IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

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** SEPARATE OPINION of _____

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** DISSENTING OPINION of Mosseo Holtzmann and Allison

- Date 25 Nov 91

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL
«نسخه برابر اصل»

CASES NOS. A3 and A8
FULL TRIBUNAL
DECISION NO. DEC 100-A3/A8-FT

MINISTRY OF NATIONAL DEFENCE
OF THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA and
BELL HELICOPTER TEXTRON CO.,
Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
DATE 25 NOV 1991
تاریخ ۱۳۷۰/۹/۴

DISSENTING OPINION OF HOWARD M. HOLTZMANN AND RICHARD C. ALLISON

1. One of the Respondents in this Case, Bell Helicopter Textron Co. ("Bell"), was required to remain on the Tribunal's docket for over nine years, and to incur legal expense, despite the fact that it was clear to all concerned that the Tribunal had no jurisdiction over the claims against it. The fault for causing Bell to incur these expenses lies with the Ministry of National Defence of the Islamic Republic of Iran ("Iran") for pursuing jurisdiction well past the point of reason. Yet, by its decision the Tribunal has determined that it is Bell and Bell alone that must bear these costs. Not only is this result unfair, it is inconsistent with the Algiers Accords and with the Tribunal's precedents in identical cases. Accordingly, we respectfully dissent.

I. THE ALGIERS ACCORDS

2. The principal objection to the Tribunal's decision is that it departs from the principle incorporated in the Algiers Accords that the costs of arbitration shall be awarded to a successful party. See Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. at 329 (Separate Opinion of Howard M. Holtzmann, concurring in award). The Claims Settlement Declaration, which established the Tribunal, provides that "the Tribunal shall conduct its business in accordance with the arbitration rules of [UNCITRAL] except to the extent modified by the Parties or by the Tribunal." The Tribunal adopted the UNCITRAL Rules governing legal expenses in all relevant respects. Specifically, Article 38, paragraph 1, of the Tribunal Rules provides that the Tribunal

> shall fix the costs of arbitration in its award. The term "costs" includes . . . . (c) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.

Article 40, paragraph 2, of the Tribunal Rules states:

> With respect to the costs of legal representation and assistance referred to in article 38, [paragraph (c)], the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. These Rules require the Tribunal to consider various factors in determining whether and to what extent a successful party is entitled to receive its legal fees and expenses. See also P. Sanders, Commentary on UNCITRAL

Arbitration Rules, Yearbook of Commercial Arbitration, Vol. II, at 172, 216 (1977). The party seeking such costs must establish that it claimed those costs during arbitration, that the legal fees and expenses requested were reasonable under the circumstances, and that there are no other circumstances in the case that make it reasonable to apportion these costs between the parties. Bell has easily met all elements of the test.

4. First, there is no doubt that Bell demanded such costs in the arbitration. It requested costs as part of each of its filings before the Tribunal, and finally when Iran requested to withdraw its complaint, Bell again asked for costs.

5. Second, the relatively modest legal expenses requested by Bell seem reasonable by any standard previously adopted by this Tribunal. Iran sought to hold Bell liable for nearly U.S.$4 million in this Case, and Bell remained under the shadow of that liability until July 29, 1991, when Iran finally withdrew this action. Considering the sum involved, it was not unreasonable for Bell to hire an experienced law firm to represent it. The only question is whether the services provided by the firm were necessary and its charges reasonable. Bell filed a 14-page brief, a motion to cancel the hearings, a letter responding to the claims of Iran, and two responses to orders of the Tribunal. Every one of the positions advanced in those filings was ultimately adopted by the Tribunal: jurisdiction was rejected, the hearings were canceled, and Iran's objections were denied. Accordingly, it cannot seriously be argued that Bell's attorneys engaged in frivolous or unnecessary actions.

6. The Tribunal's decision suggests that Bell somehow acted hastily in employing lawyers, because the Tribunal rendered its decision in Case No. A2 after the Claim had been filed. The Tribunal decision in Case No. A2 recognized

that the Tribunal had no jurisdiction over claims by a government against a national of the other State. The Tribunal now appears to imply that the decision in Case No. A2 should have been sufficient to convince Bell that it was not necessary for it to retain counsel. This implication is wrong both as a matter of logic and of experience. As a logical matter, we find no particular relevance to whether the decision in Case No. A2 was rendered before or after the Statement of Claim in this Case. The important consideration is not when the Statement of Claim was filed but when and why Bell was forced to incur legal expenses. Bell did not incur any legal fees until after Iran filed additional pleadings in support of its claim, all of which were submitted after the decision in Case No. A2 was rendered.

7. The Tribunal's suggestion also fails when one reviews the facts of this Case. Bell did not act hastily. Rather, it reasonably assumed that it could avoid all legal fees by giving the Tribunal time to dismiss the claim in light of Case No. A2. Bell remained unrepresented while the United States twice requested that the Tribunal comply with its own decision in Case No. A2. Iran objected to both U.S. filings, insisting that the claims were properly before the Tribunal. It was only at this point -- when Bell realized that Iran intended to pursue these claims despite the Tribunal's decision in Case No. A2 -- that Bell obtained legal assistance. If there were any doubt that Bell was justified in taking this step, the Tribunal removed it by accepting three more pleadings from Iran in the next twelve months, and by specifically inviting Bell to submit a brief on the issues raised.

8. To suggest now that the retaining of counsel was unnecessary ignores the Tribunal's own treatment of this Case for the past nine years. The Tribunal cannot legitimately invite parties to comment on filings and

require them to endure protracted litigation, without recognizing that they will incur legal expenses in the process. Because of Iran's action, Bell had no choice but to obtain legal representation when it did. Bell faced substantial financial exposure under this claim: U.S. $3,987,776.00 in damages. Notwithstanding the large sum involved, Bell showed considerable restraint. It waited a full year after the claim was submitted before retaining a law firm -- and even then it did so only in response to the persistence of Iran and the invitation of the Tribunal to submit a brief.

9. Moreover, the cost of those services was reasonable under any commercial test recognized by the Tribunal. The law firm's fees were less than those awarded under almost identical circumstances in Cases Nos. B59 and B69, even though this Case went on considerably longer than did Cases Nos. B59 and B69. The Ministry of National Defence of the Islamic Republic of Iran and The Government of the United States of America, et al., Award No. 247-B59/B69-1 (15 Aug. 1986), reprinted in 12 Iran-U.S. C.T.R. 33. Presumably, the lower cost reflects the fact that Bell filed fewer documents and thereby deliberately kept its legal costs to a minimum. The reasonableness of these charges is further confirmed by Bell's payment of them. "The fact that the Claimant appears to have paid the invoices from its own pocket not knowing whether it would be reimbursed for such fees by the Tribunal's award, corroborates that the amounts were reasonable." See Sylvania Technical Systems, supra, 8 Iran-U.S. C.T.R. at 336 (Separate Opinion of Howard M. Holtzmann, concurring in judgment). It is implausible for the Tribunal to suggest that it is somehow costless to file a "short brief on jurisdiction, and . . . one two-page and two one-page letters." All legal services cost money, and rarely can the value of a service be measured by the weight of the paper on which it appears.

10. Third and finally, there are abundant reasons to award costs in this Case. Iran filed this claim and aggressively pursued jurisdiction despite being aware that the Full Tribunal in Case No. A2 squarely rejected jurisdiction over such claims. Bell was forced to endure nine years of litigation under the shadow of a U.S. $4 million claim because of this behavior. As the Tribunal noted in Cases Nos. B59 and B69, it is entirely appropriate to award fees to a U.S. national who has been "constrained to take part in proceedings" after the rendering of the decision in Case No. A2 eliminated any plausible ground for jurisdiction.

11. Therefore, by any previously applied standard, the costs requested were both properly incurred and reasonable under the Tribunal Rules, and the Tribunal's failure to grant Bell's request cannot be justified.

II. TRIBUNAL PRECEDENT

12. Moreover, the Tribunal should have awarded costs here in order to remain faithful to its prior practice. The Tribunal has tried, but has failed, to distinguish this Case from our decisions in Cases Nos. B59 and B69. In Cases Nos. B59 and B69, the Tribunal awarded fees to a U.S. national for expenses it incurred when the Government of Iran continued to pursue claims against it after Case No. A2 had been decided. The present Case is indistinguishable. Just as in Cases Nos. B59 and B69, Bell "has . . . been constrained to take part in the proceedings . . . ." The fact that the Claim was filed before our decision in Case No. A2 was issued is beside the point. Bell was "constrained to take part in the proceedings" by Iran's post-A2 conduct, and remained "constrained" for as long as Iran persisted in disregard of Case No. A2. The basis for awarding fees is, if anything, even greater here because Iran's refusal to acknowledge Case No. A2 has persisted for nearly 4 years after our decision in Cases Nos. B59 and B69.

13. It makes no sense to claim that this Case must be treated like all others "involving disputes as between the two governments." This is not a case involving a dispute between the two governments; it involves a U.S. national. The basis for assessing costs is no less compelling here than in Cases Nos. B59 and B69. In all of these cases, Iran submitted filings against a U.S. national after our decision in Case No. A2 had already established that the Tribunal lacked jurisdiction to hear such claims. In all of these cases, the U.S. national was "constrained to take part in the proceedings." Accordingly, in all of these cases, the U.S. national should be awarded its reasonable costs.

14. The decision of the Tribunal in this Case is both unfounded and unfair. In denying costs to Bell the Tribunal has acted inconsistently with Articles 38, paragraph 1(c) and 40, paragraph 2 of the Tribunal Rules and has contradicted its own decisions in Cases Nos. B59 and B69. Accordingly, we dissent.

Dated, The Hague
25 November 1991

Howard M. Holtzmann

Richard C. Allison