IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

[redacted] S DATE

Case No. 10854 [redacted] e of filing: 18.12.86

112

** AWARD - Type of Award _____

- Date of Award _____

_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____

_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of MR. HOLTZMAN

- Date 18.12.86

7 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

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- Date _____

_____ pages in English _____ pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران

CASE NOS. 10853/10854/10855/10856
CHAMBER ONE
AWARD NO. 282-10853/10854/10855/10856-1

10854

IAN L. McHARG (Case No. 10853),
WILLIAM H. ROBERTS (Case No. 10854),
DAVID A. WALLACE (Case No. 10855),
THOMAS A. TODD (Case No. 10856),

claims of less than $250,000 presented
by THE UNITED STATES OF AMERICA,

Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN,

Respondent.

SEPARATE OPINION OF JUDGE HOLTZMANN, DISSENTING IN PART AND CONCURRING IN PART

I join fully in the Award, except that (i) I dissent from the Tribunal's decision that the amounts due each of the Claimants, who together control a corporation, should be reduced on account of the alleged holding of a fifth shareholder who is not a United States national; (ii) I dissent from the Tribunal's denial of termination costs which the governing contract clearly requires the Tribunal to grant; (iii) I concur in the result, but not in the reasoning, as to the Tribunal's dismissal on jurisdictional grounds of the claim for monies remaining in an account at Bank Tejarat; and (iv) I concur only in order to form a majority for the award as costs of arbitration of only $5,000, a glaringly

inadequate amount even against the background of Tribunal practice in this area.

I.

The Claimants, all United States nationals, are four of five original, equal shareholders in an Iranian corporation, Wallace, McHarg, Roberts and Todd Iran, Inc. ("WMRT/Iran"), that entered into a contract with the Department of the Environment of the Government of the Islamic Republic of Iran ("the Government") to provide landscape architectural services in connection with an environmental park to be built in the suburbs of Tehran. The fifth shareholder was Mr. Narendra Juneja, an Indian national, who served as Managing Director of the project in Iran.

The Tribunal finds the Government liable to WMRT/Iran, and hence the Claimants, for the price of services rendered before termination of the contract and for unreimbursed retainage. It reduces the amount due each Claimant, however, to 20% of the total liability, instead of the 25% that each claims, on the ground that the Claimants have failed to show that Mr. Juneja effectively transferred his shares either to the corporation or to the remaining four shareholders. Award, para. 58. In so concluding, the Tribunal errs on two counts.

As the Tribunal recognizes, the evidence shows that on 20 December 1978, approximately one month after circumstances in Iran forced him to depart the country, Mr. Juneja wrote a letter to the WMRT/Iran Board of Directors unequivocally "relinquish[ing]" his shares in the corporation to the Board. Id. In the absence, as here, of a specific showing of noncompliance with applicable law and of evidence rebutting the showing of transfer, I would find the letter produced by the Claimants sufficient to demonstrate that as

the remaining shareholders of WMRT/Iran, each now owns 25% of the corporation.

More importantly, however, I would find it unnecessary to decide whether Mr. Juneja effectively transferred his shares. In my view, the Claimants' control of WMRT/Iran entitles them, pursuant to Article VII, paragraph 2 of the Claims Settlement Declaration, to bring indirectly the undivided claim of WMRT/Iran, an ineligible corporation, regardless whether it is owned in part by non-U.S. nationals. See Concurring Opinion of Richard M. Mosk in Blount Bros. Corp. and Islamic Republic of Iran, Award No. 215-52-1, pp. 2-6 (6 March 1986); Harza and Islamic Republic of Iran, Award No. 232-97-2, para. 27 (2 May 1986) (reciting arguments in favor of rule of full recovery). Thus, I would have permitted the Claimants, on behalf of WMRT/Iran, to recover fully on the liabilities found owing, leaving applicable municipal law to govern the Claimants' obligations to the corporation and any minority shareholder.

II.

I dissent as well from the Tribunal's denial of the claim for termination costs. Article 17(b)(2) of the governing contract provided that in the event of termination by the Government, WMRT/Iran would be entitled to

> [a]ll expenses arising from [its] agreements or undertakings . . . with respect to [its] employees or other institutions as well as the expenses relating to the return of foreign employees and their families to their countries and the cost of freight of their luggage to their countries at the time of termination of this Contract and also the cost of removing the local supervision unit, provided that such expenses are incurred for the execution of this Contract and are approved by the Employer . . . .

The Tribunal squarely holds that the Respondent could only properly have terminated the contract under Article 17(b),

which would bring Article 17(b)(2) into play. Award, paras. 61, 64. Yet it refuses to award the Claimants termination costs to which the latter provision clearly entitles them. Award, para. 66.

The Tribunal's reasons for rejecting this portion of the Claims are not entirely clear. As the Tribunal acknowledges, while Article 17(b)(2) requires that reimbursable expenses be "approved by the Employer," that provision must be read to impose an obligation on the Employer to act in good faith -- that is, the Government could not unreasonably have withheld approval of legitimate, covered expenses. The Tribunal ambiguously states, however, that "in the context of this contract and the circumstances of these Cases, . . . the Respondent did not have to give its approval to these expenses." The Tribunal cannot mean by this statement that the Respondent could arbitrarily refuse to reimburse such expenses, because such a ruling would contradict the Tribunal's recognition in the immediately preceding sentence that approval cannot be unreasonably withheld. The Tribunal must mean, therefore, that the expenses incurred were unreasonable. This conclusion is equally untenable, however, because the Tribunal nowhere purports to review or reject the claimed expenses. There is, quite simply, no basis for the Tribunal's statement that "the Respondent did not have to give its approval to these expenses."

The Tribunal reasons alternatively that "there is in this instance no evidence that the Claimants sought the approval of the employer nor any evidence or explanation as to why they did not do so." In the absence of such evidence, according to the Tribunal, the Claimants have not established that they complied with the requirements of Article 17(b)(2). This reasoning is, at best, disingenuous. It is crystal-clear why WMRT/Iran did not seek the Respondent's approval for the expenses: the Government had steadfastly refused to acknowledge that WMRT/Iran was not at

fault and that, as the Tribunal holds, termination therefore could only occur pursuant to Article 17(b). Under these circumstances, WMRT/Iran can scarcely be faulted for declining to take the wholly futile step of submitting termination expenses for certain rejection.

Contrary to the Respondent's position both at the time the dispute arose and throughout this proceeding, the Tribunal holds here that the provisions of Article 17(b) governing termination in the absence of default by WMRT/Iran apply to the termination of this contract. Therefore, it should perform the review which the Respondent would not perform and determine which of the Claimants' termination expenses fall within the coverage of Article 17(b)(2). See, e.g., Henry F. Teichmann, Inc. and Hamadan Glass Company, Award No. 264-264-1, para. 46 (12 November 1986) (where employer has not given contractually required approval, Tribunal must independently determine whether invoiced work was performed, and employer cannot "rely on its own failure to [approve] as a defense to the claim"). Review of the relevant evidence would lead to an award of a substantial part, if not all, of the expenses claimed.

III.

The Tribunal dismisses the portion of the Claims seeking recovery of monies remaining in an account at Bank Tejarat. It reasons that jurisdiction fails because "the Claimants have not shown that they made a valid demand for the account balance at any time prior to 19 January 1981." Award, para. 56. See Claims Settlement Declaration, Art. II, para. 1. I concur in this holding on the ground that, as the Claimants conceded at the Hearing, they have offered no evidence that they attempted to withdraw their funds from the account, that prevailing circumstances prevented them from making such an attempt, or that prevailing circumstances would have made such an attempt futile.

IV.

Finally, I concur only in order to form a majority in the award of costs. Award, para. 74. I agree with the Tribunal that claimants in claims of less than $250,000 which are presented by the United States may nevertheless recover the costs of consulting or retaining a private attorney in connection with their claims. The Claimants have amply documented such costs in these Cases. Moreover, the request of the United States here, as customarily, for one and one-half percent of the amount of the Award as costs is more than reasonable. These Cases were relatively complex, and the Tribunal acknowledges that "voluminous pleadings and documents [were] tendered in support of these Claims." The Claimants have also successfully defended against three Counterclaims. Award, paras. 69-72. Overall, the Claimants prevailed on 75% of their Claims and 100% of the Counterclaims. Finally, at an early stage, the Respondent's disregard of the clear mandate of Article VII, paragraph 2, of the Claims Settlement Declaration required the Claimants to seek the Tribunal's protection against a proceeding in the Tehran Public Court. Award, paras. 3, 68.

In these circumstances, it is patently inadequate to award a total of only $5,000 -- an amount undoubtedly less than the expenses of translating the submissions -- for the costs of both the outside attorneys and the United States in presenting these Cases. In accord with the views expressed in my Separate Opinion in Sylvania Technical Systems, Inc.

and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), I would have awarded a significantly greater amount of costs.

Dated, The Hague
16 December 1986

Howard M. Holtzmann