IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. B55
CHAMBER ONE
AWARD NO. 457-B55-1

TELECOMMUNICATIONS COMPANY OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.

SEPARATE OPINION OF HOWARD M. HOLTZMANN

I. INTRODUCTION

1. The Award in this Case makes two fundamental errors on points of contract law. First, as to one of the transactions from which this claim arises, the Award fails to recognize that a contract is formed when a buyer offers to purchase services on specified terms and the seller indicates its acceptance by providing those services. The majority's failure to recognize this principle as to one transaction is particularly curious because, as to another transaction, the Award appears to hold that identical conduct by the same buyer and seller did result in formation of a contract. Secondly, the Award propounds a theory of contractual liability, unknown in any system of law, under which a buyer who receives services that are so defective they cannot be used -- and who so informs the seller -- must nevertheless pay for those services while waiting patiently, but in vain, for the seller to cure its defective

performance. For these and other reasons that are explained in detail below, I must dissent from the Award's result with respect to the major parts of this claim. I concur only with the minor section of the Award that correctly dismisses -- for lack of proof -- the request for payment of a small telephone bill in Tabriz. (Award at para. 72.)

2. This Case chiefly relates to two communications circuits -- one a telegraph channel, and the other a telephone line. Both circuits covered the same route from Tehran, Iran to Ankara, Turkey. Their purpose was to link the American Embassy in Tehran to a worldwide defense communications network maintained by the United States. The United States in 1971 requested the Telecommunications Company of Iran ("TCI")[1] to provide the telegraph channel and, in 1973, sought a telephone line to replace it. Thus, the events at issue in this Case occurred long before the Islamic Revolution and are unrelated to it.

II. THE TELEGRAPH CHANNEL

3. The telegraph channel was put into operation in December 1971. There are two disputes regarding payment for this channel: (1) whether the telegraph lease granted the United States a 25 percent discount on the rental charges and, (2) whether the United States is entitled to a rebate for periods when the circuit was not in service (i.e. during

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[1] TCI, the Claimant in this Case, is the successor to the Ministry of Post, Telegraph and Telephone ("PTT"), which was the contracting party for the telephone and telegraph leases that are at issue. Although the Award refers alternately to "TCI" and "PTT," for the sake of simplicity I will use only "TCI" to designate both entities.

"outages").[2] The Award holds that the United States has no contractual right to the 25 percent discount and that it should not be credited for outages because it did not properly report them. Both conclusions are wrong.

A. The 25 Percent Reduction in Rental Charges

4. I turn first to the contractual right of the United States to receive a 25 percent discount. The record demonstrates that this discount, along with the other terms of the telegraph lease, were worked out at a meeting in Tehran on 9 November 1971 between a representative of TCI and Mr. William Hughes of the United States Defense Commercial Communications Office-Europe ("DECCO-EUR").[3] Mr. Hughes immediately followed up this meeting by writing a letter to TCI on the same day confirming the terms that had been discussed at the meeting, including the 25 percent discount. That letter, a copy of which has been submitted in evidence, constituted DECCO-EUR's formal offer to contract. The letter closed by noting "your acknowledgment of this letter will constitute the formal basis for the services provided to the U.S. Government." TCI did not give a written reply, but it in effect acknowledged DECCO-EUR's letter by supplying within a month the telegraph channel that was the subject of the letter. Moreover, as Mr. Hughes testified at the Hearing, when he inquired about the lack of

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[2]The United States has at all times been willing to pay 1,053,339.50 Rials as the cost of the telegraph channel, which is calculated on the basis of the 25 percent discount and includes a rebate for the outages.

[3]The discount was part of an international rate structure. DECCO-EUR explains that it first learned that this discount was available during its negotiations for the same telegraph channel with the Turkish Ministry of Post and Telegraph. Apparently, the discount was offered to encourage use of a new communications system, known as CENTO, that linked Pakistan, Iran and Turkey.

a written answer, he was told that none was needed and that TCI would install the channel -- which it did.

5. Under recognized principles of contract law, TCI's actual performance suffices to evidence its acceptance of the offer, including the formula for the 25 percent discount that was a material condition of that offer. Nevertheless, the Award finds that "the United States has failed to demonstrate . . . that [TCI] actually agreed to the terms set out in the 9 November 1971 letter." (Award at para. 66.) The majority concludes that TCI did not accept the 25 percent discount because "there was never a formal acknowledgement by [TCI] of the terms laid down in the 9 November 1971 letter." (Id.)

6. The majority's conclusion is incorrect as a matter of law. Although the November 1971 letter requested "an acknowledgement," there is no legal requirement that this be in writing. In the leading treatise on contract formation under both the civil and common law, Professor Schlesinger and his colleagues point out that "[a]ll systems . . . agree that a [contractual] offer calling for a promise is validly accepted by complete performance on the part of the offeree if such performance conforms to the terms of the offer." 1 R. Schlesinger et al., Formation of Contracts 142 (1968). Thus, by providing a telegraph channel along the precise route that had been requested, TCI accepted DECCO-EUR's offer to contract on the terms set forth in the November 1971 letter. I note that Article 193 of the Iranian Civil Code appears to embody this same principle. That statute provides that "a transaction [i.e., a contract] may be effected by an act which indicates intention and agreement, such as taking delivery or handing over." Art. 193, Iranian Civil Code (M. Sabi trans., 1973, emphasis added). When TCI "hand[ed] over" the telegraph channel, it "indicate[d] . . . agreement" with the terms of DECCO-EUR's offer. Had TCI wished to furnish the telegraph channel on different terms,

it was free to make that clear before the channel was placed in service. Since it did not do so, TCI's decision to furnish the telegraph channel can only be construed as an acceptance of the contractual offer that was then outstanding.

7. In depriving the United States of the 25 percent discount, the Award states that "Iran denies that it received th[e November 1971] letter." (Award at para. 66.) Of course, if TCI never received the letter, the Tribunal could not find that TCI was accepting the letter's terms when it made the telegraph channel available to DECCO-EUR. It is noteworthy, however, that the Award's statement on this point is so carefully qualified. The majority stops short of holding that TCI failed to receive DECCO-EUR's 1971 letter; it merely repeats TCI's denial. There are good reasons for the majority's reticence, for the evidence that TCI did receive this letter is persuasive and is based on the first-hand knowledge of a DECCO-EUR official. By contrast, TCI's denial that it received DECCO-EUR's letter consists of nothing more than an assertion by its counsel in this Case; no statement was presented on this subject from any TCI official.

8. The information regarding the November 1971 letter has been furnished by Mr. William Hughes, the former Deputy Chief of DECCO-EUR, who appeared at the Tribunal's Hearing in this Case. It was Mr. Hughes who served as DECCO-EUR's representative at the meeting of 9 November 1971 and who that day wrote the letter to TCI concerning the telegraph lease. At the Hearing, Mr. Hughes confirmed that his letter summarized the terms of the lease that had been discussed at the meeting. He further stated that the issue of the 25 percent discount had been specifically raised with TCI's representative -- Mr. K.H. Parsa -- during the meeting. According to Mr. Hughes, when the issue was thus broached at the meeting, Mr. Parsa left the room to ascertain whether

TCI had agreed to such a discount. Mr. Parsa then returned and announced that Iran had agreed with Turkey to provide the discount. Mr. Hughes further stated that he wrote his letter immediately after the meeting and that he then presented the letter to Mr. Parsa.

9. Mr. Hughes' statement that he presented DECCO-EUR's letter to the responsible official at TCI directly contradicts the blanket denial by TCI's counsel that it received the letter. Having witnessed Mr. Hughes' demeanor at the Hearing and his detailed responses to questions from the arbitrators and from opposing counsel, I conclude that his account of the negotiations for the telegraph channel is credible. TCI presented no evidence to refute Mr. Hughes' account of the negotiations. Moreover, Mr. Hughes' account is supported by the subsequent course of events in this Case. It is clear that TCI received a copy of the 9 November 1971 letter in 1974; TCI did not then object -- nor did it assert at any other time prior to these proceedings -- that it had not received the original letter.

10. The majority remains disturbingly silent about this evidence. The Award does not even mention Mr. Hughes' statements at the Hearing concerning the 9 November 1971 letter, much less assess their credibility. Nor does it comment on TCI's revealing failure to object, when it received a copy of the letter in 1974, that it had never received the original. The majority simply recites TCI's assertion that it did not receive Mr. Hughes' letter and then turns to other matters. (Award at para. 66.) This treatment of the issue is wholly inadequate and does not fulfill the Tribunal's judicial duty to "determine the weight of the evidence offered." (Tribunal Rules, Art. 25, para. 6.)

11. If, as the majority believes, the November 1971 letter did not give rise to a contract for a telegraph channel

(either because it was never received or because it was not properly "acknowledged"), then the question arises whether a contract for the telegraph channel was ever formed. The question is not an idle one. As the Award correctly notes, the Tribunal has no jurisdiction over this portion of TCI's Claim unless there was a "contractual arrangement" for use of the telegraph channel. (Award at para. 61; see Claims Settlement Declaration, Art. II, para. 2.) The Award announces that "the Tribunal is satisfied that the lease of the telegraph and telephone circuits . . . constitute 'contractual arrangements'." (Award at para. 62.) But the boldness of this declarative sentence cannot disguise the absence of legal analysis. The majority never explains when or how the "contractual arrangement" for the telegraph channel was formed.

12. If the letter of 9 November 1971 did not lead to the formation of a contract, it is possible that the Parties' meeting on the same day did. Initially, the majority seems inclined to adopt this solution, for it acknowledges that the Parties "reached agreement upon a leasing arrangement for the telegraph circuit" during the November 1971 meeting. (Award at para. 3.) Indeed, at that meeting, the Parties agreed that the telegraph channel would be leased at a 25 percent discount. This is confirmed by the subsequent letter and is even conceded by the majority. (Award at para. 66.) In the end, however, the majority finds reasons why the agreement reached at the meeting did not constitute a "contractual arrangement" for the telegraph channel. First, the Award holds that TCI's consent to the discount during the meeting was "informal" and "did not suffice to bind Iran under the terms of the 9 November 1971 letter." (Award at para. 66.) Secondly, the Award says there is a "question" whether TCI's representative at the November 1971 meeting "was authorized to commit [TCI] in that manner." (Id.) Here again, as with its discussion of whether TCI received the November 1971 letter, the Award is unwilling to

find facts and instead simply recites an allegation. The majority does not hold that TCI's negotiator lacked authority; it merely points to a "question" in that regard that was raised by TCI.

13. Thus, in the majority's view, neither the meeting between the Parties nor DECCO-EUR's subsequent letter led to the formation of a contract for the telegraph channel. Given this complete rejection of the relevant evidence, one wonders how the majority can remain "satisfied" that there was a "contractual arrangement" for the telegraph circuit, such that the Tribunal has jurisdiction. The Award surmounts this considerable obstacle by inventing an evidentiary presumption. The majority finds that "normally" the "customer accepts the usual rates of the supplier." (Award at para. 65.) The Award therefore presumes that the Parties agreed to a "usual" rate that excluded the 25 percent discount, although the majority still does not identify when or how TCI and DECCO-EUR reached this agreement.

14. The presumption that "the customer accepts the usual rates of the supplier" flows from the majority's view that all telegraph channels are the same. That view is unjustified in this Case because it is so clearly at odds with the proven facts. As the record demonstrates, this Case does not involve the typical customer who simply asks the local office of the telephone company to supply a line to his home or business. The arrangement for a telecommunications channel connecting the American Embassy to a global defense network was not such a routine undertaking. The United States first inquired about the possibility of such a connection in 1970 and was informed that Iran's PTT "could not provide any telephone channels via CENTO system because of the lack of technical facilities." (Letter of 28 January 1971 from Major Roy Guimont, Chief of DECCO-EUR, to Iran's PTT.) Subsequent

inquiries yielded a more positive response and led to the meeting of 9 November 1971. As the majority acknowledges, "[i]n the early 1970's, DECCO-EUR commenced negotiations with Iranian authorities to arrange for telecommunications services." (Award at para. 2, emphasis added.) The Award further recites that, at the 9 November 1971 meeting, TCI and DECCO-EUR representatives "reached agreement upon a leasing arrangement for the telegraph circuit." (Award at para. 3.) Indeed, Mr. Hughes' letter of the same day recited that the Parties had agreed at the meeting to telegraph charges that were "based on the special rate formula." Given this evidence that the telegraph channel served a unique function, that it used specialized CENTO facilities, and that the parties entered into substantial negotiations over its lease, I do not see how the majority can simply presume that TCI's "usual" rates applied.

B. The Reduction to Compensate for Outages

15. There is one further issue concerning the telegraph lease on which I believe the majority errs. The United States contends that the telegraph channel was out of service for substantial periods of time during the two years that it was in use. Indeed, when DECCO-EUR asked TCI to correct its first invoice for the telegraph channel, DECCO-EUR submitted a list of the number of hours in each month when service was disrupted and for which a rate adjustment was sought. In total, DECCO-EUR sought a rebate for 8,200 hours. As the Award notes, guidelines promulgated by the International Telegraph and Telephone Consultative Committee ("CCITT") provide for a refund of charges whenever a circuit is out of service for three or more hours at a time. (Award at para. 68.) DECCO-EUR referred to these CCITT guidelines in 1972, when it complained about the persistent outages, and again in 1974 when it responded to the first invoice. Moreover, as a matter of basic contract law quite apart from the CCITT guidelines, substantial

outages in a telegraph channel constitute a failure of performance for which some compensation is due to the lessee. See, e.g., Intrend International, Inc. and Imperial Iranian Air Force, et al., Award No. 59-220-2, p. 8 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 110, 114.

16. The Award denies the United States any adjustment in the telegraph charges to reflect these substantial outages. The majority justifies this result as follows:

> the United States [is] not . . . able to claim a rebate because DECCO-EUR failed to report the outages, as required by [CCITT] Recommendation [D-1.]5.1. As explained by Mr. Hughes at the Hearing, DECCO-EUR reported the outages only by telephone to PTT without ever making a request that the fee be lowered or obtaining a promise that a rebate would be granted.

(Award at para. 69.) These premises are both factually and legally inaccurate. In the first place, the majority incorrectly states that DECCO-EUR failed to comply with the terms of CCITT Recommendation D-1.5.1 because DECCO-EUR reported outages by telephone. As even a cursory reading of that Recommendation reveals, outages need not be recorded in writing or by any other mode; the Recommendation simply states that refunds are available if "non-operation of a leased circuit . . . has been reported by the renter." (Award at para. 68.) Moreover, even if there were a requirement that reports be submitted in writing, this would doubtless be satisfied by the letter that DECCO-EUR sent after it received TCI's first invoice. That letter furnished a summary of outages by month and noted that previously "these outages were reported to the PTT Iran CENTO Microwave Technical Department." TCI has presented no evidence that the outages were not reported.

17. The majority's second erroneous premise is that DECCO-EUR reported the outages "without ever making a request that the fee be lowered." Once again, there is no requirement in

the CCITT Recommendation that such a request be made. This is scarcely surprising since the Recommendation itself provides for such a fee reduction once the outages have been reported. Moreover, even if such a request were required, this requirement was surely satisfied by DECCO-EUR's letter protesting the first invoice, which expressly requested that "[r]ebates should be granted in accordance with the C.C.I.T.T. Recommendations." Since the majority is well aware of this letter, it evidently believes that DECCO-EUR was obliged to request rebates at an earlier point -- presumably, when the outages were first reported. There is no legal basis for imposing such an obligation, nor would it be logical to do so. When a customer reports substantial outages and, as here, TCI does not contest them at the time, the customer may reasonably assume -- both because of the CCITT guidelines and as a matter of common sense -- that TCI will make a corresponding adjustment in the next invoice. In such circumstances, the appropriate time for expressly requesting a reduction is when the customer receives an invoice that does not incorporate any adjustments. This is exactly the course of action that DECCO-EUR pursued. Of course, DECCO-EUR's request for a rebate would have been made much earlier had TCI fulfilled its contractual duty to send monthly invoices. However, TCI waited two years to send its first invoice for the telegraph channel; accordingly, DECCO-EUR did not request a rebate until sending its first letter in response to that invoice. To hold -- as the majority does -- that DECCO-EUR forfeited its right to request a rebate by not doing so before it had received even one invoice defies logic and disregards the normal behavior of contracting parties.

18. The last fallacy in the majority's reasoning is its contention that DECCO-EUR cannot seek a rebate because it did not "obtain[] a promise [from TCI] that a rebate would be granted." (Award at para. 69.) The inconsistency in this conclusion is particularly glaring, since the majority states in the same paragraph of the Award that it "assume[s]

. . . that [CCITT] Recommendation 5 . . . grants the user a right to a refund." If the majority is willing to assume that the Recommendation gives a right to such a rebate, it cannot then deny that rebate on the ground that DECCO-EUR failed to secure an independent promise from TCI to honor this right.

III. THE TELEPHONE LINE

19. Two undisputed physical facts must be borne in mind when considering TCI's claim relating to the telephone line: First, it was not an ordinary circuit; and second, it never worked. In order to meet the United States' defense communications needs, the line was required to satisfy a standard for high quality performance (known as the "M-102 standard"), which was established by CCITT and expressly referred to in the contract between the United States and TCI. The telephone line never met that standard and could not be used.

20. The dispute is simple: TCI claims rental for the telephone line, and the United States, understandably, argues that it should not be required to pay when the seller failed to perform. The Award decides the matter in a single terse paragraph. (Award at para. 71.) The majority begins by correctly excusing the United States from paying for the line for the first four months after it was connected in December 1973. Then, without explanation, the majority holds that the United States must pay approximately six months' rent, beginning on the day in April 1974 when the United States formally complained to TCI's Director that the line did not work and extending until the day when the United States finally exercised its right to cancel the contract. In my view, this result is unjustified and without any foundation in contract law.

21. The process by which the Parties arranged for the lease of the telephone line was the same as for the telegraph channel, described earlier. But, in this instance, the Award appears to acknowledge that a letter from DECCO-EUR, requesting the telephone line on certain terms, led to the formation of a contract. For the majority holds that the so-called M-102 standard was an essential term of the telephone lease. And, as I explain in more detail below, the only way that the Tribunal could know that the contract included this term is by recognizing that DECCO-EUR's written offer to contract was accepted by TCI when TCI furnished the telephone line. Such a conclusion is obviously at odds with the Award's prior holding that DECCO-EUR's offer to lease the telegraph channel was not accepted by TCI's performance. While one cannot understand this inconsistency, one can at least be grateful that the majority is correct half the time.

22. The lease for the telephone line was first discussed by representatives of DECCO-EUR and TCI at a meeting held on 12 September 1973. On the same day, the DECCO-EUR representative wrote a letter to TCI, recording the terms discussed at the meeting. Those terms included a requirement that the telephone circuit be "CCITT Recommendation M-102 conditioned." This internationally accepted electronic standard was necessary so that the telephone circuit could transmit both vocal and teletype messages. In the closing paragraph of its letter to TCI, DECCO-EUR stated: "[y]our acknowledgement of this letter will constitute the formal basis for the services provided to the U.S. Government."

23. Apparently, TCI did not acknowledge DECCO-EUR's letter in writing. But TCI did put into operation a telephone line for the route that DECCO-EUR had requested, connecting the American Embassy in Tehran with the defense communications network via Ankara. As I have already explained, under any

major system of law, TCI's action in tendering the requested performance constitutes an acceptance of DECCO-EUR's offer to contract. (See para. 6, supra.) The majority appears to recognize this fact, since it finds that there was an "agreement" between DECCO-EUR and TCI and that "[u]nder the agreement TCI was to provide a service with a specified standard according to C.C.I.T.T. Recommendation M-102." (Award at para. 71.) The only document in the record that "specified" the M-102 standard is DECCO-EUR's letter of September 1973. (Award at para. 40.) One must therefore conclude that, in enforcing the M-102 standard, the majority has relied on TCI's acceptance of DECCO-EUR's written offer.[4] And, the majority correctly finds that TCI "failed to meet th[e M-102] standard in spite of combined efforts of the Parties to solve the technical problems." (Award at para. 71.)

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[4]The majority does not acknowledge its reliance on this reasoning. Indeed, the question of how the Parties formed a "contractual arrangement" for the telephone line is another issue that the Award avoids discussing. The majority suggests that it need not resolve the matter because "there is no dispute between the Parties on the terms of the agreement." (Award at para. 71.) It is far from clear that the Parties do agree on this point. TCI firmly denied any such agreement in its final pleading, stating that DECCO-EUR's allegation that the telephone lease contained the M-102 standard "is contrary to fact and not supported by any document or evidence." The majority's belief that the Parties agree to the terms of the lease must rest, therefore, on inferences drawn from statements by TCI's counsel at the Hearing. But, even if TCI implied at the Hearing that the contract did contain the M-102 standard, TCI can only have reached that conclusion by conceding that it accepted DECCO-EUR's written offer to contract. There simply is no other basis in the record for finding that the Parties' contractual arrangement "specified" the M-102 standard. Thus, the majority cannot avoid finding that TCI accepted DECCO-EUR's offer to contract merely by relying on an admission that TCI may have made concerning the terms of that contract. If TCI agrees that the telephone lease contained the M-102 standard, that only reinforces the conclusion that DECCO-EUR's September 1973 letter led to the formation of a contract for the terms specified in that letter.

24. There is ample evidence to support this finding that the telephone line never worked. A telex that was sent between DECCO-EUR offices in January 1974 reported that, while the circuit "is working within M-102 specifications between Ankara Tech Control and Cento Tech Control in Tehran, tail at Tehran . . . is not now satisfactory." Similar telexes in March and April 1974 recounted in detail the technical tests that had been performed on the line in order to isolate the source of the problem. Those tests confirmed that the local "tail" connecting the American Embassy to the main repeater station in Tehran was creating the trouble.

25. In a letter of 4 April 1974, DECCO-EUR reported to Mr. Hamizadeh, the Director of TCI, that "the user has been unable to pass traffic over [the telephone circuit] because of its poor quality." DECCO-EUR further stated that technical controllers from the United States Army had tried "to work with four different PTT stations" to correct the problem but without success. The letter concluded by requesting Mr. Hamizadeh's "personal intervention to have the faults corrected and the circuit provided in accordance with CCITT Recommendation[] . . . M-102." There is evidence that DECCO-EUR offices exchanged a further letter on this subject in August 1974. Another internal telex in October 1974 recounted that the "circuit was never accepted for service due to sub-marginal quality." Finally, on 7 October 1974, DECCO-EUR again wrote to Mr. Hamizadeh. The letter adverted to the prior correspondence of April, which had informed Mr. Hamizadeh that the circuit "could not be used," and concluded that "as of this date, the status has not changed. Therefore, we hereby cancel our request of 12 September 1973 for provision of the circuit." This evidence that the telephone circuit never functioned is further supported by information presented orally to the Tribunal. At the Hearing in this Case, the former Deputy Chief of DECCO-EUR -- who was in charge of all communications leasing

-- stated that no payments were made to the Turkish PTT for its half of the telephone circuit because the circuit never became usable.

26. Despite this substantial evidence concerning the technical problems in the telephone line and despite the majority's acknowledgement that "it is clear from the evidence that TCI failed to meet th[e M-102] standard" that was required "[u]nder the agreement," the Award directs the United States to pay TCI more than one and a half million Rials for this line. I am utterly mystified as to how the majority has reached this result. The majority makes no factual finding and cites no legal rule to support its conclusion. The Award simply announces that TCI "is entitled to its contractual fee for the period after 4 April 1974 because DECCO-EUR failed to terminate the contract before 2 October 1974." (Award at para. 71.) The majority thus finds that DECCO-EUR became liable for charges on the telephone line as of the very day when it sent a formal protest to the Director of TCI, recounting the unsuccessful efforts that had been undertaken to make the telephone line function and requesting the Director's personal intervention in the matter. The majority cites no evidence that the line was repaired or even that TCI made any effort to repair it, and, indeed, no such evidence appears in the record. The Award thus invents the principle that a buyer who waits too long for a seller to cure a defect in its performance does so at his own risk. The majority evidently believes, in other words, that a buyer who is too patient becomes obligated to compensate the seller for his unsuccessful attempts to fulfill his contractual duties. I know of no rule of contract law -- and the majority does not point to any -- that supports such a result.

IV. CONCLUSION

27. In sum, the Award is disappointing in both its legal analysis and its treatment of the evidence. It ignores recognized principles of law governing the formation of contracts. It is also internally inconsistent in this regard, holding that the Parties' identical conduct in negotiating the lease of a telegraph channel and then of a telephone circuit led to the formation of a contract only in the latter instance. Most disturbingly, in discussing TCI's claim with respect to the telegraph channel, the Award appears to rely on a mere allegation by TCI's counsel and neglects to weigh or even mention oral and documentary evidence that demolishes that allegation. Further, the Award bases liability on an evidentiary presumption that is not supported by anything in the record but, rather, is contradicted by evidence that the Award explicitly accepts. In addition, the Award refuses to adjust the telegraph charges to compensate for substantial outages, and it does this by imposing reporting requirements on the United States that are not established by law or contract. Finally, as to the telephone line, the majority requires the United States to pay for services it did not receive but cites no principle of contract law to warrant this result. Inasmuch as the Award requires the United States to pay for only some of the months during which it received no telephone service, this portion of the Award can only be seen as a clumsy attempt to rationalize a monetary compromise.

Dated, The Hague
25 January 1990

Howard M. Holtzmann