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IRAN-UNITED STATES CLAIMS TRIBUNAL

[redacted]

دیوان داوری دعاوی ایران - ایالات متحده

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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 _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
- Date _____
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- Date 15 Feb 90
8 pages in English 7 pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

CASE NO. 370
CHAMBER ONE
AWARD NO. 429-370-1

WATKINS-JOHNSON COMPANY,
WATKINS-JOHNSON LIMITED,
Claimants,

and

ISLAMIC REPUBLIC OF IRAN
(Ministry of Defence),
BANK SADERAT IRAN,
Respondents.

CORRECTION TO DISSENTING OPINION OF
ASSADOLLAH NOORI

The following corrections are hereby made to the Persian/English texts of my Dissenting Opinion in the above-captioned Case:

1. The third word in the Latin expression "exceptio non adimpleti contractus" has been misspelled "adempleti" on pages 2, 71, 90 and 91 (footnote 84) of the English text, and on page 83 (footnote 84) of the Persian text.

2. The name "Isaak I. Dore" is incorrectly given as "Dare" in footnote 32 of both the Persian and English texts.

3. In footnote 37 of both texts, the name "Mavrommatis" was misspelled "Mouramattis." In the English text, the date "1977" appearing in the 4th line from the end of the same footnote should read "1987."

4. In the Persian text, the word "Report" at the end of footnote 47 (page 61) was mis-typed as "report."

5. In footnote 62 (page 74) of the Persian text, the date "Oct. 1975" should read "Oct. 1978."

A copy of the abovementioned pages, as corrected, is attached hereto.

Dated, The Hague
15 February 1990

Assadollah Noori

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Persian language and with Iranian law] selects" will govern (cf. Article 4.1 of the Contract). Because of this intimate relationship between the Contract and Iranian law, Appendix 5, paragraph 7 of the Contract authorized the Seller to engage "the services of one or more legal counsel" in Iran, to advise him in order to ensure that the terms and conditions of the Contract, and their application, conformed to Iranian law.[32] Pursuant to Article 9 of the Contract, "[a]ll disputes and differences... shall be settled in accordance with the rules provided by the Iranian Laws..."

The majority has not taken into account the point that in light of the Contract's terms, including the express provisions of Article 11 thereof, the agreement that United States law would apply on a secondary level was made in cognizance of the fact that the Seller had also undertaken certain obligations, such as the obligation to pay all taxes, fees and duties relating to the services under the Contract, or to its personnel, outside of Iran (i.e., in the United States). Obviously, then, only United States law would deal with those obligations, since they were not matters over which differences would be expected to arise between Iranian and United States law; and otherwise, if a difference did arise, the inevitable conclusion was that Iranian law was the governing law. Thus, given that Iranian law governed wherever Iranian and United States law contained similar provisions, and also that it was recognized as governing in the event of any conflict, it must be effectively concluded, by any interpretation, that the governing law was that of Iran.

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[32] In interpreting Section 1.105 of the United States Uniform Commercial Code, which provides for application of United States law in the absence of a choice of law clause or where the law selected has no bearing upon the transaction, it has been said that to understand the parties' meeting of minds as to the governing law, it is also necessary to consider whether or not the parties to the contract are, or can be presumed to be, familiar with that law. Issak I. Dore, Choice of Law under the International Sale Convention: A U.S. Perspective, AJIL vol. 77 (1983), p. 521 at 528.

As a matter of fact, the majority is precluded from disregarding the prevailing status of the Persian text, which is the sole governing text in the event of differences between the two versions, because no arbitral tribunal has the right to ignore elements of the contracting Parties' unquestionable and unambiguous intent and consent. Article 33 of the Vienna Convention on the Law of Treaties not only gives effect to an agreement by the parties to a treaty as to their choice of a governing text, but furthermore provides, in eliminating differences between the meanings of texts of equal authenticity, that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." That is to say, it burdens the interpreter with the task of reconciling the different meanings of those texts.

56. There can be no doubt that arbitrations, whether international or between subjects of private law, derive their mandate and competence from the consent and agreement of the parties to the arbitral agreement; therefore, it is the parties' consent that determines the scope, limits and area of certitude of an arbitration's authority and jurisdiction.[37] Moreover, it is an established principle

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[37] See, in this connection, the following awards and sources:

Chorzow Factory Case (1927) P.C.I.J. Series A, No. 8, p. 32; Mavrommatis Palestine Concession Case, Judgment No. 2 (August 30, 1924) Ser. A, No. 2, at 16; The Free Zones Case (1932) P.C.I.J. Series A/B, No. 46, pp. 138-9; K.S. Carlston, The Process of International Arbitration (1946) p. 62 et seq.; Julian D.M. Lew, "Determination of Arbitrators' Jurisdiction and the Public Policy Limitation on that Jurisdiction", p. 73, published in Julian D.M. Lew, Contemporary Problems in International Arbitration (1987) p. 73; Sigvard Jarvin, "The Sources and Limits of the Arbitrator's Power," published in D.M. Lew, Contemporary Problems in International Arbitration (1987), p. 50 at 71.

operations relating to delivery of the goods under the Contract, and (b) to sell off those goods in order to mitigate its losses. The (factual and legal) grounds and arguments relied upon by the Tribunal in reaching the above findings are all either incorrect, circular, or foreign to the facts in the Case. (See also the Sections under "Exceptio non adimpleti contractus" and "Mitigation of losses," in paragraphs 77-88 of the present Opinion.)

63. The majority lays the first uneven brick of its edifice when, despite admitting the connection between the progress of works and payment of the contractual price, and the fact that delivery of the goods constituted an essential element in assessing the progress of works percentage (paragraph 78), and without considering the contractual provisions, inter alia Appendix 2 to Contract no. 108 (paragraphs 51 and 77 of the Award, and paragraphs 8-12 of this Dissenting Opinion), it alleges that Watkins-Johnson was justified in relying on its previous practice (i.e., in collecting on the invoices up to December 1977, on the basis of costs). I simply do not know to what precedent and contractual practice the majority is here referring, such that it deems it to have changed and amended the provisions of the Contract, in the face of all that has been set forth above, including (a) the fact that the payments made in 1977 do not negate the connection between the rate of progress of works and the payments, since the delivery factor was not then a significant parameter for determining the work progress percentage, and those payments do not alter the synallagmatic nature of the Contract or the condition that any payments were to be made vis-à-vis the progress of works; (b) the fact that the Project supervisors and auditors, the United States representatives, and the Respondent all believed that Watkins-Johnson's invoices should be paid on the basis of the work progress percentage; (c) the Claimant's own conduct in refraining from sending invoices for five

circumstances set forth above in paragraphs 69-72, which brought about a shift in the United States' political-strategical stance toward Iran and consequently led it to prevent the export of services and goods to Iran. In that event, in accordance with Article 7.6 of the Contract, the Buyer should only have been required to pay for the equipment already supplied or in the process of being manufactured, plus the price of services rendered up to that date, according to the original report and to the latest monthly progress report accepted by the Buyer. Obviously, if the consequences of force majeure were applied to the Contract, Watkins-Johnson would have had to return to Iran the exorbitant amounts of money it had received for the services and goods not provided. Due to its Americo-Euro-centrist mentality, the majority did not see fit to require any of the American contractors on the IBEX Project to restore to their true owners even a small portion of the millions of dollars worth of assets that were plundered from the oppressed Iranian nation as a result of the United States Government's aborting of the Project.

G. Exceptio non Adimpleti Contractus ("Exceptio")

77. The first part of the majority's Reasons for the Award, wherein it attempts to justify Watkins-Johnson's breaches of the Contract and to relieve it of responsibility for the consequences thereof, can be analyzed under this heading, particularly in view of footnotes 13 and 14 to the Award, which imply that since the Buyer refused to pay for the goods, or to give assurances that he would do so, the Seller was entitled to refuse to deliver those goods.

I am unable to concur in the majority's finding; rather, I believe that Watkins-Johnson was continually in search of some pretext for taking improper advantage of the

disorder and upheavals brought about in the Iranian Army upon the onset of the Revolution. It is the Respondent that could have resorted to the principle of Exceptio, and not the Claimant, who had acted in bad faith and in breach of contract. Such a right has an entirely specific application in connection with synallagmatic contracts whereby both parties have undertaken reciprocal obligations, and it "entitles either party to the transaction to refuse to deliver the object of his obligation until the other party fulfils his own obligation," because it derives from the reciprocity intended in that transaction; moreover, "each of the transacting parties gives possessions and assumes obligations in exchange for the possessions given, and the obligations assumed, by the other party." It is, therefore, clear that the right to invoke the principle of Exceptio accrues to both parties to a contract (here, the Buyer and Seller), and for this reason it is said that someone who fails to fulfil his own obligations cannot demand that the other party fulfil his.[84]

78. In the instant Case, the majority should have made clear which of the transacting Parties was to perform on its obligations first. Only in one sentence of paragraph

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[84] Article 377 of the Iranian Civil Code; Article 371 of the Iranian Commercial Code; Dr. Sayyed Hasan Emami, op cit in footnote 47, p. 458; Prof. Dr. Katoozian, op cit in footnote 55, para. 98; Prof. Dr. Sayyed Hossain Safa'i, op cit in footnote 47, p. 287; also Cheshire, pp. 515-520; Chalmers, pp. 175-176; Trietel, pp. 578-579; Calamari & Perillo, pp. 457-458; Corbin, p. 671; Williston, Sections 817, 827 893 (op cit, in footnote 55, supra). See also Mazeaud & Chabas, Lecons de Droit Civil, T.II vol. 1 (1978) No: 1127; and Weill et Terre, Precis de Droit Civil, Les Obligations (1980), No:474. This rule, which has long been recognized under the heading of "exceptio non adimpleti contractus," is also at the present time being made the object of efforts to develop uniform and standard legal institutions and codes, among which can be mentioned the UN Convention on Contracts for the International Sale of Goods (Article 71), and the United States Uniform Commercial Code (Section 2.609).