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Case No. 10706

Date of filing: 29. Jan 87

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** CONCURRING OPINION of _____
 - Date _____
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CASE NO. 10706

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CHAMBER ONE

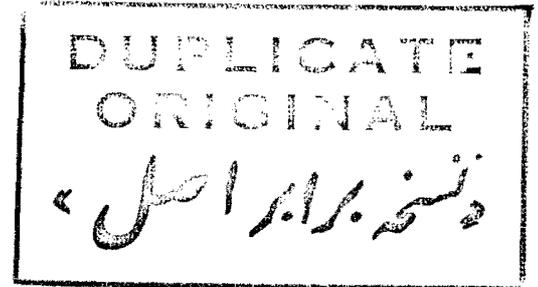
AWARD NO. 291-10706-1

ST. REGIS PAPER COMPANY,
a claim of less than US\$250,000 presented
by the UNITED STATES OF AMERICA,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	29 JAN 1987 ۱۳۶۵ / ۱۱ / ۹
No.	10706



AWARD

Appearances:

For the Claimant: Mr. J.R. Crook,
Agent of the United States of America
Mr. M. Raboin,
Deputy Agent & Assistant Presenter
Cathleen Corkan,
Attorney - Adviser, Department of State
& Presenter

For the Respondent: Mr. M.K. Eshragh,
Agent of the Islamic Republic of Iran
Mr. M.H. Bordbar,
Legal Adviser to the Agent
Mr. A. Aghighi,
Legal Adviser to the Agent

I. PROCEEDINGS

1. On 19 January 1982, the Government of the United States of America presented a claim of less than \$250,000 of the Claimant, St. Regis Paper Company ("Claimant").

2. On 20 June 1984, the United States filed a Supplementary Statement of Claim and, on 15 July 1985, the Respondent Day Construction Company ("Day") filed its Statement of Defense and Counterclaim.

3. On 13 November 1985, the Claimant filed its Reply to the Statement of Defense and, on 17 March 1986, an affidavit of Michael Kozeradsky, which the Respondent challenged as untimely. On 15 April 1986, the Government of the Islamic Republic of Iran filed its Statement of Defense.

4. A Hearing in this Case was held on 25 November 1986.

II. FACTS & CONTENTIONS OF THE PARTIES

A. Jurisdiction

5. St. Regis claims to be a United States national on the basis of evidence demonstrating that it was incorporated in the State of New York in 1899, continues to be in good standing, and is a publicly held corporation with an estimated 95 percent ownership by United States citizens. Following a resolution of the annual meeting of shareholders held on 28 April 1983, it changed its name to St. Regis Corporation.

6. St. Regis brings this Claim on behalf of Span-Deck, Inc. ("Span-Deck"). St. Regis claims that Span-Deck is a Tennessee corporation that is wholly-owned by St. Regis. St. Regis claims on this basis that Span-Deck is likewise a United States national. St. Regis asserts that, through its subsidiary, it has owned the claim continuously from the time it arose until 19 January 1981.

7. The Respondent asserts that the documents adduced to establish the U.S. nationality of St. Regis are inadequate because St. Regis' certificate of incorporation does not bear a signature, stamp, or date, and because the name of the company at the time of commencing this proceeding was St. Regis Paper Company and not St. Regis Corporation.

8. At the Hearing, the Claimant submitted a new copy of the certificate of incorporation of St. Regis Paper Company. It claimed that the previously submitted copy of the certificate did not show the signature, stamp, or date because of an error in xeroxing the document.

9. The Respondent argues that "the claim is owned by Span-Deck which, according to the Claimant, is an independent juridical person organized under the laws of the State of Tennessee, and has the locus standi to bring its own Claim before the Tribunal." Citing Article VII paragraph 2 of the Claims Settlement Declaration, it argues that St. Regis cannot bring an indirect claim before the Tribunal on behalf of Span-Deck.

10. At the Hearing the Claimant stated that St. Regis takes legal action on behalf of its subsidiaries as a matter of the Company's "internal practice" without legal assignments and applied for leave to amend the Statement of Claim to add Span-Deck as a Claimant. It argued that such an amendment would not change the legal or factual basis of the Claim, and would not prejudice the Respondent.

11. St. Regis asserts that Day is an agency, instrumentality, or entity controlled by the Government of Iran within the meaning of Article VII paragraph 3 of the Claims Settlement Declaration. It contends that since 1979 Day has been "controlled by the government of Iran, which has appointed the Company's current managers and confiscated the majority shareholdings." The Claimant contends that as one of the largest construction companies in Iran, Day was subject to nationalization pursuant to Article 44 of the Constitution of the Islamic Republic of Iran, which defined the state sector of the economy to include "all large scale and major industries." Further it argues that, regardless of whether the Company was formally nationalized, the Government of Iran has established its control through the appointment of provisional managers and confiscation of the shareholdings of the former majority owners, the Mackarechian family.

12. The Respondent denies that Day is a controlled entity within the meaning of the Claims Settlement Declaration. It states that this company has retained its private status and that Day continues to exist as an independent legal entity. Consequently, it argues, the Tribunal cannot assert jurisdiction over this Claim.

B. The Merits

13. The Claimant states that Span-Deck is in the business of selling machinery and equipment for the manufacture of a product used in the construction industry. According to the Claimant, on 13 July 1976, John McGrew, Vice President of Sales of Span-Deck, and Hadi Mackarechian, President of Day, executed a contract to sell a casting machine for the manufacture of concrete cast products and equipment for use

in the construction of a new residential housing project, and to provide technical assistance in connection with the installation and operation of the equipment. Day agreed to pay Span-Deck for the cost of the casting machine and "other equipment" through a letter of credit. The amounts due under the letter of credit have been fully paid and are not disputed by Span-Deck.

14. St. Regis claims that in the Fall of 1976 Day exercised an option under the contract to purchase additional spare parts. As in previous dealings, Vacil Company acted as Day's authorized agent for the purchase of the spare parts.

15. On 29 November 1976, the Claimant contends, Vacil Company confirmed Day's order for spare parts. Because these spare parts were not covered by the letter of credit, the parties agreed that payment would be made upon presentation of an invoice. The machinery and equipment ordered under the letter of credit, and the additional parts, were packed together in several crates and were shipped to the Respondent.

16. On 8 March 1977 Span-Deck issued Invoice No. 3811 for \$21,495.00 for the tools and spare parts ordered in November 1976. Payment terms were stated as "net 30 days." The Claimant contends that Day received the goods by late March 1977 and that during 1977 Day and Span-Deck personnel worked to assemble the machinery and equipment.

17. The Claimant asserts that, despite demands and promises to pay, the debt remains outstanding and requests an award of \$21,495.00. The Claimant also requests an additional 1.5 percent of the claimed amount for its costs in preparing this claim and interest from the date the payment was due until the date the Award is paid.

18. The Respondent argues that the July contract concerned only the sale of casting machinery and that it has fully paid for the equipment. It asserts that any purchase of spare parts would have been the subject of a new contract, and that Span-Deck has not proved the existence of such a new contract. Further it denies that Mr. Mackarechian held the position of Chairman of the Company after 1976, or that he had authority to enter into further contracts on Day's behalf. The Respondent also denies that Span-Deck shipped the spare parts together with the machinery and claims that part of the merchandise under the original contract was not delivered.

19. In response, the Claimant contends that the negotiations and exchange of communications between the parties, documented by its evidence, suffice to establish a contract. No additional writing was necessary after Day confirmed its order by telephone and in writing and later accepted the parts and promised to pay for them. The Claimant contends that in March 1977 Day confirmed receipt of the parts in subsequent correspondence with Span-Deck, in numerous telephone conversations, and in meetings with Span-Deck representatives.

C. The Counterclaim

20. The Respondent has filed a Counterclaim for \$150,000 for damages incurred by Span-Deck's failure to perform its contractual obligation to commission the machinery and for \$73,340 as a ten percent rebate of the total contract price allegedly due to the first purchaser.

21. The Claimant submits that the counterclaim is meritless and should be dismissed. It submits that it has performed fully and has discharged its obligations under the contract.

III. REASONS FOR AWARD

A. Jurisdiction

22. The present claim was filed on 19 January, 1982. It introduced St. Regis as a party to a contract to ship spare parts to Iran, billed on invoice No. 3811 dated 8 March 1977. In all subsequent submissions, St. Regis remained the Claimant, although it subsequently became clear that Span-Deck was in fact the real party to the contract.

23. At the Hearing, St. Regis proposed to amend the Claim to add Span-Deck as an additional Claimant. This proposal was opposed by the Respondent, who argued that Span-Deck was at all material times an independent juridical person which could have filed its own claim before the Tribunal before 19 January 1982. It argued that an amendment adding Span-Deck would prejudice the Respondent and should not be allowed at such a late date.

24. The Tribunal is mindful of the requirements of Article 20 of the Tribunal Rules, which permits the amendment of a claim, unless delay, prejudice, or loss of jurisdiction would result. See Fedders Corporation and Loristan Refrigeration Industries, Decision No. DEC 51-250-3 (28 Oct. 1986).

25. The Tribunal has further held that, in considering a proposed amendment to add or to substitute a party, it must determine whether the proposed amendment is "an attempt to introduce a new claim after the deadline prescribed in Article III, paragraph 4, of the Claims Settlement Declaration," see The Austin Company and Machine Sazi Arak, Award

No. 257-295-2 (30 Sept. 1986), or simply the clarification of the true identity of the proper Claimant. This principle was elaborated in Refusal to Accept the Claim of Raymond International (U.K.) Ltd., Decision DEC 18-Ref 21-FT, p.3 (8 Dec. 1982), in which the Tribunal said:

Article 20 of the Provisionally Adopted Tribunal Rules provides that a party during the course of the arbitral proceedings [including the refusal proceedings] may amend or supplement his claim unless the Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, to substitute a new Claimant for the original one is tantamount to the filing of a new claim and cannot be regarded simply as an amendment to the existing claim, timely received by the Registry.

26. In this Case, the Tribunal holds that, whether St. Regis remained on the record as a Claimant or not, the proposed amendment would amount to a substitution of Span-Deck for St. Regis as the Claimant, and that this would be "tantamount to the filing of a new claim" within the principle set out above. See also Universal Enterprises, Ltd. and National Iranian Oil Company, Decision No. DEC 38-746-2 (23 July 1985).

27. The history of this claim leading up to the proposed amendment distinguishes it from the facts in Refusal to file Claim of AMF Overseas Corporation, Decision No. DEC 17-Ref 20-FT (8 Dec. 1982). In that case, the Tribunal allowed the claim of AMF Overseas Corporation, which had been refused by the Co-Registrars on 21 May 1982 on the grounds that AMF Overseas was not a national of the United States, to continue as "a claim of AMF Incorporated on behalf of AMF Overseas" on the grounds that "the Statement of Claim on its face showed that it concerned a claim of a non-United States Company . . . but also indicated clearly that this company was a wholly-owned subsidiary." Consequently, the Tribunal held that the Petition was merely "a clarification of who is

the proper Claimant, and not an amendment whereby a new Claimant is named." Id. at p.3.

28. In the present Case there was no indication in the Statement of Claim that the contracting party was other than St. Regis, or that there was any other Claimant. The only possible link in the Statement of Claim to Span-Deck was a reference to Invoice No. 3811. But the Statement of Claim did not state that the invoice was in the name of Span-Deck. Indeed, the wording of the Statement of Claim would lead one to believe that the alleged contract was between St. Regis and Day. Only subsequently, when Invoice No. 3811 was attached to the Supplementary Statement of Claim, did it become clear that the alleged contract involved Span-Deck. The Supplementary Statement of Claim represented for the first time that Span-Deck, and not St. Regis, was named as the contracting party.

29. It is the Tribunal's view that, in the light of the documents filed in this Case, it cannot be said that the proposed amendment would amount to no more than a clarification of who is the proper Claimant. Unlike AMF Overseas, the real party to this contract was not identified until two years after the original Statement of Claim had been filed. When the real party is referred to sufficiently clearly in the original Statement of Claim, the circumstances may permit the Tribunal to allow an amendment to name the proper Claimant. In circumstances such as this, however, the addition of Span-Deck amounts to the filing of a new claim by Span-Deck against the Respondent.

30. The Tribunal further distinguishes the present case from American International Group Inc. and The Islamic Republic of Iran, Award No. 93-2-3 (19 Dec. 1983). In that case the Claimant American International Group ("AIG") claimed compensation for the nationalization of its interests in an Iranian subsidiary. The question was raised as to whether the Claimant was entitled to seek compensation

for a certain portion of shares that were held by one of the Claimant's subsidiaries. In the Claimant's Supplemental Memorandum, it contended that the shares were held in the name of its subsidiary on its behalf, and that, consequently, the Claimant was the proper Claimant with respect to the whole of its shareholding. Alternatively, it requested leave to amend its Statement of Claim to include the subsidiary as an additional Claimant. The Tribunal allowed the amendment on the grounds that the "amendment does not change the amount sought or the factual or legal basis of the Claim and cannot be said to prejudice the Respondent." Id. at p.9. The Tribunal notes in particular that in AIG the original Claimant was a proper Claimant both before and after the amendment. The amendment merely added a Claimant which had already been mentioned in an Exhibit to the original Statement of Claim and transferred part of the claim to it.

31. In the present case, however, the Claimant, in the original Statement of Claim, in no way mentioned or referred to Span-Deck. The Claimant has proffered no explanation for the failure of Span-Deck to file its own claim before 19 January 1982. In such circumstances, the Claims Settlement Declaration clearly precludes the exercise of the Tribunal's jurisdiction by providing for jurisdiction over indirect Claims only when the "other entity is not itself entitled to bring a claim" Claims Settlement Declaration, Article VII, paragraph 2. Because Span-Deck could have asserted this Claim on its own behalf, St. Regis cannot assert an indirect Claim before this Tribunal on its subsidiary's behalf. Thus, the proposed amendment would substitute a proper party, Span-Deck, for an improper party, St. Regis, after the jurisdictional deadline prescribed by the Claims Settlement Declaration.

32. For the reasons set out above, the Tribunal denies the proposed amendment and dismisses this Claim. Since Span-Deck is not a proper Claimant, the Counterclaim against it must be dismissed on the same grounds. In these circumstances the Tribunal does not find it necessary to determine the status of Day Construction Company.

B. Costs

33. As to the costs, the Tribunal has previously stated that there is no objection in principle to making an award for costs in Claims of less than \$250,000. See the Trustees of Columbia University and The Islamic Republic of Iran, Award No. 222-10517-1 (15 Apr. 1986). This includes costs which could be awarded to the Respondent, when the Claimant has failed to establish its Claim.

34. The Respondent has requested to be awarded "legal damages" without specifying an amount. In the circumstances of this Case, the Tribunal determines that it would be reasonable to award an amount of \$200 as costs for the Respondent.

IV. AWARD

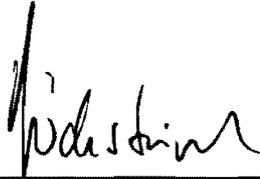
35. For the foregoing reasons:

THE TRIBUNAL AWARDS AS FOLLOWS:

- a. The Claim of St. Regis Paper Company is dismissed.
- b. The Counter-Claim of Day Construction Company is dismissed.

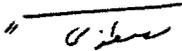
- c. The Claimant shall pay as costs of arbitrating this Claim the sum of Two Hundred United States Dollars (US\$200) to the Respondent.

Dated, The Hague
29 January 1987



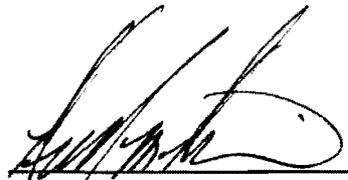
Karl-Heinz Böckstiegel
Chairman
Chamber One

In the Name of God



Mohsen Mostafavi

As I have previously stated elsewhere, I do not agree with assessment of costs of arbitration. Nonetheless, in order to arrive at a majority, and since it is the practice of this Chamber to award reasonable costs of arbitration, I concur with respect to the costs awarded.



Howard M. Holtzmann
Dissenting Opinion.