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

THE UNITED STATES OF AMERICA,
Respondent.

DISSENTING OPINION OF JUDGE HOLTZMANN

I.

Case No. B-1 is the largest case before the Tribunal -- largest both in amount claimed and in number of factual issues. Faced with so massive and complex a task, the Tribunal should seriously consider procedures to simplify adjudication. Paragraph 5 of the Tribunal's Order of 16 May 1984 was designed to serve that purpose. It required the Parties to submit memorials on the question "whether claims for non-receipt of items sold under [the Foreign Military Sales contracts] at issue are barred unless notice was given within one year from the date of passage of title or billing, whichever is later, under [Clause B.6.] of the General Conditions of the Letters of Offer and Acceptance." A

finding that the time bar applies would eliminate a significant number of factual disputes, thereby facilitating the resolution of the Case.

The Case was simplified to a degree when the memorials submitted by the States Parties revealed that they do not dispute that the time bar of the General Conditions applies to sales of defense articles in the circumstances described in the Tribunal's Order. That rendered pointless the proceeding instituted by the Order. At that time the Tribunal should have simply recorded the Parties' common ground and then framed new procedures for dealing with issues that had emerged as to what evidence is necessary to demonstrate that the time bar applies to a particular transaction. Instead, the Tribunal sets forth several admittedly incomplete propositions which, while intended to provide "guidance to the Parties", in actuality raise more questions than they answer. The Tribunal prescribes no procedures to elucidate the unanswered questions, except to indicate that it prefers to consider those issues in the context of "actual disputes as to shipment of particular articles." The delphic character of the Tribunal's statements complicates further proceedings at a time when we should be trying to clarify them.

II.

To the extent that the Interlocutory Award answers questions fully, it merely restates the obvious. For example, it holds that where it is established that defense articles were actually shipped, "Clause B.6. of the 'General Conditions' bars any claim not raised within one year after the date title to the article in question passed or the date of billing, whichever is later." That is now common ground between the Parties. The Tribunal also holds that a "shipping document which shows receipt by a carrier, freight forwarder or authorized representative of the purchaser and

which identifies the article has having been shipped shall, by itself, constitute conclusive evidence of such shipment". That point, too, is undisputed.

The Tribunal declines to indicate, however, what evidence of shipment besides a shipping document will trigger the time bar. This is a matter of considerable practical importance. The United States has explained that thousands of receipts for separate shipments may not have been preserved over the many years involved or may be very difficult to find, because there appeared to be no need to retain receipts once the one-year period prescribed in the General Conditions had passed. However, contemporaneous documents prepared in the ordinary course of business that summarize shipments in considerable detail, such as a delivery listing, may well be available.

The Interlocutory Award holds that a delivery listing, "by itself," does not constitute conclusive evidence of shipment. By noting, however, that the notice to the purchaser provided by a delivery listing "may be relevant to the burden of proof," the Tribunal suggests that in the absence of persuasive rebuttal evidence, a delivery listing will suffice to establish shipment. Moreover, by including the words "by itself" in its holding, the Tribunal clearly indicates that there are other circumstances or documents that in combination with a delivery listing will conclusively establish shipment so as to trigger the time bar. But how are the Parties to know what those other documents or circumstances are? For example, it appears that, in practice, after the United States presented a delivery listing showing shipment and a bill, it would charge the amount billed against the Trust Fund that Iran had established as a source of payment for such bills. Iran had an interest, of course, in not permitting its Trust Fund to be charged for amounts not shipped, because it would be called upon to replenish the Trust Fund when depleted, failing which

further shipments would halt. In these circumstances, would the delivery listing, in combination with Iran's having allowed payment for listed items to be made from its Trust Fund, be sufficient to establish shipment for the purpose of triggering the time bar?

The Interlocutory Award should have pointed to some way to resolve these questions. One method would be to pose these questions in an Order and establish a schedule for briefing and arguing them. Another way would be to identify one or more actual sales as to which there is a delivery listing showing shipment in combination with a contemporaneously uncontested charge against the Trust Fund, and then to arrange for briefing and arguments as to that transaction. That would give the Tribunal the opportunity to decide the issue of what evidence suffices to prove shipment, as well as related questions of burden of proof, in the context of a concrete dispute about particular articles. The decision would provide a helpful guide to the Parties and to the Tribunal itself. The Tribunal followed just such a procedure in examining nine typical forum selection clauses in order to facilitate the determination of recurrent issues.[1] The Tribunal's successful experience in resolving the forum clause issues is a useful example of efficient case management.

III.

Perhaps because it is premature, the Tribunal's holding with respect to defense services is equally incomplete and

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[1] See Interlocutory Awards in Case Nos. 6, 51, 68, 121, 140, 159, 254, 293 and 466, all filed 5 November 1982, reprinted in 1 Iran-U.S. C.T.R. 236. For a discussion of the underlying procedure, see the Concurring and Dissenting Opinion of Howard M. Holtzmann with Respect to Interlocutory Awards in Nine Cases Containing Forum Selection Clauses, reprinted in id. at 284-85.

inchoate. It was reasonable for the United States to believe that the Tribunal intended to limit the present proceeding to sales of defense articles. Accordingly, it dealt in its memorial, submitted before Iran's, only with defense articles, making but incidental mention of defense services.[2] Iran, in contrast, expanded the Order to cover sales not only of defense articles but also of defense services. The United States then suggested, albeit somewhat belatedly, that the question of the applicability of the time bar to defense services not be decided until all aspects of it had been fully briefed by both sides. That would have been helpful to the Tribunal, for not only is the entire issue largely unbriefed by the United States at this stage, but Iran also has submitted nothing concerning the practice of the Parties which, as the Tribunal acknowledges, may be of decisive importance. Consequently, the Tribunal is forced frankly to state that it "is thus far uninformed" as to "[w]hether in practice the Parties have considered the bar of claims not received within one year to apply also to claims for services and other charges". Moreover, neither Party has yet briefed the question whether all relevant documents read as a whole, in contrast to Clause B.6. interpreted in isolation, might indicate that defense services are also within the ambit of the time bar provisions.[3] In these circumstances, the Tribunal has limited

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[2]As used in this opinion, the phrase "defense services" includes not only services but also certain other charges, such as administrative, accessorial, and termination charges applicable to the particular sale.

[3]For example, Clause B.3.f., which the Tribunal does not mention, expressly refers to Clause B.6., and appears to relate both to articles and services. Clause B.3.f. and the preceding subparagraphs B.3.a. through e. set forth various payment terms and mechanisms expressly applicable to both articles and services. The final sentence of Clause B.3.f. provides that "[w]hen appropriate, Purchaser will request adjustment of any questioned billed items by subsequent

(Footnote Continued)

its holding to a statement that defense services "are not covered by the language of Clause B.6." Again, the Award states the obvious, for the word "services" never appears in that Clause. Again, it is incomplete and unenlightening, because the language of that particular Clause may well need to be interpreted in the light of other provisions and of the Parties' conduct.

In my view, it would have been preferable for the Tribunal to have taken steps to secure the necessary information and views of the Parties before expressing any opinion as to whether the time bar provisions of Clause B.6. apply to claims concerning defense services.

IV.

Noting that the United States wrote the time bar provisions of the General Conditions, the Tribunal finds occasion to state:

> If the seller wishes to create by such a clause an absolute bar to the claims for non-receipt of items that are not asserted within a year, it could be expected to do so clearly. A failure to do so clearly resulting in an ambiguity of such a clause would have the consequence that the buyer could be expected to rely on that one of several possible interpretations which would be in its favor, and such ambiguity could be expected to give rise to difficulties in enforcement.

This analysis is inappropriate in the circumstances of this Case. Evidence before the Tribunal shows that the United States took extensive steps to dispel any possible misunderstanding concerning the meaning of Clause B.6. It published manuals for customers that described the procedures for making claims under Clause B.6. and explained the

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(Footnote Continued)
submission of required discrepancy reports in accordance with paragraph B.6. below."

consequences of the time bar if such claims were not made within one year; it conducted classes for customers on this subject; and it maintained an expert staff in Tehran to answer any questions. Against that background, it is inappropriate to suggest, as does the Tribunal, that Iran is in a position "to rely on that one of several possible interpretations which would be in its favor."

V.

The Interlocutory Award promises "guidance", but provides only confusing half-answers. It fails to establish any procedures for the sound management of this complex Case. The Tribunal owes it to the States Parties to find better ways to conduct its business.

I respectfully dissent.

Dated, The Hague,
4 April 1986

Howard M. Holtzmann