background on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings.²⁸ The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.²⁹

The United States became a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") in 1970, and Congress soon after enacted legislation implementing the provisions of the Convention into domestic law, codified as

²¹ *Id.*

²² *Id.* at 1172.

²³ *Id.*

²⁴ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *4 (citing 9 U.S.C. s 207).

²⁵ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *5.

²⁶ *Id.*

²⁷ *Id.* at *5-6.

²⁸ 1958 - *Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention*, UNCITRAL, http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html (last updated 2012).

²⁹ *Id.*

Chapter II of the Federal Arbitration Act (“FAA”), Pub.L. 91-368, 84 Stat. 692 (1970).³⁰ A district court’s “review of a foreign arbitration award is quite circumscribed.”³¹ There is a general pro-enforcement bias under the Convention.³²

The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.³³ The grounds for refusing to recognize or enforce an arbitral award include:

- (a) The parties to the agreement...were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present [his or her] case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decision on matter submitted to arbitration may be recognized and enforced.³⁴

III. PROCEDURAL HISTORY

A. Cubic’s Argument in District Court

1. Article V(1) (c)

On June 25, 1998, the Ministry filed its petition for an order confirming the ICC’s award. Cubic cross-motivated for an order vacating the award on October 9, 1998.³⁵ The district court considered their decision pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards. Considering its early precedent in the case, *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, the court determined that it shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.³⁶ Section 10 of the FAA and case law addressing domestic arbitration set forth grounds upon which a court may refuse to confirm an

³⁰ Codified at 9 U.S.C. §§ 201-208.

³¹ Ministry of Def. & Support, 29 F.Supp.2d at 1172 (citing Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764, 770 (9th Cir. 1992)).

³² *Id.*

³³ Ministry of Defense, 969 F.2d at 770 (citing 9 U.S.C. §207).

³⁴ Ministry of Def. & Support, 29 F.Supp.2d at 1172 (citing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)).

³⁵ Ministry of Def. & Support, 29 F.Supp.2d at 1172.

³⁶ Ministry of Def. & Support, 29 F.Supp.2d at 1172 (citing Ministry of Defense, 969 F.2d at 770 (citing 9 U.S.C. s 207)).

arbitration award. These grounds, however, are not applicable to confirmation under the Convention.³⁷

Cubic's first argument is that the ICC award violates Article V(1) (c) of the Convention because it deals with differences not contemplated by or not falling within the terms of the submission to arbitration and it contains decisions on matters beyond the scope of the submission to arbitration.³⁸ In addition, Cubic alleges that the award violates Article (1) (c) because it ignores the terms of the Parties' Contracts and therefore any decision which exceeds the scope of that jurisdictional reference is improper.³⁹ Cubic takes issue with the following legal theories:

- (1) The conclusion that the Parties agreed in 1979 to discontinue the Contracts at least for the time being, i.e., until the results of Cubic's attempt to resell the System would be known (Award s 10.11);
- (2) The conclusion that there was an "implicit agreement for the postponement of the maturity date of any such claims until Cubic has resold the equipment or declared its inability to resell" (Procedural Order No. 6 s 1.3);
- (3) The conclusion that there was "a factual termination of the contracts at the request of Iran" (Award s 11.22); and
- (4) The finding that it can be implied from the Termination for Convenience Clause that "Cubic shall credit Iran with...products manufactured for Iran prior to the termination of the Contracts" (Award s 13.6).⁴⁰

Cubic argues that the Tribunal decided issues not submitted by the Parties and issued a ruling based upon legal theories not contemplated and/or asserted by the Parties.⁴¹

Cubic also disputes the Tribunal's reference to the Principles of International Commercial Contracts and to principles of fairness, including good faith and fair dealing.⁴² Cubic argues that these references violate Article V(1) (c) because the principles exceed the scope of the Terms of Reference.

2. Article V(1) (a)

Article V(1) (a) provides that a court may refuse to confirm an arbitral award if an agreement in writing, including an arbitral clause in a contract or an arbitration agreement, is not valid under the law to which the parties have subjected it.⁴³ Cubic argued that the four theories of the Tribunal that Cubic contests constitute oral amendments to the Contracts' arbitration clauses

³⁷ Ministry of Def. & Support, 29 F.Supp.2d at 1172.

³⁸ *Id.* at 1173.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1174.

⁴³ *Id.*

and Terms of Reference and therefore violate the Convention's requirement that the agreements be in writing.

3. *Article V(1) (b)*

Article V(1) (b) allows a court to refuse confirmation of an arbitral award if the "party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present [his or her] case."⁴⁴ Cubic argues that it was denied a meaningful opportunity to present its case because

- (1) The Ministry shifted its factual and legal theories throughout the proceedings;
- (2) The Tribunal issued interim decisions regarding bifurcation of the proceedings; and
- (3) The legal theories and remedies articulated in the award were not previously presented.⁴⁵

B. District Court's Opinion

1. *Article V(1) (c)*

The district court reasoned that the Terms of Reference allow the Arbitrators leeway in resolving the conflict that the Parties presented to them. The questions posed for the Arbitrators were presented in the following manner in the Terms of Reference:

The issues to be determined shall be those resulting from the Parties' submissions and which are relevant to this adjudication of the Parties' respective claims and defenses. In particular, the Arbitral Tribunal may have to consider the following issues (but not necessarily all of these or only these, and not necessarily in the following order)...⁴⁶

The Arbitrators were neither required to consider all of the disputes nor limited to the issues listed, but could consider additional issues in resolving this dispute.⁴⁷ The Court reasoned that the award is within the parameters of those twelve issues, even if the legal theories applied are different from those presented in the Parties' pleadings.⁴⁸ Therefore the use of legal theories not presented by the Parties is acceptable under the Terms of Reference.⁴⁹

In response to Cubic's argument that the use of legal theories not presented by the Parties precludes confirmation of the award, the Court held that under the Convention, a court is to

⁴⁴ Ministry of Def. & Support, 29 F.Supp.2d at 1175.

⁴⁵ *Id.*

⁴⁶ Ministry of Def. & Support, 29 F.Supp.2d at 1173.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Ministry of Def. & Support, 29 F.Supp.2d at 1174.

determine “whether the award exceeds the scope of the [arbitration agreement], not whether the award exceeds the scope of the parties’ pleadings.⁵⁰ The subject matter of this dispute is the Service and Sales Contract between Cubic and the Ministry, which the ICC award resolves and although not based on the same legal theories as stated in the pleadings cannot be a basis for refusing to confirm it.⁵¹

The court determined that the reference to the Principles of International Commercial Contracts or the reference to equitable principles does not exceed the scope of the Terms of Reference.⁵² That Cubic disagrees with the Tribunal’s response to the applicability of international law is not a reason to find that the Tribunal addressed issues beyond the scope of the Terms of Reference.⁵³ This Court’s discretion in reviewing a foreign arbitration award is circumscribed.⁵⁴ The principles were applied within the terms of the submission to arbitration and therefore the court ruled that the award granted by the Tribunal does not violate Article V(1) (c).⁵⁵

2. *Article V(1) (a)*

The Tribunal has the task of resolving the dispute over the Contracts between the Ministry and Cubic. The district court held that the court cannot refuse to confirm the award simply because the legal theories and conclusions presented in the award differ from those contemplated by the Parties in their pleadings.⁵⁶ Legal theories used by adjudicators to resolve contract disputes are not considered oral amendments to the contract or the arbitration agreement.⁵⁷ The district court ruled that the award does not violate Article V(1) (a).

3. *Article V(1) (b)*

The district court determined that even if Cubic’s allegations were true, Cubic’s claims do not rise to the level required by Article V(1) (b) to justify a refusal to confirm the award.⁵⁸ The district court reasoned that Cubic’s active participation in the entire process demonstrates notification of the proceedings.⁵⁹ In addition, Cubic was also able to present its case and therefore Cubic had its day in court and had ample opportunity to present its interpretation of the facts and its legal theories to the Tribunal.⁶⁰ The district court ruled that the award did not violate Article V(1) (b).

⁵⁰ *Id.* at 1174 (citing Ministry of Defense, 969 F.2d at 771).

⁵¹ Ministry of Def. & Support, 29 F.Supp.2d at 1174.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Ministry of Def. & Support, 29 F.Supp.2d at 1174.

⁵⁷ Ministry of Def. & Support, 29 F.Supp.2d at 1175.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

IV. COURT OF APPEALS

A. Cubic's Argument

1. Public Policy

Cubic contends that the district court erred by confirming the ICC's award because confirmation is contrary to the public policy of the United States. The Convention's public policy defense, Article V(2) (b) states:

Recognition and enforcement of an arbitral award may...be refused if the competent authority in the country where recognition and enforcement is sought finds that...(b) The recognition or enforcement of the award would be contrary to the public policy of that country.⁶¹

Cubic argues that confirmation of the ICC's award is contrary to a fundamental public policy of the United States against trade and financial transactions with the Islamic Republic of Iran.⁶² Cubic demonstrates this policy by referencing several sanctions the United States has imposed on Iran.⁶³ Cubic claims that the sanctions prohibit Cubic from paying the ICC's award unless the Treasury Department's Office of Foreign Assets Control (OFAC) issues a specific license.⁶⁴ Cubic extends the policy against payment of an award to confirmation of an award.⁶⁵ Although the sanctions do not specifically prohibit the confirmation of the award, Cubic sees them as evidence of a comprehensive United States policy against trade, investment, and economic support for Iran that makes even confirmation of the ICC's award repugnant to the public policy of the United States.⁶⁶

Cubic cites *Bassidji v. Goe* to support its argument. In that case the court considered the scope and purpose of a set of sanctions prohibiting virtually all trade with and investment in Iran by a United States person.⁶⁷ The court suggested that any "transfer of wealth to Iran," or any "payment [that] would provide funds to the Iranian economy," would violate the "fundamental purposes," if not necessarily the letter, of the regulations.⁶⁸

In the alternative, Cubic argues that confirmation of the ICC's award is contrary to the public policy of the United States because "affirmance of the judgment would put Cubic in the nightmare position of being subject to an apparently enforceable judgment when Cubic and any of its involved agents would commit crimes by paying or allowing payment."⁶⁹

⁶¹ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *10 (citing N.Y. Convention, art. V(2)).

⁶² Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *11.

⁶³ See Iranian Assets Control Regulations, 31 C.F.R. pt. 535; Iranian Transactions regulations, 31 C.F.R. pt. 560; Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 C.F.R. pt. 544.

⁶⁴ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *12.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at *13 (citing *Bassidji v. Goe*, 413 F.3d 928 (9th Cir. 2005)).

⁶⁸ *Id.* at *14 (citing *Bassidji*, 413 F.3d at 935, 939).

⁶⁹ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *20.

2. ICC Award not Binding

Cubic argues that the ICC award has not become binding on the parties.⁷⁰ Under the Convention:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that...(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.⁷¹

3. Not a Money-Judgment

Cubic contends the district court's judgment is not a money judgment and is therefore not subject to postjudgment interest because it does not specify the dollar amount of the arbitration award.⁷² Cubic argues that postjudgment interest should be tolled because Cubic has been prevented, through no fault of its own, from paying the judgment after it was confirmed by the district court.⁷³

B. Court of Appeal's Opinion

1. Public Policy

The Court of Appeals recognized that there is a presumption of favoring international arbitration awards under the Convention and therefore construed the public policy defense narrowly.⁷⁴ The defense only applies when confirmation or enforcement of a foreign arbitration award "would violate the forum state's most basic notions of morality and justice."⁷⁵ The court held that the public policy in support of the recognition of foreign arbitration awards carries more weight than the regulatory restrictions governing payment of the ICC's award.⁷⁶ The United States has a strong public policy favoring the confirmation of foreign arbitration awards.⁷⁷ The goal of the Convention and the subsequent American adoption of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and awards are enforced in

⁷⁰ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *21.

⁷¹ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *22 (citing N.Y. Convention, art. V(1)).

⁷² Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *23.

⁷³ *Id.* at *25.

⁷⁴ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *10 (citing *Parsons & Whittemore Overseas Co. v. Societe generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)).

⁷⁵ *Id.* at *11.

⁷⁶ *Id.* at *14.

⁷⁷ *Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992) (quoting *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975)).

signatory countries.⁷⁸ The Court of Appeals determined that in order for Cubic to prevail, Cubic must demonstrate a countervailing public policy sufficient to overcome the presumption favoring upholding foreign arbitration agreements.⁷⁹

The Court of Appeals held that Cubic did not meet its burden. The court reasoned that the sanctions against relations with Iran do not preclude the confirmation of the ICC award.⁸⁰ The Iranian Assets Control Regulations do not prohibit payment, let alone confirmation, of the ICC award.⁸¹ The court also reasoned that although Cubic argues that the regulations prohibit payment absent a license, there is a great difference between payment and confirmation.⁸² Confirmation of the award transfers no wealth to Iran and therefore confirmation does not violate the public policy against economic support for the government of Iran.⁸³ Payment is subject to licensing rather than barred absolutely, and therefore the court held that confirmation should not be refused because payment is prohibited when payment may in fact be authorized by the government's issuance of a specific license.⁸⁴ The fact that the license can be issued supports the confirmation of the award.⁸⁵ The court also reasoned that the applicable regulations provide general licenses authorizing legal representation of Iran in legal proceedings in the United States relating to disputes between Iran and a United States national.⁸⁶ Although the regulations do not expressly authorize confirmation of the award in favor of Iran, the regulations show that legal proceedings to resolve disputes such as this one are, short of payment of a judgment, not in conflict with United States sanctions policy.⁸⁷ Lastly, the United States government's confirmation that the ICC's award comports with the national and foreign policy of the United States is entitled to great weight.⁸⁸ For the previous reasons the Court of Appeals held that confirmation of the ICC's award is not contrary to the public policy of the United States under Article V(2) (b) of the Convention.⁸⁹

⁷⁸ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *14 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974)).

⁷⁹ *Id.* at *15.

⁸⁰ The Iranian Assets Control Regulations block the transfer of certain property in which Iran has an interest. A general license, however, authorizes the transfer of property interests acquired after January 1981. *See* 31 C.F.R. § 535.579 (a). The Supreme Court has already held that Iran's interests in this case are covered by that general license. *See* *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366 (2009).

⁸¹ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *16.

⁸² *Id.*

⁸³ *See Nat'l Oil Corp. v. Libyan Sun Oil Co.*, 733 F.Supp. 800, 820 (D.Del. 1990) ("Although Sun Oil argues that confirmation of this award would mean that U.S. dollars would end up financing Qadhafi's terrorist exploits, the Court has already pointed out that the President is empowered to prevent any such transfer through the Libyan Sanctions Regulations.").

⁸⁴ Br. of the United States as Amicus Curiae 3-4 ("if this Court affirms the confirmation of the award, the Treasury Department can issue a license requiring Cubic to make any payment satisfying the judgment into a blocked account held in the Ministry's name by a U.S. financial institution.").

⁸⁵ *See Belship Navigation, Inc. v. Sealift, Inc.*, No. 95 CIV. 2748, 1995 WL 447656, at *6 (S.D.N.Y. July 28, 1995) ("Any award that Belship might recover through arbitration would be placed in a 'blocked' interest bearing account until relations with Cuba improve to the point where the funds may be released to Belship. Allowing arbitration to proceed will hardly violate the United States' 'most basic notions of morality and justice.'").

⁸⁶ *See* 31 C.F.R. § 544.507 (a) (3) (authorizing "legal services to...persons whose...interests in property are blocked," for the "[i]nitiation and conduct of domestic U.S. jurisdiction").

⁸⁷ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *18, *19.

⁸⁸ *Id.* at *19.

⁸⁹ *Id.* at *20.

The Court of Appeals also addressed Cubic’s alternative argument and ruled that there is no showing that the judgment is unpayable because a license can be issued.⁹⁰ If however the court confirmed an unpayable award, the affected party could seek a stay of execution of judgment.⁹¹

2. *Binding Effect of ICC Award*

The Court of Appeals holds that Cubic argument that the ICC award has not become binding on the parties is without merit.⁹² An arbitration award becomes binding when “no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal).”⁹³ The court reasoned that Cubic does not dispute that all arbitration appeals have been exhausted in this case.⁹⁴ Thus the award has become binding and Article V(1) (e) does not apply.⁹⁵

3. *Money-Judgment*

The governing statute provides that “interest shall be allowed on any money judgment in a civil case recovered in a district court.”⁹⁶ The Court of Appeals adopted the Third Circuit’s definition of money judgment.⁹⁷ Under this definition, a money judgment consists of two elements: “(1) an identification of the parties for and against whom judgment is being entered, and (2) a definite and certain designation of the amount which plaintiff is owed by defendant.”⁹⁸ The court compared this case with *EEOC v. Gurnee Inns, Inc.* In *EEOC v. Gurnee Inns, Inc.*, 956 F.2d 146 (7th Cir. 1992), the district court ordered the defendant to pay specified sums to a number of employees, “less appropriate payroll deductions.”⁹⁹ The Seventh Circuit rejected the defendant’s argument that this was not a money judgment, stating: “the awards did not lose their character as sums certain simply because they were subject to the mechanical task of computing the payroll deduction.”¹⁰⁰ In this case, the court held that although the judgment does not spell out the amount of the ICC’s award, a definite and certain designation of the amount that Cubic owes the Ministry is readily discernible by looking to the arbitration award itself.¹⁰¹ The Court of Appeals ruled that the judgment of the district court satisfied both elements of a money judgment.

⁹⁰ *Id.* at *21.

⁹¹ 30 Am. Jur. 2d Executions § 314 (2011) (“a stay of execution is proper upon a showing that an immediate enforcement of the judgment will result in unnecessary hardship to the judgment debtor.”).

⁹² Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at * 20.

⁹³ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *22 (citing *Fertilizer Corp. of India v. IDI Mgmt., Inc.*, 517 F.Supp. 948, 958 (S.D. Ohio 1981) (quoting G. Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United Foreign Arbitral Awards*, 3 Sw. U.L.Rev. 1, 11 (1971)).

⁹⁴ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *22.

⁹⁵ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *23 (Article V(1) (e) imposes a finality requirement rather than incorporating common law excuses for nonperformance of a contract).

⁹⁶ 28 U.S.C. § 1961(a).

⁹⁷ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *24.

⁹⁸ *Id.* (citing *Penn Terra Ltd. V. Dep’t of Env’tl. Res.*, 733 F.2d 267, 275 (3d Cir. 1984).

⁹⁹ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *95.

¹⁰⁰ *Id.*

¹⁰¹ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *25 (The district court recognized that the ICC ordered “Cubic to pay Iran \$2,808,591 with simple interest of 12% annum from September 24, 1991 until May 5, 1997,” and “to reimburse Iran \$60,000 which was advanced by Iran” for the cost of arbitration.).

In addition to Cubic's alternative argument that Cubic has been prevented from paying the judgment, the Court reasoned that the plain language of §1961 forecloses that argument.¹⁰² The Court of Appeals ruled that the Ministry is therefore entitled to postjudgment interest.¹⁰³

4. *Post-award/Prejudgment Interest and Attorney's fees*

The Ministry argued that the district court abused its discretion by denying the Ministry's motion for post-award, prejudgment interest covering the period following the ICC's final award in May 1997.¹⁰⁴ The district court concluded it lacked authority to award prejudgment interest.¹⁰⁵ The Court of Appeals held that the district court erred.¹⁰⁶ First the court reasoned that "[w]hether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts."¹⁰⁷ Secondly, the court reasoned that nothing in the federal statutes implementing the Convention, or in the Convention itself, reveals any intention on the part of Congress or the contracting states to preclude post-award, prejudgment interest.¹⁰⁸ The court also reasoned that nothing restricts the court's jurisdiction over collateral issues such as prejudgment interest and therefore falls within the district court's discretion.¹⁰⁹ Lastly, because the losing party has an incentive to withhold payment, the absence of authority to grant post-award, prejudgment interest would be a result contrary to the purposes of the Convention.¹¹⁰ The Court of Appeals held that federal law allows a district court to award post-award, prejudgment interest in actions under the Convention.¹¹¹

The Ministry also argued that the district court abused its discretion when it denied the Ministry's motion for attorney's fees based on what it contends was Cubic's willful bad faith in failing to abide by the ICC's award.¹¹² The district court denied the request because it concluded that it lacked jurisdiction.¹¹³ The Court of Appeals reasoned that federal courts have authority to award attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."¹¹⁴ Accordingly the Court of Appeals held that federal law permits an award

¹⁰² 28 U.S.C. § 1961(a) ("interest shall be allowed on any money judgment in a civil case recovered in a district court").

¹⁰³ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *26.

¹⁰⁴ *Id.*

¹⁰⁵ According to the Ninth Circuit, a district court's "review of a foreign arbitration award is quite circumscribed," and, the district court has "little discretion." Ministry of Defense of the Islamic Republic of Iran v. Gould, 969 F.2d 764, 770 (9th Cir. 1992). The Convention does not provide for the award of interest by a district court, but rather only provides for the confirmation of the arbitral award. In this case, the award does provide for some pre-judgment interest, and it is that which this Court confirmed. However, Iran can point to no binding authority under which this Court would be authorized to award interest in addition to that already awarded by the ICC. Neither the Convention, Congress' implementation of that Convention under 9 U.S.C. s [s] 200-208, nor binding case law authorize[s] the award of pre-judgment interest by a district court reviewing an arbitral award under the Convention.

¹⁰⁶ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *27.

¹⁰⁷ *Id.* (citing *Waterside Ocean Navigation*, 737 F.2d at 153).

¹⁰⁸ *Id.* (citing *Waterside Ocean Navigation*, 737 F.2d at 154 ("[T]he Convention is silent on the question of pre-judgment interest.")).

¹⁰⁹ Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *29.

¹¹⁰ *Id.* (citing *Nat'l Oil Corp.*, 733 F.Supp. at 821).

¹¹¹ *Id.*

¹¹² *Id.* at 30.

¹¹³ *Id.*

¹¹⁴ *Id.* at *31 (citing *Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Indus., Inc.*, 84 F.3d 1186, 1192 (9th Cir. 1996)).

of attorney's fees in an action under the Convention.¹¹⁵ Because the district court did not believe it had the authority, it did not address the Ministry's allegations that Cubic acted in bad faith. Therefore the case is remanded to the district court.¹¹⁶

V. IMPLICATIONS

The Court of Appeals ruling in favor of confirming the ICC's arbitral award further demonstrates the strong public policy in favor of arbitration. Public policy is one of seven defenses to the confirmation of an arbitration award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention."¹¹⁷ In this case, with support from the United States government's amicus brief, the Court of Appeals for the Ninth Circuit determined that the public policy in favor of confirming international arbitral awards outweighs the public policy against transacting with Iran.

The Court's ruling also enforces the goals and purpose of the Convention. Chapter 2 of Title 9 of the United States Code contains the New York Convention and the enabling legislation by which it was ratified by the United States in 1970. The goal of the New York Convention is to facilitate international business transactions by promoting enforcement of arbitral agreements in contracts involving international commerce.¹¹⁸ The Convention requires courts in subscribing countries to enforce arbitration awards as if the awards were made in that country, subject to limited grounds on which enforcement may be refused.¹¹⁹

Section 2 of the Federal Arbitration Act (FAA) states that agreements to arbitrate...shall be valid irrevocable, and enforcement.¹²⁰ This policy favoring agreements to arbitrate and the enforcement of arbitral awards extends to a policy favoring the enforcement of foreign arbitral awards. Since the 1979 Iranian Revolution, relations between the United States and Iran have been hostile. Since 1995, the United State has had an embargo on trade with Iran.¹²¹ Sanctions against transacting with Iran have continued to be renewed and extended by the United States causing further tension between the two nations. However the result of this dispute and the confirmation of the arbitral award in favor of the Ministry of Iran, further exemplifies the strong public policy that outweighs even the decade's worth of sanctions placed against any economic transactions that would benefit Iran.

VI. CONCLUSION

Despite the United State's public policy against transacting with Iran, the Court of Appeals confirmed the ICC award in favor of Iran. Although public policy is one of seven defenses to the confirmation of an arbitration award under the Convention on the Recognition and

¹¹⁵ *Id.* at *32.

¹¹⁶ *Id.* at *33.

¹¹⁷ Kenneth Ofgang, *Ninth Circuit Upholds Arbitration Award in Favor of Iran*, METROPOLIAN NEWS-ENTERPRISE (Dec. 16, 2011), <http://www.metnews.com/articles/2011/iran121611.htm>.

¹¹⁸ Richard R. Ryan, *Enforcement of Arbitration Agreements and Awards in Insurance Coverage Disputes*, <http://www.mcanl.com/arbitration.html> (last updated 1999).

¹¹⁹ *Id.*

¹²⁰ 9 U.S.C. §2.

¹²¹ *Islamic Revolution of 1979*, IRAN CHAMBER SOCIETY (Feb. 19, 2012), http://www.iranchamber.com/history/islamic_revolution/islamic_revolution.php/

Enforcement of Foreign Arbitral Awards, known as the “New York Convention,” the Court of Appeals hereby furthers the goals of fostering international business by confirming international arbitration awards. Moreover, the Court of Appeal’s ruling exemplifies the United State’s strong policy favoring the confirmation of international arbitration awards.