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CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحدہ

ORIGINAL DOCUMENTS IN SAFE

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Case No. 409

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** AWARD - Type of Award _____
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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of Mr HOLTZMAN
- Date 2. Nov 87
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CASE NO. 409

CHAMBER ONE

AWARD NO. 323-409-1

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HARRIS INTERNATIONAL
TELECOMMUNICATIONS INC.,
Claimant,
and

THE ISLAMIC REPUBLIC OF IRAN,
THE IRANIAN MINISTRY OF DEFENSE,
BANK MARKAZI and BANK MELLI IRAN,
Respondents.

DUPLICATE
ORIGINAL

نسخه برابر اصل

SEPARATE OPINION OF JUDGE HOLTZMANN
DISSENTING FROM DENIAL OF TERMINATION COSTS

I join in the Award, except that I dissent from the portion that denies Harris International Telecommunications, Inc. ("Harris") the termination costs that it incurred as a result of the cancellation of its contract with the Iranian Air Force. I dissent on this point for three reasons. First, this decision flies in the face of the Tribunal's consistent holding in other cases recognizing that the IBEX Project, and all of the related contracts, were deliberately terminated by Iran. Second, allowing Iran to gain shelter under the force majeure provisions of this contract effectively allows it to terminate the contract for convenience without paying the contractually agreed-upon price for such a termination. Third, the decision unfairly punishes Harris for taking a reasonable action to protect itself against

Iran's wrongful attempts to call the bank guarantees and letters of credit.

I.

Harris was one of ten United States corporations employed by Iran to carry out an integrated Project to design and install a complex air defense intelligence gathering system known as IBEX, and to train Iranian personnel to operate it. To date, the Tribunal has considered and decided four cases involving the IBEX Project. See Ford Aerospace & Comm. Corp. and The Government of the Islamic Republic of Iran, Award No. 289-93-1 (29 Jan. 1987); Touche Ross & Co. and The Islamic Republic of Iran, Award No. 197-480-1 (30 Oct. 1985); Questech, Inc. and The Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1 (25 Sept. 1985); and Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985).

The Iranian revolutionary turmoil affected all of the IBEX Project contractors. This large, complex, and highly sensitive project required close cooperation between the contractors and the Iranian Government. As events made clear, however, the new Iranian Government wanted no part of this Project. From early 1979 onward, the Government of Iran refused to pay outstanding invoices, refused to respond to the increasingly urgent requests for direction from the American contractors, and began to make wrongful calls on bank guarantees and letters of credit. All of these actions taken by Iran reflected its decision to terminate the IBEX Project.

Iran confirmed its intent to terminate the Project by sending identical letters to all of the IBEX contractors, including Harris. Those letters, each dated 16 July 1979, declared that "from the date Bahman 21, 1357 (Feb. 10,

1979), the accomplishment of all works and expenditures under [the relevant contract] has been considered to be stopped due to the recent transformation arising from the Islamic Revolution of Iran."¹ The use of the past tense is instructive. The Government of Iran was informing the IBEX contractors that the contracts had been terminated on 10 February 1979. The new Iranian Government held the view that, as an Iranian representative told one of the IBEX contractors, "the contracts concluded with the former Government . . . had ceased to exist on 10 February." Ford, supra, at 13. Indeed, the record in this and other IBEX cases shows that Iran stopped all performance of the contracts on or about 10 February 1979.

The Tribunal has consistently held in prior IBEX cases that "the Iranian Government made a deliberate policy decision not to continue with American contractors in a project that related to secret military intelligence operations." See Sylvania, supra, at 21; Questech, supra, at 18. The Tribunal has held that the contracts at issue in prior IBEX cases, as well as the contract with Harris, permit Iran to terminate for its own convenience, subject to the obligation to make certain payments, to release performance guarantees, and to cancel any letters of credit established by the contractors as guarantees of their performance or as security for advance payments. The Tribunal's repeated recognition that Iran terminated the IBEX Project, and all of the related contracts, for its convenience is amply supported by Iran's contemporaneous behavior. Refusing to pay outstanding invoices, refusing to provide direction to the contractors, and seeking wrongfully to call performance guarantees are hardly the actions of a party that seeks to

¹See Sylvania Technical Systems, Inc., supra, at 21; Questech, Inc., supra, at 18; Touche Ross & Co., supra, at 15; Ford Aerospace & Communications Corp., supra, at 21.

complete an ongoing project. I can find no reason to depart from our consistent practice in holding that Iran terminated these contracts for its convenience.

II.

Moreover, the Tribunal's reasoning allows Iran to terminate the contract for convenience, but to escape the contractually agreed-upon consequences of such a termination. While Iran clearly had the right to terminate this contract, the exercise of that right entailed certain consequences, one of which is the compensation of Harris under the termination for convenience clause of the contract. By allowing Iran to effectuate its "deliberate policy decision" without paying the agreed-upon compensation for such a termination, the Tribunal unfairly deprives the Claimant of the benefit of its bargain and rewrites the contract for the Parties. I can find no justification for such a decision.

Today's holding is unique in this respect. In view of the Tribunal's repeated findings that Iran terminated the IBEX Project for its own convenience, contractually-required termination costs have been awarded in all prior IBEX cases in which the contractor claimed such costs.²

²One IBEX contractor, Touche Ross and Company, did not claim any termination costs. Like Harris, Touche Ross invoked force majeure as a ground of terminating its Contract. Because termination costs were not sought, however, Chamber One (Judge Lagergren presiding) was able to decide the case on the basis of Touche Ross' letter invoking force majeure and had no need to consider the effect of Iran's 16 July 1979 letter. Inasmuch as Touche Ross did not seek termination costs, the Tribunal's reliance on the Claimant's force majeure letter, rather than on Iran's letter of 16 July 1979, had no effect on the amount awarded. Had Touche Ross requested termination costs, we would then have had to face directly the issue of the effect of Iran's 16 July 1979 letter.

III.

The Tribunal, however, denies Harris any award for termination costs. The majority concludes that Harris terminated the contract for force majeure in its letter dated 14 June 1979, and therefore is not contractually entitled to the termination costs that would otherwise have been due to it. In my view such reasoning ignores the context in which Harris acted and effectively rewards Iran for its abusive conduct.

In evaluating the events of June and July 1979 in this Case, the context in which the Parties acted must be borne in mind. By early 1979 Iran had defaulted on several outstanding invoices, an act that itself constituted a breach of this contract, and had cabled the Bank of America suspending the bank's authority to pay Harris by charging Bank Markazi's account. Further, not only did Iran refuse to pay the outstanding invoices, it also refused to provide guidance or direction to the contractors involved in the IBEX Project.

But Iran did not stop at simply refusing to pay invoices or to respond to Harris' requests for direction. Rather, Bank Melli, acting on behalf of the new Government, demanded an extension of \$15.2 million worth of performance guarantees and down payment guarantees on 26 February 1979. Bank Melli made it clear that all of these guarantees would be called if the extensions were not granted. Allowing these guarantees to be paid on Iran's wrongful call would have been disastrous, greatly increasing Harris' losses. Consequently, Harris took reasonable steps to bar the payment of the guarantees: it agreed to the extensions, it filed suit to block the payment of any wrongful calls on the guarantees, and it invoked the force majeure provisions of

its contract.³ Article 7.4 of the contract, as noted by the majority, supra at para. 155, requires Iran to cancel and release the bank guarantees upon cancellation of the contract for force majeure. This was accordingly a defense readily available to Harris and it quite reasonably invoked it.

Nonetheless, however, Iran continued its efforts to call the letters of credit in violation of the Contract. Indeed, Harris was not relieved of the threat of Iran's improper calls until the issuance of the Award today. It is ironic that the majority denies Harris its termination costs because of a letter Harris wrote in an effort to counteract what the Award recognizes as wrongful action by Iran. That irony becomes even greater when one realizes that Harris' letter failed to achieve its purpose because Iran compounded its wrongful conduct by refusing to release the letters of credit as required by the Contract. In sum, Harris' prudent -- but vain -- effort to protect itself against Iran's improper action has resulted in the majority denying termination costs that would otherwise be payable. Such a result does nothing less than reward Iran for its own wrongful


³The chronology of the events clearly shows that Harris took this step in response to Iran's actions. Harris invoked the force majeure provisions of the contract four days after Bank Melli demanded an extension of the guarantees. Moreover, it should be noted that Iran's acts were not rash steps taken in the haste of the Revolution. Rather, Iran made repeated attempts to call the bank guarantees. See Award at para. 17 (Bank Melli attempted to call the bank guarantees on 8 January 1980, 26 February 1980, and 6 April 1980).

conduct and punish Harris for taking a reasonable step to defend itself against Iran's improper acts.⁴ By focusing only on the Claimant's attempts to defend itself, and ignoring Iran's abusive conduct, the Tribunal reaches a result that is manifestly unjust.

IV.

I would hold that Harris has a contractual right to termination costs and would proceed to examine the extent to which it has proven its claim for such costs.

Dated, The Hague
2 November 1987



Howard M. Holtzmann

⁴The Award correctly grants Harris its legal fees of \$365,133.56 for the cost of defending itself against the wrongful calls on the letters of credit. The Award errs, however, in refusing to grant Harris attorneys' fees for its costs in defending itself against Bank Melli's coercive demands for extensions of the letters of credit in February 1979. See Award at para. 156. The majority reasons that, because Iran was entitled to seek extensions and Harris agreed, there can be no damages. This reasoning ignores the obvious: Iran secured Harris' agreement to extend the letters of credit solely by means of a threat to illegally call over \$15 million worth of letters of credit. This threatened breach renders Harris' agreement void, as it was obviously secured under duress. Harris' subsequent efforts to protect itself against forthcoming calls (quite reasonable, as it turned out, since Iran actually called the letters of credit within a year) should be considered damages arising from Iran's threatened breach. I would have awarded Harris these attorneys' fees incurred in defending itself apart Iran's coercive demand for extension of the letters of credit, for, in my view, they were as entitled to be reimbursed for these fees as much as for the other counsel fees that the Tribunal grants to them.