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...S CLAIMS TRIBUNAL

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ORIGINAL DOCUMENTS IN SAFE

Case No. 111 Date of filing: 10 Oct 85

** AWARD - Type of Award _____

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** CONCURRING OPINION of _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 111
CHAMBER ONE
AWARD NO. 194-111-1

INTERNATIONAL SCHOOLS SERVICES, INC.,
Claimant,

and

NATIONAL IRANIAN COPPER INDUSTRIES COMPANY,
Respondent.

SEPARATE OPINION OF JUDGE HOLTZMANN

The Award in this case correctly grants $552,333 of the claim for unpaid services and materials supplied by International Schools Services (ISS) under a contract to operate a school in Iran for the children of the United States employees of the National Iranian Copper Industries Company. The Award finds that the purpose of the contract was frustrated in early 1979 when conditions of force majeure in Iran resulted in all of the children in the school leaving the country so that it became unnecessary and impossible to continue operating the school. Because the contract came to end in such circumstances, the Award properly holds that ISS is not entitled to compensation for "lost profits" of $65,376 it would have earned in the form of fees if the contract had gone on for its full term. I join fully in these conclusions.

The Award, however, wrongly denies the claim of ISS for payment of its costs and fees of approximately $65,000 in transporting the school staff and their personal effects back to the United States when the contract came to an end, and for the final month's salary that ISS paid the staff in winding up the operation. I respectfully dissent from those decisions.

The Award, without giving any reason, provides only 10% interest. I consider this incorrect in the light of the reasoned precedents of recent cases. I join in the Award on this point, however, because that is necessary to form a majority on this question. Similarly, I vote for the unreasonably low amount of costs awarded only in order to form a majority.

I. Transportation and Salary Costs

Unless a contract provides otherwise, termination due to force majeure, frustration or impossibility relieves each party of obligations of future performance, but does not discharge obligations arising from past performance. In the circumstances of this case -- in which school staff were brought to Iran with the understanding that transportation costs would be provided for their return home at the end of the school year -- the costs of return transportation are directly related to the performance of the contract before its termination. For the contract could not have been performed unless the teachers had come to Iran, and they would not have come unless assured of their transportation home. Thus, the costs of round-trip transportation must be seen as flowing from the inception of performance, not from later events.

Similarly, the Claimant was to be reimbursed under the contract for costs of salaries of the staff. It cannot be expected that teachers' salaries could be cut off at the

precise moment the contract came to an end; rather such salaries necessarily continued during a brief winding-up period. Thus, a mere one month's final salary to teachers should be considered a cost reasonably arising from performance of the contract prior to its termination date.

The Award cites with approval the statement in Queens Office Tower that when there is a contract termination due to circumstances such as occurred in the present case, "[t]he apportionment of the loss is subject generally to the Tribunal's equitable discretion, using the contract as a framework and reference point." Applying that standard, I would have awarded the Claimant the amount of its costs, as calculated under the contract, for transporting the staff and their personal effects home and for paying them a final month's salary.[1]

II. Interest

The Award -- without any explanation whatsoever -- grants the Claimant interest at the rate of only 10% on the

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[1] Because of its conclusions regarding the legal consequences of the termination of the Contract, the Award does not reach the Respondent's argument that the claim is barred from the Tribunal's jurisdiction because it allegedly arises out of "injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran," within the meaning of Paragraph 11 of the General Declaration. I would have preferred to decide this jurisdictional question before dealing with the merits. As I have explained in my dissenting opinion in Lillian Byrdine Grimm and the Government of the Islamic Republic of Iran, Award No. 25-71-1, at 12-13 (22 March 1983), reprinted in 2 Iran-U.S. C.T.R. 81, 88-89, the Respondent's argument is baseless, because Paragraph 11 of the General Declaration by its express terms relates only to the seizure and detention of the 52 United States nationals on 4 November 1979. This case does not arise out of injuries sustained by any of the hostages or their property.

unpaid amounts due to it. That rate is below prevailing rates, and thus does not make the Claimant whole. It ignores the wise policy stated in our Award in Sylvania Technical Systems and the Government of the Islamic Republic of Iran, Award No. 180-64-1, at 30-34 (27 June 1985). In that case the Chamber stated:

> This Chamber finds it in the interest of justice and fairness to develop and apply a consistent approach to the awarding of interest in cases before it. . . . In the absence of a contractually stipulated rate of interest, the Tribunal will derive a rate of interest based approximately on the amount that the successful Claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country. Six-month certificates of deposit in the United States are such a form of interest for which average interest rates are available from an authoritative official source.

Id. at 31-32. Accord Questech, Inc. and the Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1, at 31 (25 September 1985). On that basis, interest of 12% was awarded in Sylvania and Questech; approximately the same amount should in my view have been awarded here.

III. Costs

The Award grants $20,000 for costs of arbitration in this case. I consider that amount to be unreasonably low. This is a subject that I have analyzed in some detail in my Separate Opinion in the Sylvania case, and I need not repeat that analysis here. It is pertinent to note that the Claimant in this case, in addition to the costs of pleading, briefing and arguing the merits of the case at a hearing before this Chamber, also was required to brief and argue the jurisdictional issue of its U.S. nationality at a

hearing before the Full Tribunal. Having successfully carried its case at both hearings, it should be reimbursed for its costs as contemplated by the Tribunal Rules.

Howard M. Holtzmann

The Hague
10 October 1985