IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. B/1
FULL TRIBUNAL
AWARD NO. ITL 60-B1-FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

UNITED STATES OF AMERICA;
Respondent.

DISSENTING OPINION OF JUDGE BROWER

I.

1. The evident futility of this proceeding should have dictated its redesign before decision.

2. Doubtless the Parties and the Tribunal acted in good faith when they collaborated to create a formal contentious proceeding addressing

> the question of whether claims for non-receipt of items sold under [Foreign Military Sales] cases at issue are barred unless notice was given within one year from the date of passage of title or billing, whichever, is later under Article B(6) of the General Conditions of the Letters of Offer and Acceptance.

When, however, the Parties later agreed that the answer to this question was "Yes," the proceeding constructed around it necessarily became moot.

3. This proceeding then should have been restructured to focus on what in the meantime had emerged as the issues truly in dispute. Instead, the Tribunal, albeit somewhat hesitantly, has stumbled onward to discuss those issues without pausing to afford the Parties the usual opportunity to submit appropriate memorials elucidating them. The result is an Award which dares not dispose of those issues fully while nonetheless purporting to resolve them in part.

II.

4. This proceeding was initiated to determine whether the contractual one year limitation for submission of claims under the United States Foreign Military Sales program applies "only for shortages of specific items of equipment delivered to Iran within a box, but not for entire shipments which are never received." (Respondent's Memorial at 20.) Stated differently, the question posed was whether that limitation could be invoked when Iran failed to receive even a single rifle of 100 ordered as well as when some but not all of them arrived. The pertinence of this question was evident from the text of Article B6 produced by Respondent (effective from 1 August 1977), which referred particularly to "shortages":

> B. THE PURCHASER
>
> . . .
>
> 6. Shall accept title to the defense articles at the initial point of shipment . . . . Purchaser shall be responsible for in-transit accounting and settlement of claims against common carriers. Title to defense articles transported by parcel post shall pass to the Purchaser on date of parcel post shipment. Standard Form 364 shall be used in submitting claims to the USG for overage,

> shortage, damage, duplicate billing, item deficiency, improper identification or improper documentation and shall be submitted by Purchaser promptly. Claims of $100.00 or less will not be reported for overages, shortages, or damages. Claims received after one year from date of passage of title or billing, whichever is later, will be disallowed by the USG, unless the USG determines that unusual and compelling circumstances involving latent defects justify consideration of the claim. (Emphasis added.)

In this context it was reasonable to conclude that the question put to the Parties related only to tangible articles of defense equipment and not also to services or other charges. The Memorial submitted by Respondent on 9 August 1984 was so limited.[1]

5. The subsequent Counter-Memorial of Claimant, filed seven months later, on 4 March 1985, went well beyond the question thus posed, however, and discussed at length the further, far broader issue of whether the one year bar applies to the provision of services and the levying of various charges. Indeed, it had the temerity to restate the issue as follows:

> [W]hether Iran's Claim 3 for defence services and defence articles billed in excess of those

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[1]The Order of 16 May 1984 initiating this proceeding required the Respondent to file its Memorial first. That defense "articles" rather than defense "services" and other "charges" were intended to be the subject of this proceeding is further confirmed by paragraph 3 of that Order, which, in ordering the filing of other materials in this Case, referred to "items delivered and shipped," or "delivered and not shipped," and provided that "the words 'delivered' and 'delivery' are to be interpreted in accordance with their ordinary meaning." This belies the statement in the instant Award (at para. 34) that "whether the bar to claims not raised within one year applies to services would seem to be included in" the question posed because the "word 'items' used by the Tribunal in the question which is the subject of this Award is a term used in the contracts for both defense articles and defense services . . . ." (Emphasis added.)

> rendered or delivered, or for other billing discrepancies, comes within the purview of General Condition B6 on the one-year time limitation or not?

In the absence of any reaction from the Tribunal, the Respondent on 5 August 1985, just a month before the Hearing, while seeking leave to file further documents, pointedly noted the obvious:

> This [Claimant's Memorial] raises many points (such as applicability of the limitation to services and other financial charges) on which the Tribunal has not requested briefing, which have therefore not been briefed by the United States, and which are not part of the question set for hearing. While these issues may well be appropriate for briefing at some future date, they cannot properly be addressed at the hearing [scheduled and held 3 September 1985].

6. In that submission Respondent disclosed for the first time that prior to 1 August 1977 two other contract forms (dating from 1969 and 1973) were in use, in both of which Article B6, unlike the 1977 version, included express reference to "non-receipt" as well as "shortage," a fact of material relevance to the question posed by the Tribunal as the basis of this proceeding. The Claimant, while filing objections to that submission, on 30 August 1985, nonetheless finally joined Respondent in answering "Yes" to the question around which the proceeding had been centered:

> . . . [I]t is not contested that if certain items are missing from receipt documents either in part or in whole, whether be it called shortage, or non-receipt of items, are subject to B6.

Claimant proceeded then to shift the debate to one over whether claims for non-receipt were barred absent any evidence of shipment other than a quarterly billing.

7. Thus just four days before the Hearing the Parties agreed on the answer to the question they had assisted the

Tribunal to formulate more than fifteen months earlier. Despite the fact that the orientation of this proceeding thus changed radically, further written submissions were not ordered. In addition, the reoriented proceeding was expanded de facto at the Hearing and in the instant Award to embrace the applicability of the one year limitation to defense services and other charges, a subject on which one of the Parties never has been permitted an opportunity to file a relevant memorial.

III.

8. The mischief inherent in attempting to decide issues not submitted to the usual adversary process is evident in the instant Award. To begin with, the first paragraphs of the dispositif restate two self-evident propositions on which the Parties agree, i.e., that the one year bar applies to "defense articles . . . actually shipped" and that "a shipping document which shows receipt . . . shall . . . constitute conclusive evidence of such shipment." After that, however, the dispositif, as explicated by the preceding text of the Award, becomes determinedly equivocal. It ventures a ruling that a "delivery listing, by itself, does not constitute such [conclusive] evidence" of shipment, although, admittedly, such a listing "(a document attached to each quarterly billing statement for each contract) . . . puts the purchaser on notice that the seller believes the identified article has been shipped, . . . may be relevant to the burden of proof," and with "other documents or combinations of documents may suffice . . . ." (Emphasis added.) (Paras. 31, 33.) The dispositif goes on to conclude that "the language of Clause B6" itself does not cover defense services and other charges," while confessing (para. 35) that "the Tribunal is thus far uninformed" and therefore "does not reach [the] question" of "[w]hether in practice the Parties have considered the bar . . . to apply also to claims for services and other charges . . . . "

(Emphasis added.) Finally, the Award gingerly concludes, "it appears to the Tribunal that the above conclusions apply also" to the 1973 version of Article B6 belatedly submitted by the Respondent, although the Tribunal (para. 36) is "not prepared to make any holding with respect to the 1969 version . . . . " (Emphasis added.)

9. The "guidance" thus offered by the Award is of little more use to the Parties than is an astrolabe to an astronaut.

IV.

10. The proper course would have been for the Tribunal to reformulate the issues and order further memorials before proceeding to an Award. To have advanced as the Tribunal has done leaves the Parties on the one hand with less guidance ultimately than could have been provided and on the other hand with partial directions whose tentative character greatly limits their utility. The resultant dissipation of judicial resources is also regrettable. The dissent to which one is thus compelled is registered in the hope that in the future the Tribunal will act more wisely to enhance its ability and that of the Parties to deal efficiently with such a massive claim.

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