IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 48
CHAMBER THREE
AWARD NO. 255-48-3



AMERICAN BELL INTERNATIONAL INC.,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE MINISTRY OF DEFENSE
OF THE ISLAMIC REPUBLIC OF IRAN,
THE MINISTRY OF POST, TELEGRAPH, AND
TELEPHONE OF THE ISLAMIC REPUBLIC OF IRAN,
and
THE TELECOMMUNICATIONS COMPANY OF IRAN,
Respondents.



## CONCURRING OPINION OF JUDGE BROWER

1. I believe this Award, the largest contested one issued by the Tribunal in its five years of existence, to be broadly equitable and therefore I concur in it notwithstanding that with respect to one of the claims, i.e., that for "termination costs," I would have inclined towards both a different analysis and a more fully compensatory award.[1]

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[1] Under Article 31(1) of the Tribunal Rules "any award . . . shall be made by a majority" of the Chamber's three Members.

2. In particular, the Award correctly grants in full the claims of (1) $26,019,838 for services rendered during November and December 1978; (2) $937,644.71 for office space costs; and (3) $283,964 for expropriation of bank deposits. The Tribunal also awards most of the claims for procurement invoices ($1,480,758 of $1,662,535.46 sought), justifiably excluding only those items as to which the record is indeed equivocal. Furthermore, the grant of ten percent interest, as noted in my Concurring and Dissenting Opinion (paras. 22-28) in McCollough & Company, Inc. and The Ministry of Post, Telegraph and Telephone, Award No. 225-89-3 (22 April 1986), is essentially fair.[2]

3. Moreover the counterclaims properly have been rejected,[3] save in three instances where Respondents' points

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[2]In my opinion it would have been more appropriate, however, to measure interest on the December 1978 invoice for services rendered at least from the date the Statement of Claim was filed, i.e., 16 November 1981, rather than from the date Claimant's Memorial evidence was submitted. However one evaluates the fact of Claimant's not having "substantiated" such invoice in accordance with the contract prior to such filing, certainly from that date forward Respondents should be regarded as having been on notice that continued failure to pay the sum demanded would be at their peril.

[3]I believe that it would have been more proper for this Chamber, however, to follow the consistent precedent of the Tribunal, including this Chamber (Three) under its previous Chairman, rejecting counterclaims for such charges as social security premia and taxes for lack of jurisdiction. See my Concurring and Dissenting Opinion (para. 14) in McCollough, supra. As a knowledgeable observer of the Tribunal recently has written:

> Undoubtedly it is desirable for the Tribunal to follow its own precedents, because consistency of outcome among similarly situated claimants is all the more important in view of the essentially arbitrary order in which claims are heard. . . . These uses of precedent . . . facilitate the Tribunal's primary responsibility for ensuring that valid claims are

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were not without merit: (1) Claimant does not appear to have revised two "deliverables," i.e., Documents Nos. 234 and 287-2, despite its apparent acceptance of timely requests to do so, for which the Tribunal awards $50,000;[4] (2) $49,154 is awarded, as requested, to Respondent TCI, as per the contractual terms, for what appear on the face of the record to be excessive absences of two ABII employees; and (3) Respondents are awarded $3,500,000 as a return of unrealized United States tax costs paid to Claimant, for which Claimant seems to have conceded liability.[5]

4. It is the claim for termination costs that the Tribunal has found conceptually the most difficult one with which to deal. The Award, following a genuinely thoughtful analysis, concludes, on balance, that the contract was not terminated, as Claimant has argued, which finding would have triggered an entitlement to contractually prescribed "termination costs." The Award determines instead that the drastic reduction in Claimant's operations ordered by Respondents in

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satisfactorily resolved.

Damrosch, Book Review, 24 Col. J. Trans. L. 429, 434 (1986) (reviewing R. Lillich ed., The Iran-United States Claims Tribunal 1981-83 (1984)).

[4]The Award (para. 176) arrives at this sum as "reasonable" while admitting "the lack of evidence concerning" damages and acknowledging consequently "the difficulties of assessing them." Ordinarily I believe that where liability is adjudged but proof of damages is missing a token or symbolic amount may be awarded. I interpret this to be the intent of the instant Award on this point.

[5]This counterclaim was raised only a month or so before the Hearing and was documented at that time with admissions of Claimant in its correspondence as well as in contemporaneous memoranda of meetings. In its subsequent Rebuttal Memorial and evidence Claimant neither claimed prejudice due to late submission of the counterclaim nor sought to rebut Respondents' evidence. Consequently Claimant would appear at least tacitly to have conceded this liability.

late 1978 and early 1979 gave rise to a contractual obligation, under Articles 2.12 and 3.10 (as supplemented by Appendix 3, paragraph 2), to "negotiate an adjustment to the man/months rates" so that "[t]he Contract amount will be adjusted accordingly." Citing Kuwait and The American Independent Oil Company (Aminoil), Award of 24 March 1982 (Reuter, Sultan, Fitzmaurice, arbs.), reprinted in 21 Int'l Legal Mat'ls 976 (1982), the Award (para. 54) essays a determination of "what the parties, in the light of their intentions as reflected in the contract, would have agreed upon as the financial consequences" in order to arrive at a "reasonable compensation." In doing so the Award (para. 59) primarily proceeds "from the definition of termination costs in" the contract. Thus although the Tribunal adopts an analysis different from that proposed by Claimant, towards which I myself would have inclined,[6] in the end it leads to nearly the same judicial task.

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[6]To me the declaration of "Colonel of Headquarters, Naghi Eskandarzadeh" as "The Temporary Officer in Charge of" CEO, by letter of 11 August 1979, that Claimant's "contract is considered terminated as of . . . (10 Februay 1979)" accurately, and with the force of an admission binding on Respondents, describes the legal conclusion to be drawn from the events of late 1978 and early 1979, which the Tribunal has found included, at a minimum, (1) failure by Respondents to pay in excess of $28,000,000 due for services rendered, procurements effectuated and other legitimate costs; (2) forced reductions by Respondents of Claimant's personnel from 846 to 58, i.e., by 93.1 percent, at a time when a personnel increase to 1145 within a few months had been projected; (3) commensurate forced cancellation of commercial and residential leases; (4) the departure six days following the victory of the Iranian Revolution, i.e., 16 Februay 1979, of Claimant's remaining personnel; and (5) consequently the hurried sale of millions of dollars of assets in Iran.

The Award's repeated emphasis on lack of a written notice of termination by any Party strikes me as overly formalistic. In fairness, however, it should be noted that the Award's perspective, and its consequent conclusion that expenses related to the departure of Claimant's last 58

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5. I believe that in carrying out its task the Tribunal could have taken a more realistic view of what the Parties must have contemplated to be the consequences of Respondents' actions. It must be recalled that the task the Tribunal has undertaken, itself referring to the award in Aminoil, supra, is, as that award recites (para. 19), to reach a result which recognizes not "only [the Parties'] obligation to negotiate, but also the existence in principle of an obligation, of which only the numerical computation remains unsettled prior to negotiation." As is also set forth in Aminoil, supra, at paragraph 24, "a study of the remaining clauses of the contract, as also of its juridical setting, must determine the way in which it can be modified or brought to an end." I believe that proper application of these principles entails a survey of the contract somewhat broader than that reflected in the Award.

6. In essence, the contract, as I view it, provided that any end to the contract, whether due to force majeure (Article 18, paragraph 1), nonpayment by Respondents of material invoices (Article 18, paragraph 2), failure of Claimant to perform (Articles 6.1 and 18, paragraph 3), any Party's omission to post required guarantees (Articles 6.6 and 18, paragraphs 3 and 4), or expiry of the contract without renewal (Article 18, paragraph 5), would entitle Claimant to up to $80,000,000 (Appendix 3, paragraph 1.4) for "all . . . costs associated with" such "shutdown" (Appendix 3, paragraph 7), plus a charge equal to 12 percent

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personnel (6.9 percent) and other costs were attributable to force majeure, doubtless was encouraged by Claimant's apparent posture, thoroughly understandable as a business matter, of studiously not taking steps definitively to declare the contract terminated and not claiming termination expenses as such until after the date on which the contract in any event automatically would have expired, i.e., 15 July 1979, and thus long after many, if not most, of the asserted termination costs had been incurred.

of "the actual costs" of winding up (Appendix 3, paragraph 11). Reinforcing this, the contract provides, without limitation, that a whole catalogue of costs of types not implying an end to the contract (Appendix 3, paragraph 10), e.g., certain costs arising "[i]n case of Force Majeure which does not result in cancellation of the Contract" (Article 6.7), will be paid by Respondents, together with an added 12 percent. In short, the overall scheme of the contract was that when it would be at an end, whenever that occurred and whatever the reason, Claimant would be entitled to all costs incident to its demise, up to a limit more than double the "termination costs" claimed here.[7] Against this background, the present Award does not satisfactorily explain why nearly thirty percent of the documented termination costs and charges associated with the shutdown (excluding the most arguable category of such costs, i.e., that for losses on post-termination asset sales) are rejected as uncompensable.[8] I believe a monetary award closer to the actual documented costs and contractual charges would have reflected more accurately the Parties' true expectations regarding the compensation that should flow from a 93.1 percent reduction of the contract.

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[7]This obviously was the bargained alternative to current contractual charges calculated to produce a sufficient reserve to cover ultimate winddown costs. It had clear advantages for both Parties: Claimant had the benefit of both the resulting disincentive to cancellation by Respondents and the guarantee that such costs could be recouped; Respondents had the advantage of lower current costs, not distorted by inclusion of any provision, necessarily arbitrary, for inherently speculative contingencies.

[8]Of the $29,007,133 in non-asset loss termination costs and charges claimed and accepted as documented the Tribunal awards only $21,015,032, excluding thereby $7,992,101, or 27.55 percent, of such charges. See paragraph 11, infra, regarding losses on post-termination asset sales.

7. Specifically, it would have been appropriate to award amounts equal to the full salary, relocation and other costs demanded, undiminished by a 6.9 percent "force majeure" or related "factor."[9] Similarly, there appears to be no very clear reason not to have awarded amounts equal to those requested as the costs of lease terminations and closing up Claimant's office in the United States, rather than the awarded round sums, implicitly arbitrary, of about half the amounts thus sought.[10]

8. Finally, the contractual provision for 12 percent to "be added to the actual costs" should have been given more serious consideration.[11] The Award describes this as a "fee" and, without citing any basis for its conclusion, states that this "represents a profit element." (Para. 90.) The Award laconically determines that Claimant "could not reasonably count on gaining profits as a consequence of the reductions" and rejects entirely the 12 percent. (Id.)

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[9] $6,413,013 was requested as salary costs, and $5,970,515 is awarded; $9,366,869 was demanded as relocation costs, and $8,445,858 is awarded; $3,167,196 was sought for other specific costs, and $2,948,659 is awarded.

[10] The Award grants $650,000 of the $1,334,329 requested for lease termination costs, on the unstated principle, which I deem to be of dubious logic, that even though the full salary costs and expenses of relocation must be paid in respect of an employee because he fell victim to the force reduction rather than to any force majeure, the cost of cancelling his apartment lease in Tehran is attributable in part to force majeure.

The Award also limits recovery in respect of closing the United States office of Claimant to $3,000,000 of the $5,617,819 demanded, partly by rejecting out of hand certain unquantified costs as unrelated to the "shutdown" in Iran, where Claimant's only business was conducted, and otherwise by attributing an undetermined amount to force majeure.

[11] The sum requested in respect of this was $3,771,359, none of which is awarded.

9. This disposition arguably is wrong in both its assumption and its analysis. This 12 percent is added, under the contract (Appendix 3, paragraph 11), "to the actual costs incurred . . . for accomplishing paragraphs 1.2 ['necessary undetermined and specific items to be procured'], 1.4 ['termination or cancellation costs'] and 10 above," which last paragraph provides that "Any costs incurred by [Claimant] as a result of conditions or events described in the following articles will be paid by [Respondents to Claimant]":

2.3 Claims Evaluation
2.3 Personnel Replacement
5.8 Employer Duties
5.11 Third Party Liabilities
5.12 Iranian Taxes and Social Security Contributions
5.14 Employer Personnel
17 Government Legislation and Regulations
6.7 Force Majeure

This litany of circumstances giving rise to a 12 percent add-on strongly suggests that at least in part, and in some instances in whole, the added 12 percent was in the nature of reimbursement for indirect expenses rather than representing a profit. For example, it would be more reasonable to infer that a 12 percent charge added to reimbursement for Iranian taxes (Article 5.12) is designed solely to compensate Claimant for its overhead expenses in dealing directly with such tax matters than to suggest that Respondents intended that Claimant profit from complying with Iranian law.

10. Even assuming, however, that the 12 percent addition were to represent profit, whether in whole or in part, such character should not exclude it from consideration in the Tribunal's constructed "negotiation" revising the contract price. Clearly man/month charges, the literal focus of the

Parties' hypothetical bargaining, included a profit element; this is necessarily implicit in the contract. Why, then, in referring to the termination costs scheme of the contract for guidance should a profit element be excluded? To ask the question is to answer it.

11. I think it a far more doubtful question whether, as the Claimant argued, the Tribunal, in arriving at the appropriate compensation, should have accepted claimed losses for the hurried sale of more than $10,000,000 worth of assets in Iran.[12] It can be debated whether these are "costs associated with" the shutdown in Iran even under the broadest interpretation of that phrase (Appendix 3, paragraph 7). A reasonable person can conclude that under other political circumstances those same assets could have been sold at their claimed net book value or readily exported notwithstanding a complete cessation of Claimant's operations in Iran. While the ending of the contract need not necessarily have caused the claimed losses in order for them to be compensable, there must be some material relationship between the two for liability to arise under the contract terms. Claimant alleges no extra-contractual basis for liability as to this item. I am not inclined to find fault with the Award on this score.

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[12]Claimant asserts the fully depreciated, net book value of these assets, and claims the difference between that figure and the actual total realization on sale of the assets, or $5,528,766. The Award grants none of this.

12. In conclusion, although I believe a fuller monetary award would have been justified, I am sufficiently satisfied with the justice of this Award to concur in it without reluctance.[13]

Charles N. Brower

[13]Given my view of the claim for termination costs I also would have been inclined to grant Claimant the bulk, although not all, of its claimed costs of arbitration, which totalled $905,534.90.