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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 Howard M. Holtzmann

- Date 12 Mar '90

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 357
CHAMBER ONE
AWARD NO. 473-357-1

TME INTERNATIONAL, INC.,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, NATIONAL IRANIAN OIL COMPANY, AHWAZ PIPE MILL COMPANY, S.A.T.T.I.
Respondents.

SEPARATE OPINION OF HOWARD M. HOLTZMANN DISSENTING FROM THE DENIAL OF JURISDICTION OVER THE CLAIM FOR SOCIAL INSURANCE WITHHOLDINGS

1. While the Award in this Case grants a number of the claims, it holds that the Tribunal does not have jurisdiction over the claim relating to the return of the social insurance withholdings. I do not agree with that conclusion in the circumstances of this Case, and I write separately to explain my views.

2. The Tribunal has in a number of prior cases developed legal guidelines for dealing with claims that relate to social insurance premiums under the Iranian governmental insurance scheme. Where the decision of a case would require the Tribunal to determine whether an employer is required by Iranian law to pay social insurance premiums, or to make complex calculations of the proper amount owing under such laws, the Tribunal has correctly determined that

it has no jurisdiction.[1] Similarly, the Tribunal has denied jurisdiction over requests to make findings that an employer has fulfilled its obligations under the social insurance law.[2] In those cases, the Tribunal has reasoned that the Claims Settlement Declaration[3] contains no grant of authority to construe or enforce municipal revenue laws, and that such laws are "manifestations of jus imperii which may be exercised only within the borders of a state" unless an applicable treaty provides otherwise by "the clearest possible expression."[4]

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[1] See, e.g., Agrostruct International, Inc. and Iran State Cereals Organization, et al., Award No. 358-195-1, para. 54 (15 Apr. 1988), reprinted in 18 Iran-U.S. C.T.R. 180, 197; Arthur Young & Company and Islamic Republic of Iran, et al., Award No. 338-484-1, para. 76 (1 Dec. 1987), reprinted in 17 Iran-U.S. C.T.R. 245, 263 (hereinafter "Arthur Young"); Harris International Telecommunications, Inc. and Islamic Republic of Iran, et al., Award No. 323-409-1, para. 176 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 31, 83; Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1, pp. 38-40 (25 Sept. 1985), reprinted in 9 Iran-U.S. C.T.R. 107, 135-36; Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1, pp. 40-41 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298, 326-27; T.C.S.B., Inc. and Islamic Republic of Iran, Award No. 114-140-2, pp. 23-24 (16 Mar. 1984), reprinted in 5 Iran-U.S. C.T.R. 160, 173.

[2] See Arthur Young, Award No. 338-484-1 at paras. 77-79, reprinted in 17 Iran-U.S. C.T.R. at 263-64.

[3] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration").

[4] Computer Sciences Corporation and Government of the Islamic Republic of Iran, et al., Award No. 221-65-1, p. 56 (16 Apr. 1986), reprinted in 10 Iran-U.S. C.T.R. 269, 313 (cited in Arthur Young, Award No. 338-448-1 at para. 78, reprinted in 17 Iran-U.S. C.T.R. at 263-64).

3. On the other hand, the Tribunal will exercise jurisdiction where a claim relating to social insurance premiums arises, not from municipal law, but from an obligation expressed in a contract entered into between the parties, and where that obligation would not have arisen independently under Iranian law.[5] In such cases, the Tribunal reasons that its competence derives from the provision of the Claims Settlement Declaration authorizing it to decide claims that "arise out of contracts."[6] The most common example of a claim relating to social insurance premiums that the Tribunal recognizes as having its source in a contractual obligation -- and thus being within its jurisdiction -- is where an Iranian buyer withholds part of the purchase price until the United States seller presents a clearance certificate from the Social Insurance Organization ("SIO") proving that all legally required premiums have been paid.[7]

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[5] See, e.g., Houston Contracting Company and National Iranian Oil Company, et al., Award No. 378-173-3, paras. 82-87 (22 July 1988), reprinted in 20 Iran-U.S. C.T.R. 3, 27-29 (hereinafter "Houston Contracting"); Training Systems Corporation and Bank Tejarat, et al., Award No. 283-448-1, paras. 41-44 (19 Dec. 1986), reprinted in 13 Iran-U.S. C.T.R. 331, 341-42 (hereinafter "Training Systems"); see also Tippets, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, et al., Award No. 141-7-2, pp. 14-16 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 227-28 (including consideration of entity's SIO obligations in valuation of expropriation claim).

[6] Claims Settlement Declaration, Art. II, para. 1 provides in relevant part that "[a]n international arbitral tribunal . . . is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of Iran against the United States, . . . if such claims . . . are outstanding on the date of this Agreement . . . and arise out of . . . contracts."

[7] See Houston Contracting, Award No. 378-173-3 at paras. 82-87, reprinted in 20 Iran-U.S. C.T.R at 27-29; Training Systems, Award No. 283-448-1 at paras. 41-44, reprinted in 13 Iran-U.S. C.T.R. at 341-42 (Tribunal grants claim for social insurance withholdings where claim arose out of contract and claimant testified that final certificate from

(Footnote Continued)

4. In the present Case, the Award denies jurisdiction because it categorizes the demand of TME International, Inc. ("TME") for reimbursement by Ahwaz Pipe Mill Company ("APM") of amounts it withheld to cover SIO premiums as being a claim that requires the Tribunal to determine whether TME actually fulfilled its obligations under the social insurance law. It is understandable that the Tribunal should have been led to this conclusion because the Claimant raised the issue by arguing at length that it had met its obligations under the social insurance legislation, and by submitting the text of that law and an expert legal opinion interpreting it. However, in my view, it is preferable to approach the matter from a different perspective.

5. The better approach to this issue does not require the Tribunal to consider whether TME was legally entitled to a SIO clearance certificate -- an issue outside our jurisdiction -- but rather whether TME was prevented by events beyond its control from obtaining the clearance certificate contemplated by its contract with APM -- a question within our competence to decide. That is the approach taken by the Tribunal in Houston Contracting, Award No. 378-173-3 at para. 87, reprinted in 20 Iran-U.S. C.T.R. at 28-29.

6. Houston Contracting teaches that the Tribunal is not divested of its jurisdiction simply because the buyer's obligation to reimburse is triggered by production of a clearance certificate obtained from the SIO. See id. That case holds that the failure to obtain a SIO clearance certificate does not preclude the Tribunal from ordering reimbursement when that failure is excusable under the circumstances and other proof is provided that the seller

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(Footnote Continued)
SIO had been obtained but the certificate was not in the record).

attempted to comply with its underlying social insurance obligations. See id.

7. In Houston Contracting, the Tribunal exercised jurisdiction to decide a contractor's entitlement to social insurance withholdings on facts that are legally indistinguishable from the present Case. The contract between Houston Contracting Company ("HCC") and the buyer in that case stated "'[f]inal payment shall not be made to HCC' before [clearance] certificates are produced" by HCC. Id. at para. 85, reprinted in 20 Iran-U.S. C.T.R. at 28. That contractual provision is strikingly similar to the controlling provision in the present Case which states that APM shall pay TME the amounts it had withheld to ensure that TME had made SIO payments "upon presentation by TME to APM of the clearnce [sic] centificate [sic] from the Social Insurance Organization." Award at para. 78. Thus, the obligation of APM to TME to release the amount withheld arose specifically from their contract. Neither the withholding itself, nor the obligation to return it, arose as a matter of municipal law; rather they arose as the result of the contracts between the Parties.

8. It was undisputed in Houston Contracting that the contractor neither applied for, nor obtained, the required clearance certificate. See id. at para. 86, reprinted in 20 Iran-U.S. C.T.R. at 28. Despite this failure even to attempt to comply with the requirement to obtain a clearance certificate, the Tribunal granted the claim for release of the withholdings, reasoning that the claimant had earned the money in question and that the requirement "to produce a clearance certificate . . . is a requirement relating to the procedure to effect final payment, and does not affect HCC's entitlement to that sum." Id. at para. 87, reprinted in 20 Iran-U.S. C.T.R. at 28.

9. In granting the claim in Houston Contracting, the Tribunal did not consider that it was required to decide whether HCC was legally entitled to a SIO clearance certificate, and thus it did not need to interpret or apply the social insurance law. The Tribunal looked only at whether the seller, HCC, had done all it could to fulfill its part of the contract. In that connection, the Tribunal held that there was sufficient evidence to show that HCC had paid the SIO premiums it believed that it was required to pay, and that due to the revolutionary conditions that existed in Iran:

> it was unlikely that an American company would receive the necessary cooperation from public bodies to obtain a clearance certificate. Under these circumstances, which were beyond the control of HCC, failure to obtain such a certificate cannot be considered wrongful or a bar to payment of [the amount due]. (See Gould Marketing, Inc. and Ministry of Defense, Award No. 136-49/50-2 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 272). HCC was therefore released from the requirement to obtain such certificates as of 4 November 1979. Furthermore, HCC has evidenced to the satisfaction of the Tribunal that it paid Social Security contributions during the life of the [contract] . . . and thus has attempted to satisfy its underlying obligations to the Social Security Organization. Therefore, the Tribunal finds that HCC is entitled to receive payment. . . .

Id.

10. The same is true in the present Case. It is not disputed that if TME had obtained the clearance certificate it would be entitled to the SIO withholdings. Thus, the issue is whether, under the circumstances, TME's failure to obtain such a certificate should be excused. This is precisely the issue that the Tribunal took jurisdiction over, and decided in the affirmative, in Houston Contracting. That case is indistinguishable from the present Case, and I respectfully disagree with the Award's view that the cases are different in significant respects.

11. The Award unconvincingly attempts to distinguish Houston Contracting on a number of bases. First, the Award reasons that in the present Case "the condition of production of the certificate was a specific obligation entered into between the Parties." Award at para. 103. The obvious response to this argument is that in Houston Contracting the requirement to produce such a certificate was also a "specific obligation entered into between the Parties." Moreover, it is not clear to me why the fact that this was a contractual obligation entered into between the Parties should operate to divest the Tribunal of its jurisdiction; rather, this argues in favor of jurisdiction.

12. Second, the Award attempts to distinguish Houston Contracting on the basis that the claimant in that case would have applied for its clearance certificate in November 1979, whereas TME applied in late 1978. See id. This distinction is dependent on the argument that the force majeure conditions which prevented HCC from obtaining a clearance certificate would have been significantly different in fall 1978. However, as the facts of this Case specifically demonstrate, the Iranian governmental attitudes that affected TME were precisely those that the Houston Contracting award found made it "unlikely" that an American company would obtain a clearance certificate.

13. The evidence in the present Case provides strong indications that it was only governmental attitudes beyond TME's control that barred issuance of a clearance certificate by the SIO. The last communication TME received from the SIO was that a clearance certificate would be issued upon the presentation of certain additional information concerning the project. Documentary evidence establishes further that by December, 1978, TME had supplied the data requested by the SIO and there is no evidence that the SIO thereafter objected to that material or raised any other objection -- or even gave any answer at all. Highly

unsettled conditions already existed in Iran at this time, including anti-American sentiment, and the actual change of government occurred within two months. Moreover, TME's requests to the SIO for a certificate, and to APM for payment, were still outstanding on 4 November 1979 and thus TME was affected to the same degree as HCC by "the seizure of the American Embassy in Tehran [on 4 November 1979] and the severing of relations between the two countries." Houston Contracting, Award No. 378-173-3 at para. 87, reprinted in 20 Iran-U.S. C.T.R. at 28.

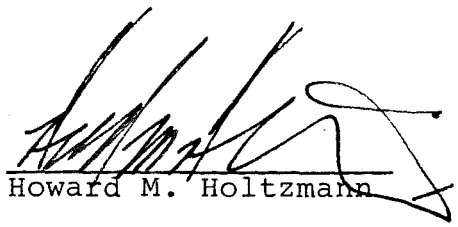
14. Finally, I do not perceive that any difference in legal analysis is required because TME had made a request for a certificate that it did not get, and HCC appears accurately to have considered it futile to do so. For the same basic factor -- continuing official hostility -- governed both situations.

15. If the Award had followed the conceptually correct approach of Houston Contracting, there is no doubt that the Tribunal would have found that, like HCC, TME had "paid Social Security contributions during the life of the [contract] . . . and thus has attempted to satisfy its underlying obligations to the Social Security Organization." Id. There is ample evidence in the record to support such a finding, including check stubs that show payments, receipts for payments issued by the SIO, and affidavits by the Certified Public Accountants of TME and of its subcontractor, Montalev-Fassan, stating that both companies had fully paid their SIO premiums during the life of the relevant contracts. In fact, at one point the SIO went so far as to grant a final clearance to Montalev-Fassan, the subcontractor who employed most of the Iranians on the project. Although the Respondents now claim that this clearance was a forgery, they present no proof to this effect. In light of the compelling evidence of compliance, and the lack of

specific rebuttal thereof, I would grant the claim for return of the SIO withholdings.

16. In sum, the correct approach in this Case would be for the Tribunal to take jurisdiction on the ground that the claim arises pursuant to the contract between the Parties, and to award TME the amount withheld by APM to insure the payment of its SIO premiums. This is not only conceptually correct, but it also avoids unfairly permitting APM to keep money that both Parties acknowledge certainly does not belong to it.

Dated, The Hague
12 March 1990



Howard M. Holtzmann