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AIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 834
CHAMBER TWO
AWARD NO. 295-834-2

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
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No. 834 شعبه

SCHLEGEL CORPORATION on behalf of SCHLEGEL LINING TECHNOLOGY GMBH,

Claimant,

and

NATIONAL IRANIAN COPPER INDUSTRIES COMPANY,

Respondent.

AWARD

Appearances:

For Claimant:

Mr. Markham Ball
Attorney for Claimant
Mr. Eugene C. Holloway
Assistant General
Counsel of Claimant

For Respondent:

Mr. Mohammad K. Eshragh
Agent of the Government
of the Islamic Republic
of Iran
Dr. Akbar Shirazi
Advisor to the Agent
Mr. Abdolmajid Aghighi
Assistant to the Agent

Mr. Mehdi Kermani
Representative of
National Iranian Copper
Industries Co.
Mr. Mier Jallalod Deen
Homayun Far
Representative of
National Iranian Copper
Industries Co.
Mr. Ghader Nabavi
Alamdari
Representative of
National Iranian Copper
Industries Co.
Mr. Khosrou Asgari
Representative of
National Iranian Copper
Industries Co.

Also Present:

Mr. John Crook
Agent of the United
States of America

I. THE CLAIM

1. SCHLEGEL CORPORATION ("the Claimant"), a New York corporation, has brought this claim on behalf of its German subsidiary, Schlegel Lining Technology GmbH ("Schlegel"), formerly known as Schlegel Engineering GmbH, against the NATIONAL IRANIAN COPPER COMPANY ("Copper Company"), formerly known as the Sar Cheshmeh Copper Mining Company, for 497,466 Deutschmarks, plus interest. This sum represents the unpaid portion of monies owed to Schlegel for work done as a subcontractor on a water reservoir construction project in Iran, completed in 1977.

2. A Hearing was held in this Case on 24 October 1986.

II. THE FACTS

3. In early 1974, the Copper Company, acting through its engineers Binnie & Partners ("Binnie"), entered into a 1.38 billion rial contract ("Main Contract") with Fassan Construction Co., Ltd. ("Fassan"), an Iranian company, for Fassan to act as the main contractor on a Water Development Project designed to supply water to the Sar Cheshmeh copper mine and processing plant.

4. Part of the project involved the construction of a Terminal Reservoir, the specifications of which provided for approximately 38,000 square meters of watertight polyethylene lining. In June 1974, after some negotiations, Schlegel formally submitted to Binnie its tender for the lining work on the Terminal Reservoir including provision of the lining material and its installation. Binnie thereafter directed Fassan by letter to enter into a subcontract with Schlegel, enclosing the tender.

5. Consequently, Fassan wrote to Schlegel expressing its "readiness to enter into a Sub-Contract with you as we have

been instructed by Binnie . . . ." The Contract was later formalized in a document entitled "Sub-Contract No. 1 Terminal Reservoir Lining" (the "Sub-Contract"). The Sub-Contract indicated that Schlegel had been given the opportunity to read and note the provisions of the Main Contract, and that Schlegel was deemed to have full knowledge of those provisions. The Main Contract comprised the Conditions of Contract (International), which was a standardized contract applicable to works of civil engineering construction,[1] certain amendments and conditions of particular application to the civil works under consideration, specifications, and drawings. Both the Sub-Contract Specification and the Main Contract represented that Schlegel was a "nominated Sub-Contractor" to whom, according to the Main Contract, the Copper Company was entitled to pay directly should the Contractor Fassan fail to pay. Were the Copper Company to effect such a direct payment it was entitled to deduct any amount so paid from any amounts due to be paid by it to Fassan. Schlegel asserts that these provisions induced it to enter into the contract with Fassan because they acted as an assurance that the Copper Company stood behind Fassan's obligations.

6. By the end of June 1976, Schlegel had substantially completed the installation of the reservoir lining. In October of 1976, however, wind damage to the lining occurred, resulting in a dispute over who should bear the costs for the necessary remedial work. This dispute was resolved in a meeting of the representatives of Fassan, Binnie, and Schlegel on 4 and 5 May 1977 at which Schlegel agreed to undertake the remedial work. It also undertook to meet the costs related to a portion of the remedial work. This agreement was telexed to the Copper Company.

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[1]Prepared by the Fédération Internationale des (Footnote Continued)

7. On 16 November 1977, Binnie issued its Maintenance Certificate signifying that all of Schlegel's work had been satisfactorily completed and that Fassan's obligations to the Copper Company under the Main Contract in that regard had ceased. Schlegel received from Binnie, at the same time, the Engineers' measurement of Schlegel's work and the resulting financial calculations of the gross value of Schlegel's work. On 8 February 1978, Fassan, at Schlegel's request, provided Schlegel with a statement of the total balance due to Schlegel.[2] Basing its own calculations on Binnie's measurements, Fassan's statement showed a balance due of 12,934,124 rials, or 497,466 Deutschmarks at the contractually agreed rate of exchange.

8. Schlegel made numerous attempts to secure payment of the balance. In December 1980, when the Claimant discovered that Fassan had filed for bankruptcy, the Claimant registered a bankruptcy claim in Iran. In March 1981, the bankruptcy proceedings were lifted, and the Claimant resumed its attempts to collect from Fassan and the Copper Company. These attempts culminated in a telex on 23 September 1981 from the Claimant to the International Legal and Financial Claims Committee of Bank Markazi in Iran, asking for assistance in expediting payment. Evidently informed of that telex, Fassan wrote to Bank Markazi on 11 October 1981, explaining that it did owe the sum claimed by Schlegel and would pay Schlegel when it received from the Copper Company the outstanding amount due on the water supply project, of which the money owed to Schlegel was a portion. Neither the

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(Footnote Continued)
Ingenieurs-Conseils (F.I.D.I.C.) with the Federation Internationale des Entrepreneurs Européens de Bâtiment et des Travaux Publics (F.I.E.E.B.T.P.).

[2]Out of a total of 51,096,412 rials due, Schlegel had already been paid 38,162,288 rials by Fassan.

Copper Company nor Fassan ever paid Schlegel nor did the Copper Company ever pay Fassan the amount due to Schlegel.

III. JURISDICTION

9. The Claimant submitted evidence establishing to the Tribunal's satisfaction that it, a privately held New York corporation, is a national of the United States as defined in Article VII, paragraph 1, of the Claims Settlement Declaration. The Claimant has submitted evidence to the satisfaction of the Tribunal that Schlegel is a corporation organized under the laws of the Federal Republic of Germany whose shares are 100% owned by Schlegel GmbH, also a German corporation, whose shares in turn are essentially wholly owned by the Claimant.[3] Accordingly, the Claimant has standing under the terms of Article VII, paragraph 2, of the Claims Settlement Declaration to present indirectly the claim of Schlegel before the Tribunal. Undisputed evidence, furthermore, has been presented that the Respondent is an entity controlled by Iran within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration. Nor is there any dispute that this Claim arises "out of debts, contracts . . . expropriations or other measures affecting property rights" within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. The Tribunal, consequently, has jurisdiction over this Claim.

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[3] Out of 2,300 shares the Claimant owns all but one share. That share is owned by the Claimant's Chairman.

IV. THE MERITS

10. Of the alternative grounds on which the Claimant has based its claim,[4] the ground of unjust enrichment is the only one in which the Tribunal finds merit in this Case. The Claimant alleges that Schlegel had, pursuant to its contractual obligations, carried out the lining on the reservoir belonging to the Copper Company, including the subsequent repair works on it. The Claimant has alleged further that Schlegel had not been completely reimbursed either by the Copper Company or Fassan for the material provided and work performed. It, therefore, argues that by retention and enjoyment of the lining, the Copper Company was unjustly enriched to the extent of sums still owed to Schlegel.

11. As the Tribunal has confirmed on numerous occasions, the concept of unjust enrichment appears in various forms in the different legal systems of the world and "is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals."[5]

12. The Copper Company, however, argues as a threshold issue that such a claim based on unjust enrichment cannot be asserted in this situation where both, Schlegel and the

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[4]The Claimant's alternative grounds of recovery were that Schlegel was a third party beneficiary of the Main Contract or a Sub-Contract obligee of the Copper Company acting through its agents Binnie and Fassan.

[5]Sea-Land Service, Inc. and Government of the Islamic Republic of Iran, Award No. 135-33-1, p. 27 (22 June 1984). See also, Shannon and Wilson, Inc. and Atomic Energy Organization of Iran, Award No. 207-217-2. para. 17 (5 December 1985); Flexi-Van Leasing, Inc. and Government of the Islamic Republic of Iran, Award No. 259-36-1, p. 26 (13 October 1986).

Copper Company, had separate contracts with Fassan. The existence of the contract with Fassan, according to the Respondent, limits Schlegel's recourse to its remedies under that contract and eliminates the subsidiary or alternative basis for recovery of unjust enrichment against the Respondent.

13. The Tribunal has indeed ruled earlier that a substitute right of action based on unjust enrichment does not arise where a Contract binding on both parties exists, because in that situation, "the issue of whether a performance of the Contract results in any 'enrichment' of a party and whether such enrichment is 'unjust' in relation to the other party, cannot be decided without specifically determining the contractual rights and obligations of the parties."[6] In the same vein, the Tribunal, in setting out guidelines to the availability of principles of unjust enrichment, has stated that "[t]here must be . . . no contractual or other remedy available to the injured party whereby it might seek compensation from the party enriched."[7] In this Case, however, the Parties have no contractual rights or obligations to each other and Schlegel has no contractual or other remedy against the Copper Company, the party enriched. Moreover, in an earlier case, the Tribunal allowed a claim based on unjust enrichment to be made in a situation where the claimant and the respondent, contractually unrelated, both had contracts with a third party against whom the claimant had a direct contractual remedy. See Benjamin R. Isaiah and Bank Mellat, Award No. 35-219-2 (30 March 1983). The Tribunal recognizes, however, that the absence of a binding

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[6] T.C.S.B., Inc. and Iran, Award No. 114-140-2. pp. 21-22 (16 March 1984), reprinted in 5 Iran-U.S. C.T.R. 160, 172. Accord, Aeronutronic Overseas Services, Inc. and The Government of the Islamic Republic of Iran, et al., Award No. 238-158-1, p. 21 (20 June 1986).

[7] Sea-Land, supra, at 7 (emphasis added).

contract between the party enriched and the party impoverished does not necessarily make available remedies based on unjust enrichment, particularly in construction sub-contract cases. In a situation somewhat similar to the present case, the Tribunal held that "[t]he circumstances of the instant case have not been shown to be such as to justify any exception from the established principle that generally a subcontractor has no direct right as against the party with whom the contractor has a Contract."[8]

14. The Tribunal has observed, furthermore, that the rule against unjust enrichment "represents a principle based on justice and equity and therefore 'makes it necessary to take into account all the circumstances of each specific situation.'"[9] Whether or not the relationship among Fassan, Schlegel, and the Copper Company may give rise to a claim based on unjust enrichment can only be determined through examination of the particular circumstances of the Case.

15. It is inherent in the principle of unjust enrichment that there must have been an enrichment of one party to the detriment of the other. In this Case there is no dispute that the Copper Company was enriched by Schlegel's provision and installation of the reservoir liner, an integral part of the project and specified expressly by the Copper Company itself. The Copper Company was also clearly enriched by the remedial work performed by Schlegel as a result of dispute resolution requested by the Copper Company, the outcome of which was reported to it. Finally, the Tribunal notes that the Copper Company obtained the benefit of a 10-year

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[8] Chas. T. Main International, Inc. and Mahab Consulting Engineers, Inc., et al., Award No. 70-185-3, p. 9 (2 September 1983).

[9] Sea-Land, supra, at 28, quoting Jiménez de Aréchaga, "International Law in the Past Third of a Century," Recueil des Cours, 1978 at 299-300.

warranty on the liner provided for in the Sub-Contract Specification. That document states that, at the completion of the Sub-Contract performance, the warranty was to be transferred to the benefit of the Copper Company.

16. The Tribunal has observed that for a claim of unjust enrichment to succeed, the enrichment must be sufficiently direct. As the Tribunal stated it, the enrichment of one party and the detriment of the other "both must arise as a consequence of the same act or event."[10] The Tribunal finds such a direct enrichment here. The Copper Company had itself provided for the reservoir liner specifications in the Main Contract's Specification and Bill of Quantities. The Copper Company's consulting engineers Binnie had ordered Fassan to make Schlegel a "nominated sub-contractor" as defined in the Main Contract. Binnie exercised supervisory authority over Schlegel. When Schlegel had performed its work, the result was that the Copper Company had acquired a reservoir lining to its specifications provided by a company it had effectively nominated to do work supervised and approved by its own engineers.

17. The Tribunal finds that the enrichment was and remains unjust. The evidence is clear that the Copper Company has never paid the balance due for Schlegel's work.[11] Nor is

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[10] Sea-Land, supra, at 7. Cf. Dickson Car Wheel Company v. United Mexican States, 4 R.I.A.A. 669 (1974) where one of the several reasons the U.S.-Mexican General Claims Commission did not grant recovery on the basis of unjust enrichment was because of an enrichment, if any, that was too indirect.

[11] In all the written pleadings, the Copper Company maintained that it had not paid Fassan. It was the Copper Company that introduced Fassan's letter of 11 October 1981 which stated that Fassan had not been paid by the Copper Company for the balance due to Schlegel. Fassan admitted that it owes Schlegel 12,934,124 rials for materials and (Footnote Continued)

there any doubt, given Binnie's issuance of the Maintenance Certificate, that Schlegel's work had been satisfactorily completed. The Tribunal also notes that the Copper Company does not run the risk of double liability. Article 59(2) of the Main Contract provides for the deduction of sums paid directly to a sub-contractor from monies owed to Fassan by the Copper Company. Under the particular circumstances of this Case, it was not unreasonable for Schlegel to look to and expect payment directly from the Copper Company under Article 59(2). It is fair to assume that this provision gave the sub-contractor Schlegel the security of anticipating payment directly from the Copper Company in circumstances where the contractor Fassan refused to pay it for work performed under the Sub-Contract. Article 59(2) also provided a means by which the Copper Company could ensure continuation of a sub-contractor's work by enabling the Copper Company to pay the sub-contractor directly amounts owed to it by Fassan. The Tribunal concludes under the circumstances that, once the work had been completed by the sub-contractor Schlegel, and it had for good and valid reasons appealed to the Copper Company for payment directly, it was manifestly unjust for the Copper Company to deny payment to Schlegel under Article 59(2), particularly when it would not have incurred any loss to itself by doing so. The Tribunal holds, consequently, that the Copper Company has been unjustly enriched and must therefore pay Schlegel the balance due of 12,934,124 rials.

(Footnote Continued)
services rendered by Schlegel, and said that this sum was part of 248,896,873 rials owed by the Copper Company to Fassan. Only at the Hearing did the Copper Company, for the first time in these proceedings, assert -- without any evidence -- that it had paid Fassan in full. The Tribunal notes that proof of payment to Fassan would be a defense, but no such proof was offered, either prior to the Hearing in response to the Tribunal's Order of 12 March 1986 or even at the Hearing.

18. In reaching this conclusion, the Tribunal notes that Schlegel made reasonable efforts under difficult circumstances to attempt to recover the sums owed to it. Taking into account the relations of the parties and the other circumstances of this Case, and in the absence of any evidence that the Copper Company had good cause for non-payment to Fassan or directly to Schlegel (which it was entitled to do without risk of double liability), the Tribunal cannot conclude that the Copper Company met the requirements of good faith in meeting its contractual obligations.

19. The Tribunal notes that, pursuant to the contract, Schlegel was to be paid in Deutschmarks at the rate of 26 rials to the mark. Therefore, the Tribunal finds it reasonable to apply that exchange rate here. The Claimant argued that the conversion of the resulting figure of 497,466 DM to U.S. Dollars should be made as of the 1978 year-end exchange rate. The Tribunal, however, has been given no reason to believe that the Claimant's German subsidiary would have converted its proceeds to dollars at the end of 1978. The Claimant's testimony concerning the yearly consolidation of the financial books of the Claimant and its subsidiaries does not persuade the Tribunal to the contrary. The Tribunal, therefore, finds that the rate to be applied is that in effect at the time of this Award, Accord, T.C.S.B., Inc., supra, and consequently awards Claimant U.S. $271,839.

V. INTEREST

20. The Tribunal finds that interest on the amount due to the Claimant should run from 8 February 1978, the date of Fassan's final confirmation to Schlegel of the balance due to it. Consequently, the Tribunal considers it fair to award simple interest at the rate of 10.5 percent from that date.

VI. COSTS

21. Each of the Parties shall bear its own costs of arbitrating this claim.

VII. AWARD

22. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(a) The Respondent NATIONAL IRANIAN COPPER INDUSTRIES CO. is obligated to pay the Claimant SCHLEGEL CORPORATION the sum of Two Hundred Seventy-One Thousand Eight Hundred Thirty Nine United States Dollars (U.S. $271,839) plus simple interest at the rate of 10.5 percent per annum (365-day year) on this amount from 8 February 1978 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

(b) This obligation shall be satisfied by payment out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981.

(c) Each of the Parties shall bear its own costs of arbitrating this claim.

(d) All other claims are dismissed.

23. This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague
27 March 1987

Robert Briner
Chairman

In the Name of God

George H. Aldrich

Hamid Bahrami-Ahmadi
Dissenting Opinion