

764-86

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Case No. 764

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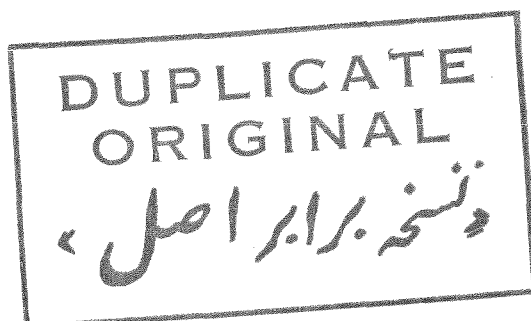
** CONCURRING OPINION of _____
 - Date _____
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CASE NO. 764

CHAMBER ONE

AWARD NO. 428-764-1

WORLD FARMERS TRADING INCORPORATED,
Claimant,

and

GOVERNMENT TRADING CORPORATION,
BANK MELLI IRAN,
BANK MARKAZI IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران - ایالات متحده
ثبت شد - FILED	
Date	7 JUL 1989
	مارش ۱۴ / ۴ / ۱۳۶۸

FINAL AWARD

1. This Case arises from the alleged breach of two contracts for the sales of agricultural commodities by World Farmer's Trading Incorporated ("WFT") and Government Trading Corporation ("GTC"). WFT made Claims against GTC related to the sales contract, and also against Bank Melli Iran and Bank Markazi Iran based on the letters of credit allegedly issued by them in connection with the transactions. GTC made a Counterclaim against WFT. In a Partial Award, the Tribunal dismissed the claim against GTC for lack of jurisdiction, and directed the Parties to submit their comments concerning the Tribunal's jurisdiction over the Claims against the two banks and over the Counterclaim. World Farmer's Trading Corporation, et al., Partial Award No. 66-764-1 (16 August 1983), reprinted in 3 Iran-U.S. C.T.R. 197 (the "Partial Award"). Later, in view of the particular circumstances of the Case the Tribunal indicated that it would decide the jurisdictional issues and the merits without a hearing unless a party requested one. This Final Award determines the remaining issues in the Case.

I. THE PROCEEDINGS

2. On 18 January 1982, WFT filed a Claim with the Tribunal. WFT sought an award of damages of \$9,471,420 against the Respondent GTC for the alleged breach of two contracts entered into on 6 July 1979 for the sale and purchase of certain quantities of yellow sorghum and soybean meal. The same amount was claimed against Bank Melli Iran and Bank Markazi Iran under two irrevocable letters of credit allegedly issued in respect of the contracts.

3. GTC asserted a counterclaim for \$473,571 for the amount of the performance guarantee that WFT was required by the contracts to provide, but which GTC alleges was submitted with unacceptable terms.

4. In the Partial Award, the Tribunal determined that the forum-clause in the contracts between WFT and GTC falls within the scope of the forum clause exclusion contained in Article II, paragraph 1, of the Claims Settlement Declaration. Therefore, the Tribunal decided that it has no jurisdiction over the claim against GTC and dismissed it.

5. In the partial Award the Tribunal directed the Claimant to file

...by 17 October 1983 its comments concerning the Tribunal's jurisdiction over the claims against BANK MELLI IRAN and BANK MARKAZI IRAN, in view of the forum clause in the two contracts with GTC and the terms of the two Letters of Credit; and also its comments concerning the Tribunal's jurisdiction over the Counterclaim of GTC.

The Tribunal further decided in the Award that after having received comments from both WFT and the Respondents,

[i]t is the present intention of the Tribunal to proceed thereafter to render its decision on jurisdiction on the basis of the documents submitted.

6. The Claimant did not file any submission by 17 October 1983, as directed by the Award. Accordingly, by Order filed on 31 August 1984, the Tribunal, acting pursuant to Article 28 of the Tribunal Rules, stated that it would decide this Case on the basis of the pleadings and documents submitted, if by 15 October 1984 the Claimant had not filed any comments on these issues. On 5 November 1985, the Claimant filed a letter to the Tribunal dated 2 July 1985, which had been refused filing by the Tribunal Co-Registrars when first received by the Tribunal on 16 July 1985 because it was unaccompanied by a Persian version as required by Article 17 of the Tribunal Rules. The letter stated, inter alia, that WFT re-adopted the documents it had previously submitted in this Case. Subsequently, on 25 November 1985, WFT filed a Motion to Expedite this Case.

7. By Order filed on 24 February 1986, the Tribunal stated that it intended to join to the merits of the Case the remaining issues of jurisdiction over the Claims against Bank Melli Iran and Bank Markazi Iran and over the Counter-claim of GTC. By the same Order the Parties were requested to file their evidence. On 20 May 1986, the Claimant requested an extension, but filing of the request was refused because it was not accompanied by a Persian version as required by the Tribunal Rules. However, by an Order filed on 27 May 1986, the Tribunal first extended the time limit for the filing of evidence to 16 June 1986, and subsequently by an Order filed on 4 August 1986, further extended the time to 18 August 1986. The last paragraph of that Order stated:

[U]nless by 18 February 1987 either Party has filed a request for an oral Hearing, both the jurisdictional issues and the merits of the Case will be decided thereafter by the Tribunal on the basis of the documents submitted.

In response, Bank Markazi made a timely request for a Hearing.

On 24 July 1986, WFT submitted an extension request that was refused filing by the Tribunal Co-Registrars, because it was not accompanied by a Persian version as required by the Tribunal Rules. WFT filed no evidence as required by the Order of 4 August 1986.

8. On 18 February 1987, the Agent of the Government of the Islamic Republic of Iran filed a letter requesting the Tribunal to dismiss the Claims. By Order filed on 6 March 1987, the Tribunal noted that the Claimant had chosen not to file any submission pursuant to the Order of 4 August 1986 scheduling further proceedings in this Case.

By the same Order, the Tribunal invited the Claimant to file by 17 April 1987 its comments on the request of the Agent of

the Government of the Islamic Republic of Iran to dismiss the Claims. The Order further indicated that

[i]f no comments have been filed by said date, the Tribunal will deem the Claim to have been withdrawn.

9. On 20 April 1987, WFT filed a submission consisting of three parts. The first part is entitled "Amended Claim", the second "Amended Notice of Arbitration" and the third "Claimant's Comments Requested in Partial Award". In the third part, WFT requests the Tribunal, inter alia, to reconsider its Partial Award rendered in this Case, to reverse its jurisdictional ruling, and to entertain the Claim against Respondent GTC on the merits. On 23 April 1987, the Agent of the Government of the Islamic Republic of Iran filed a letter, in which he requested the Tribunal to issue an Order for the termination of the Case pursuant to Article 34 of the Tribunal Rules, submitting that, since the Claimant failed to file any comments within the deadline established by the Order filed on 6 March 1987, the Claim should be considered as having been withdrawn. In response to an Order of 28 April 1987, in which the Tribunal invited the Respondents to file any comments on WFT's latest submissions, the Agent of the Government of the Islamic Republic of Iran filed a letter on 8 May 1987, followed by another letter filed on 20 July 1987, reiterating his previous request that the Tribunal terminate the Case.

10. On 16 December 1987, WFT filed a letter informing the Tribunal that it had retained new counsel. On 31 December 1987, WFT filed a further letter indicating that evidence and legal argument would be submitted no later than 15 January 1988. On 7 January 1988, WFT filed its comments on the request of 18 February 1987 by the Agent of the Government of the Islamic Republic of Iran to dismiss the Claim. On 13 January 1988, WFT filed a submission entitled "Claimant's Notice of Claims and Issues to be Resolved by the Tribunal", in which WFT requested, inter alia, that the

Tribunal hold a Hearing. On 15 January 1988, the Agent of the Government of the Islamic Republic of Iran filed a letter stating that the Respondents object to the Claimant's recent filings and consider the Claim as having been withdrawn.

11. On 25 January 1988, WTC filed three submissions, one entitled "Claimant's Summary of Written Evidence", another "Notice of Filing Written Evidence", and, finally, "Claimant's Notice of Claims and Issues to be Resolved by the Tribunal", which had previously been filed on 13 January 1988 but without the attachments to which it referred. On 2 February 1988, the Agent of the Government of the Islamic Republic of Iran filed a letter, objecting on behalf of the Respondents to the Claimant's filings of 25 January 1988. On 11 April 1988, WFT filed a letter requesting the Tribunal to expedite the proceedings in this Case. On 23 June 1988, WFT filed a further submission requesting a report on the status of the Case.

12. On 15 August 1988, WFT filed a submission entitled "Claimant's Emergency Motion to Expedite Case and Request for Status Report". The Motion was stated to be filed in view of the serious medical condition of WFT's primary witness, Daniel Flinchum, its President. On 29 August 1988, the Agent of the Government of the Islamic Republic of Iran filed an objection to the contents of WFT's submission of 15 August 1988. On 10 November 1988, WFT filed a submission entitled "Claimant's Second Emergency Motion to Expedite Case and Request for Status Report".

II. REASONS

1. Preliminary Issues

a) WFT's Request for Reconsideration of the Partial Award

13. As noted (para. 9, supra), WFT has requested the Tribunal to "reconsider" the Partial Award and to reverse the decision that WFT's Claim against GTC is outside the Tribunal's jurisdiction. This request must be denied for the same reasons as those set forth in Mark Dallal and Islamic Republic of Iran, Decision No. DEC 30-149-1 (12 January 1984), reprinted in 5 Iran-U.S. C.T.R. 74:

With respect to the request for reconsideration, neither the Algiers Accords nor the Tribunal Rules provide for the case to be re-opened in the manner contemplated by Mr. Dallal. Art. IV(1) of the Claims Settlement Declaration provides "All decisions and awards of the Tribunal shall be final and binding". Article 34(2) of the Tribunal Rules states that an award rendered by the arbitral tribunal "shall be final and binding on the Parties". In order to promote the finality of Awards, the Tribunal Rules limit the power of the Tribunal after an Award has been issued. Thereafter, the arbitrators may only give an interpretation of their Award (Article 35), or "correct any error in computation, any clerical errors, or any error of similar nature" (Article 36), or make an additional Award "as to claims presented in the arbitral proceedings but omitted from the award" (Article 37). The request by Mr. Dallal is not covered by Articles 35, 36 or 37.

Similarly, the request of WFT is not within the scope of Articles 35, 36 or 37. WFT points to no way in which the Partial Award is unclear so as to require interpretation, or is incomplete so as to need an additional award. Nor does WFT seek correction of computations or revisions in the nature of clerical or typographical errors. Rather it seeks reversal of a decision. See, also, Henry Morris and Government of the Islamic Republic of Iran, Decision No.

DEC 26-200-1 (16 September 1983), reprinted in 3 Iran-U.S. C.T.R. 364. Moreover, requests pursuant to Articles 35, 36 and 37 must be made within thirty days after receipt of the award. It is obvious that WFT's request made more than four years after the filing of the Partial Award is untimely and should not be admitted in the circumstances of this Case.

b) Decision Without a Hearing

14. The Tribunal's Order filed on 4 August 1986, quoted above, informed the Parties that the Tribunal would decide both the remaining jurisdictional issues and the merits of this Case on the basis of the documents submitted, unless one of the Parties filed a request for an oral Hearing by 18 February 1987. (para. 7, supra). That Order was within the Tribunal's power under Article 15(2) of the Tribunal Rules which states:

If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses . . . or for an oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents or other materials.

15. None of the Respondents requested a Hearing except Bank Markazi. (para. 7, supra) However, later the Agent of the Government of the Islamic Republic of Iran, in the light of the circumstances as they developed, requested on behalf of Respondents that the Tribunal terminate the Case because it should be considered to have been withdrawn (para. 9, supra). A party who requests that a case be terminated on the asserted ground that it has been withdrawn and whose later submissions do not mention a Hearing, clearly no longer desires a Hearing. Accordingly, the Tribunal determines that there is no presently outstanding request for a Hearing by Bank Markazi or any other Respondent.

16. WFT did not file a request for Hearing by the 18 February 1987 deadline established by the Tribunal's Order filed 4 August 1986. Eleven months after the deadline, however, WFT requested a Hearing. Article 15(2) of the Tribunal Rules, quoted above, states that a party may request a Hearing at "any stage of the proceedings". This provision should be interpreted, in the light of the particular circumstance of each case, to mean that Hearings are to be held upon the reasonable request of a party made at an appropriate stage of the proceedings. The Tribunal determines that, in the light of all the circumstances of this Case, WFT having failed to request a Hearing within the deadline set by the Tribunal's Order, WFT's request is not reasonable or appropriate at this stage. Therefore, the Tribunal will decide the remaining jurisdictional issues and the merits on the basis of the documents that have been submitted without holding a Hearing.

c) Other Preliminary Issues Related to the Claims

17. There are several other preliminary issues relating to the Claims, notably (i) whether, as the Respondents request, the Claims should be deemed withdrawn in view of WFT's failure to make timely filings (para. 9, supra); (ii) whether WFT's "Amended Claim" and other submissions filed on 20 April 1987 are admissible (para. 9, supra); (iii) whether WFT's submissions filed on 25 January 1988 are admissible (para. 11 supra); and (iv) whether in the light of the Partial Award the Tribunal has jurisdiction over the Claims against Bank Melli and Bank Markazi. The Tribunal need not, however, decide these issues because even if WFT's position were accepted on all of them, nevertheless the Claims against Bank Melli and Bank Markazi would have to be dismissed on the merits because WFT has failed to produce any of the evidence needed to sustain these Claims. (See, paras. 20-22, infra)

d) Jurisdiction Over GTC's Counterclaim

18. It is clear on the basis of the pleadings submitted that GTC's Counterclaim against WFT for damages as a result of WFT's alleged failure to fulfill the contract and to furnish a performance bond guarantee is based on the same contracts on which the Claim against GTC is based. In view of the fact that the Tribunal in its Partial Award in this Case dismissed the Claim based on the two contracts on the ground that it does not have jurisdiction, it follows that the Tribunal also lacks jurisdiction over the Counterclaim arising out of the same contracts. There being no other jurisdictional basis for the Counterclaim, it must be dismissed. See e.g. Reliance Group, Inc. and National Iranian Oil Company, et al., Award No. 15-90-2 (8 December 1982), at p.3, reprinted in 1 Iran-U.S. C.T.R. 384, 385; William Bikoff, et al. and The Islamic Republic of Iran, Award No. 138-82-2 (29 June 1984), at p. 11, reprinted in 7 Iran-U.S. C.T.R. 1, 7; International Technical Products Corporation, et al. and The Government of the Islamic Republic of Iran, et al., Award No. 186-302-2 (19 August 1985), at pp. 42-43, reprinted in 9 Iran-U.S. C.T.R. 10, 38; Ministry of National Defence of the Islamic Republic of Iran and The Government of the United States of America, et al., Award No. 247-B59/B69-1 (15 August 1986) at p. 5, reprinted in 12 Iran-U.S. C.T.R. 33, 36; International Systems and Controls Corporation and Industrial Development and Renovation Organization of Iran, Award No. 256-439-2 (26 September 1986) at p.34; reprinted in 12 Iran-U.S. C.T.R. 239, 264; Bendone-Derossi International and The Government of the Islamic Republic of Iran, Award No. 352-375-1 (11 March 1988), at p.6.

2. Merits

WFT's Claims Against the Banks

19. As previously noted, the Partial Award dismissed the Claim against GTC for lack of jurisdiction. (para. 4, supra) Therefore, the only Claims of WFT outstanding in this Case are those against Bank Melli Iran and Bank Markazi Iran based on alleged letters of credit.

20. In order to recover on the letters of credit, WFT must first establish two facts:

1. That the letters of credit were in fact issued; and
2. That WFT presented the necessary documents (e.g. proof of shipment of the goods) to the banks and complied with all of the terms and conditions of the letters of credit.

There is, however, no evidence that the Respondent banks actually issued the letters of credit. WFT has not submitted to the Tribunal copies of them, nor has it explained why it has not placed in evidence this elementary proof of the issuance of the letters of credit. Rather, it appears that the Respondent banks did not issue the letters of credit because of existing disputes between WFT and GTC over the terms of the performance bond and the terms of the sales contracts - disputes over which the Tribunal has no jurisdiction for the reasons stated in the Partial Award. Although telexes from the Respondent banks contain language to the effect that the letters of credit were "opened", the same telexes go on to explain that the letters of credit were not yet "operable". This suggests that the Respondent banks considered that their actual issuance of the letters was conditioned upon further actions by WFT.

21. Moreover, there is no evidence that WFT presented to the Respondent banks the conforming documents required before a bank can pay any amount on a letter of credit. In fact, WFT did not possess all the necessary documents because the goods were never shipped. The Tribunal must therefore conclude that WFT has failed to furnish the basic evidence needed to establish its Claims against the Respondent banks.

22. WFT contends that the Respondent banks had a duty which they breached by "unilaterally" changing the terms of the performance bond and adding new conditions to the sales contracts. WFT's own evidence indicates that these alleged requests for changes did not originate with the banks but were demands of GTC which the banks transmitted on behalf of their customer. Even if any such duty did exist, and was breached by the banks, there is no evidence of damages suffered by WTC as a result. WTC seeks payment for the contract price of the goods. However, it has presented no evidence that it actually bought the goods that, apparently, it was going to resell to GTC. Nor is there any evidence that WFT fulfilled its legal obligation to mitigate its damages by selling, or attempting to sell, the goods to others.

23. Finally, the Tribunal notes that WFT has had more than sufficient opportunity to present evidence. It has sought and been granted several extensions to make its submissions. Yet, it has repeatedly failed to meet deadlines for submissions established by Orders of the Tribunal. The submissions it has made were untimely, and, even if they were admitted, they do not provide adequate evidence to support the Claims.

24. For the reasons stated above, the Tribunal concludes that WFT has failed to prove its Claims against Bank Melli and Bank Markazi. Therefore, the Claims are dismissed for lack of evidence.

Costs.

25. The Respondents Bank Melli Iran and Bank Markazi Iran are awarded jointly costs of arbitration in the amount of U.S.\$1,000.

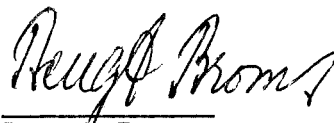
III. AWARD

For the foregoing reasons,

THE TRIBUNAL DETERMINES AS FOLLOWS:

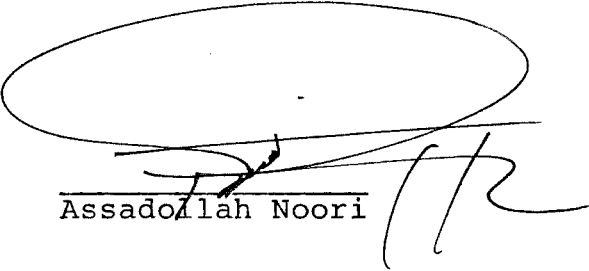
- a) The Claims against BANK MELLI IRAN and BANK MARKAZI IRAN are dismissed.
- b) The Counterclaim of GOVERNMENT TRADING CORPORATION against WORLD FARMERS TRADING INCORPORATED is dismissed for lack of jurisdiction.
- c) The Claimant WORLD FARMERS TRADING INCORPORATED is obligated to pay BANK MELLI IRAN and BANK MARKAZI IRAN jointly costs of arbitration in the amount of U.S.\$1,000.

Dated, The Hague,
7 July 1989

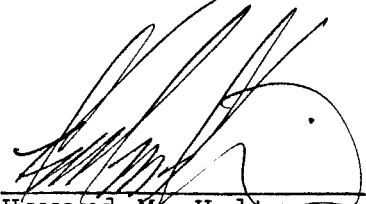


Bengt Broms
Chairman
Chamber One

In the Name of God



Assadoollah Noori



Howard M. Holtzmann