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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 114
CHAMBER THREE
DECISION NO. DEC 53-114-3

DUPLICATE ORIGINAL
«نسخه برابر اصل»

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری ایران - ایالات متحده
FILED - ثبت شد
Date 10 DEC 1988 تاریخ
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No. 114 شماره

UNITED TECHNOLOGIES INTERNATIONAL, INC.,
Claimant,

and

ISLAMIC REPUBLIC OF IRAN,
THE IRANIAN MINISTRY OF WAR FOR ARMAMENT,
ITS SUCCESSORS AND ASSIGNS,
THE IRANIAN NAVY,
IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY,
BANK MARKAZI IRAN,
INTERNATIONAL BANK OF IRAN AND JAPAN,
INTERNATIONAL BANK OF IRAN,
and
IRANIAN FLIGHT HANGAR,

Respondents.

DECISION

I. INTRODUCTION

1. On 18 November 1981 the Claimant, UNITED TECHNOLOGIES INTERNATIONAL, INC. ("UTI"), filed a claim divided into seven components, referred to as Counts, against THE ISLAMIC REPUBLIC OF IRAN, THE IRANIAN MINISTRY OF WAR FOR ARMAMENT, ITS SUCCESSORS AND ASSIGNS, THE IRANIAN NAVY, IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY ("IHSRC"), BANK MARKAZI IRAN, INTERNATIONAL BANK OF IRAN AND JAPAN, INTERNATIONAL BANK OF IRAN, and IRANIAN FLIGHT HANGAR. Pursuant to this Statement of Claim, UTI seeks compensation and damages in a total amount of U.S.$644,539.51, plus interest and costs.

2. The Claim under Count IV is stated against Iran and IHSRC and is alleged to have arisen out of contracts (the "repair orders") entered into between the Claimant and IHSRC for the servicing and overhaul of helicopter components owned by IHSRC.

3. The instant decision concerns solely the request filed on 23 May 1986 by the Claimant under this Count seeking a direction from the Tribunal allowing the Claimant either to auction the components which are stored in its warehouses or directing it to continue to store and preserve the components.

II. CONTENTIONS OF THE PARTIES UNDER COUNT IV

a) The Claim

4. The Claimant alleges that IHSRC shipped certain SH-3D model helicopter components ("the frozen components") to its unincorporated operating division Sikorsky for repair and overhaul, and contends that, in compliance with the repair

orders created by exchanges of IHSRC purchase orders and Sikorsky sales orders, it supplied the overhaul and repair services at Sikorsky's factory in Connecticut. According to the Claimant, IHSRC thereafter refused to accept delivery of the components at Sikorsky's warehouse in Connecticut, in breach of the provisions of the repair orders which provide for delivery "F.o.b. Factory". After the onset of the Revolution the Claimant refused to modify the contract, as requested by IHSRC, to provide for "C and F, Tehran" delivery. The shipment of the components out of the United States was thereafter prohibited when the United States Government issued orders freezing Iranian assets and also advised the Claimant that the disputed components had been placed on the United States Munitions List, which prevents the unlicensed shipment of such goods outside the United States.

5. The Claimant asserts that as a result it is now in possession of 22 fully repaired components and 11 partially repaired components for which payment has not been received.

6. Under Count IV the Claimant seeks to recover U.S.$183,886.05, as the price of the parts provided and services rendered by UTI in overhauling and repairing the components, plus storage charges at the rate of U.S.$1,838.86 per month from 14 November 1979 to 31 December 1980 and at a rate of U.S.$2,758.29 per month thereafter. In addition to that, the Claimant seeks interest at an annual rate equivalent to the average prime interest rate charged by major banking institutions in New York, New York, U.S.A., from 14 November 1979 to a date of a Final Award.

b) Defense and Counterclaim

7. In addition to raising jurisdictional objections, IHSRC alleges, by way of defense, that the frozen components,

exceeding in number those referred to by the Claimant, were delivered for repair under its own "Standard Terms and Conditions for Foreign Purchases", which in article 38 (b) provide that return shipment shall be "C and F Tehran, Iran". Therefore IHSRC alleges that the Claimant is liable for failing to return the entirety of the components sent for overhaul and repair. IHSRC also argues that the Claimant's failure to redeliver the components cannot be excused by the issuance of U.S. Government orders prohibiting the re-export of the components.

8. By way of counterclaim IHSRC seeks an Award ordering the Claimant to redeliver the components allegedly designated in the purchase orders, or, in the alternative, granting payment of the value of the items, allegedly amounting to U.S.$5,500,000, plus damages to cover the loss resulting from the non-delivery of the parts, in the amount of U.S.$15,000,000, and other incidental damages in the amount of U.S.$68,410,713.

9. In reply to IHSRC's counterclaim the Claimant alleges that Sikorsky was entitled to suspend performance of the repair orders and to cancel any outstanding orders because of IHSRC's breach of contract. Furthermore, it contends that it cannot be held liable with respect to IHSRC's purchase orders for overhaul and repair of components which were not accepted by Sikorsky. According to the Claimant, 36 of the components listed by IHRSC were not received, 2 were repaired and redelivered, and 4 were recommended to be scrapped.

III. THE REQUEST FOR INTERIM MEASURES

10. In its Pre-Hearing Memorandum filed 23 May 1986 the Claimant has requested the Tribunal to allow Sikorsky

"either to sell the frozen components or to obtain a specific direction to continue to store the frozen components and to award Sikorsky reimbursement of the costs of such storage and preservation". This request was reiterated during the Pre-Hearing Conference held 26 June 1986.

11. IHSRC opposed such request.

12. The Claimant allegedly placed in storage the components sent by IHSRC for servicing and overhaul. These components have been kept in storage since the fall of 1979 and through the years have been deteriorating in such a manner that their market value is declining and that they run the risk of becoming obsolete and eventually having to be scrapped.

13. In addition, the Claimant asserts that the components must be kept in air-conditioned warehouses to ensure their preservation, entailing considerable and ever-increasing costs.

14. Under Connecticut law, allegedly applicable under the repair orders, the Claimant holds an "artisan's lien" on the goods in its possession securing payment of the costs for repair and servicing and accrued storage costs.

15. According to the Claimant, it is severely prejudiced by the growing insufficiency of the lien, which is alleged to be declining due to the loss of value of the goods occurring during the period of storage. In support of its request the Claimant contends that it would suffer irreparable injury if the Tribunal does not grant the requested interim measures. According to it, the best way to preserve the rights of all the Parties would be sell the components before their value is reduced any further.

IV. THE REASONS FOR THE DECISION

a) The power of the Tribunal to grant interim measures

16. The procedural framework for the grant of interim measures is to be found in Article 26 of the Tribunal Rules, which provides, inter alia, that:

> At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of the perishable goods.

17. This article embodies the generally accepted rule that an international arbitral tribunal is allowed to take interim measures. According to the practice followed by international arbitral tribunals, this particular form of relief or remedy, pendente lite, may be granted when the rights and/or property which the issuance of such measures is designated to protect are deteriorating in such a manner that irreparable harm might be done to the said rights and/or property of the applicant before a Final Award is rendered.[1]

18. The circumstances in which interim measures can be granted have been clearly stated in several decisions of the International Court of Justice. In the Anglo-Iranian Oil Co. Case[2] the International Court of Justice, on 5 July 1951, issued an order indicating provisional measures and laid

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[1] E. Dumbauld, Interim Measures of Protection in International Controversies 143-147 (1932).

[2] Anglo Iranian Oil Co. Case (United Kingdom v. Iran), 1951 I.C.J. 89, 93.

down, inter alia, the principle that the object of interim protection is "to preserve the respective rights of the Parties pending the decision of the Court." The Court also tends to consider that the violation of a right must cause "irreparable prejudice" to justify the granting of interim measures. On 17 August 1972 the Court, in the Fisheries Jurisdiction Case[3], granted interim measures requiring that the litigants ensure that no action be taken which might prejudice the rights of the other party. The same principle was repeated by the Court in its orders of 22 June 1973 in the Nuclear Test Case[4]. In all cases the Court took into consideration only the preservation of rights which were in dispute in the merits of the case and formed the subject matter of the dispute.

b) The Circumstances of the Present Case

19. The Claimant has presented its request in an alternative manner. The Claimant applied for leave to auction the components or "to obtain a specific Tribunal direction to continue to store and preserve the frozen components and to award Sikorsky current reimbursement of the costs of such storage and preservation."

20. A specific feature of this Case is that the Claimant, which makes the present request for interim measures, is not the owner of the frozen components. While the ownership and legal title of IHSRC to the goods are undisputed, IHRSC is denied unrestricted dominion over the components, which are stored in the Claimant's warehouses.

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[3] Fisheries Jurisdiction Case (United Kingdom v. Iceland), 1972 I.C.J. 12, 16.

[4] Nuclear Test Case (Australia v. France), 1973 I.C.J. 106.

21. On three occasions IHRSC itself requested interim measures under Article 26 of the Rules to the effect that the Claimant be prevented from selling the components without the Tribunal's approval. The Tribunal denied this relief on the basis of the Claimant's assurance that it would not sell the components without the Tribunal's approval.

22. Moreover, by way of counterclaim, IHRSC seeks, inter alia, an award ordering the Claimant "to deliver the articles repaired" held in Claimant's possession.

23. The relief sought by IHRSC, i.e., the restitution of the goods, constitutes an obstacle to the issuance of the interim measures requested by the Claimant. These measures, if they were granted, would make impossible the execution of the Final Award of the Tribunal, in the event it obligated the Claimant to deliver the components to IHRSC.

24. Alternatively, the Claimant requests the Tribunal to award it reimbursement of the costs of storage and preservation of the goods. During the Pre-Hearing Conference the Claimant also stated that it would be highly prejudiced in the event the Tribunal were to deny its claim for storage charges accrued after 19 January 1981.

25. The Tribunal has already noted that one of the claims submitted by the Claimant under Count IV is a claim for storage charges (see paragraph 6 above). Therefore, it appears that the request for interim measures is, in this respect, identical to one of the Claimant's claims on the merits. Under such circumstances, to grant this request would amount to a provisional judgment on one of the Claimant's claims.

26. The Tribunal furthermore notes that the protection requested by the Claimant is clearly unnecessary for the

storage costs that the Tribunal would grant to the Claimant, since the payment of its awards against Iran is fully secured by the Security Account established pursuant to the General Declaration. The Claimant would only have an interest in obtaining this protection for the part of the storage costs accrued after 19 January 1981, in the event that the Tribunal were to consider the claim related to this part to be outside its jurisdiction. By the same token, however, the rights stemming from the lien which secure the storage charges accrued after 19 January 1981 would be outside of the Tribunal's jurisdiction and therefore such interim measures hypothetically would not be related to the subject matter of the dispute within the meaning of Article 26 of the Tribunal Rules.

27. Another obstacle to the issuance of an interim order of protection is the lack of a clear statement in the record as to specific property at issue. While the parties appear to agree that the 33 components listed by the Claimant in the Statement of Claim are currently held by the Claimant, the additional components listed by IHSRC in the Statement of Counterclaim are not clearly identified. The Claimant has not identified which specific components it is holding.

28. The Tribunal also notes that another potentially relevant issue has not been addressed by the Claimant. This relates to the question as to whether the responsibility for obtaining an export licence would have any bearing on the disposition of the goods subject to an interim order of protection.

29. In view of these findings, the Tribunal is not called upon to examine the issue of prima facie jurisdiction over the Parties and the claims, an issue which, moreover, has not been addressed by the Parties.

30. The Tribunal concludes that it is not appropriate to order the interim measures of protection as requested.

V. DECISION

31. For the foregoing reasons,

THE TRIBUNAL DECIDES AS FOLLOWS:

The Claimant's request for interim measures of protection filed on 23 May 1986 is denied.

Dated, The Hague
10 December 1986

Michel Virally
Chairman
Chamber Three

In the name of God

Charles N. Brower

Parviz Ansari Moin