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CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL
«نسخه برابر اصل»

CASE NO. 115
CHAMBER THREE
AWARD NO. 315-115-3

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 10 SEP 1987 تاریخ
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No. 115 شماره

RELIANCE GROUP, INCORPORATED,
Claimant,

and

OIL SERVICE COMPANY OF IRAN,
NATIONAL IRANIAN OIL COMPANY, and the
GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

AWARD

Appearances:

For the Claimant:
Ms. Carolyn H. Williams,
Mr. Robert B. Barnett,
Attorneys;
Mr. Blair Fensterstock,
Mr. William A. Gow,
Representatives of Reliance Group, Incorporated.

For the Respondents:
Mr. Mohammad K. Eshragh,
Agent of the Government of the Islamic Republic of Iran;
Mr. Mohammad Taghi Naderi,
Legal Advisor to the Agent of the Government of the Islamic Republic of Iran;
Mr. Allahyar Mouri,
Attorney for the National Iranian Oil Company;
Mr. Abbas Hashemi,
Representative of the National Iranian Oil Company.

Also present:
Mr. Daniel M. Price,
Deputy Agent of the Government of the United States of America,

I. INTRODUCTION

1. On November 1981 RELIANCE GROUP, INCORPORATED ("Reliance"), the Claimant, filed a Statement of Claim with the Tribunal against three Respondents: OIL SERVICE COMPANY OF IRAN ("OSCO"), NATIONAL IRANIAN OIL COMPANY ("NIOC") and the GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("Iran"). The Statement of Claim sought $234,356 for "damages for breach of Contract No. 3-79-763-349" ("Contract") between a subsidiary of the Claimant and OSCO or, in the alternative, for "services furnished . . . and the costs . . . incurred in connection with furnishing such services." The Statement of Claim also sought interest and the Claimant's costs of arbitration.

2. All Parties have submitted written pleadings on all aspects of this Case, and a Hearing was held at the Tribunal on 14 January 1986.

II. PROCEDURAL ISSUES

A. Untimely Filings

3. On 13 January 1986, the day before the Hearing, the Claimant submitted four affidavits: one by a Mr. Carlton, one by a Mr. Barnett and two by a Mr. Fensterstock. The affidavit of Mr. Barnett related solely to the costs of arbitration, but the other three affidavits pertained to issues of the Claimant's nationality and the merits. At the Hearing the Respondents objected to the admission of these affidavits on the ground that they were untimely. In fairness to the Respondents, the Tribunal decided at the Hearing that the Carlton and Fensterstock affidavits could not be accepted at such a late stage of the proceedings. The Tribunal accepted the Barnett affidavit on the ground that it pertained solely to the costs of the arbitration, and as such could be submitted at a late stage in the

proceedings. On the same ground the Tribunal accepted for filing a supplemental affidavit by the same Mr. Barnett, filed on 10 April 1986, also relating solely to costs of arbitration.

B. New Claim

4. At the Hearing the Claimant raised a new claim for $92,185 in alleged lost profits. Due to the lateness of Claimant raising the issue, the Respondents were given no opportunity to submit any response to the claim. The Tribunal thus rejects this claim as untimely.

III. JURISDICTION

A. The Parties

5. The Claimant contends that the Tribunal has jurisdiction over its claim as an indirect claim of a subsidiary corporation established and existing in the United Kingdom of Great Britain and Northern Ireland ("U.K.") within the meaning of Articles II, paragraph 1, and VII, paragraph 2, of the Claims Settlement Declaration ("CSD").

6. The Claimant contends that the immediate holder of the claim, by virtue of it being the contracting party with OSCO, is Inbucon International Ltd. ("Inbucon"). The Respondent NIOC contends, however, that the Contract here is between OSCO and "Inbucon International Consultants" and thus suggests that the claim is asserted by an incorrect party.

7. The Tribunal notes that Section 1 of the Contract does list OSCO and "Inbucon International Consultants" as parties thereto. In Section 1.2, however, the Contract provides that certain documents listed therein, including the Claimant's original tender, "collectively constitute and shall be

construed as the entire contract between the parties." The tender clearly is signed by W.A. Gow on behalf of "Inbucon International Ltd." In explanation of this apparent discrepancy the Claimant stated in its pleadings that Inbucon International Consultants is a name under which Inbucon "sometimes does business" and that they are one and the same entity. The Tribunal is satisfied that the contracting party here was in fact Inbucon as claimed.

8. The Tribunal also finds that Inbucon is a U.K. corporation established on 4 May 1960 and that another U.K. corporation, Inbucon Limited, has directly or beneficially owned Inbucon in its totality.

9. Evidence submitted further shows that Inbucon Limited was incorporated on 25 March 1936 and that it has "been in continuous and unbroken existence" since that date. The Tribunal finds that Reliance World Trade Co., Ltd., a U. S. Corporation, owned at all relevant times all of the 2,455,000 issued and outstanding shares of Inbucon Limited, with the exception of 4,000 shares. As to these remaining 4,000 shares, the Tribunal is satisfied that 2,500 of these shares were held during the relevant period in trust for Reliance World Trade Co. Ltd. and that the other 1,500 shares were held in trust, in part for Leasco World Trade Co., Ltd. and in part for Reliance Consulting Group, Incorporated, respectively the predecessor and successor corporations of Reliance World Trade Co. Ltd. The entirety of the issued and outstanding shares of Inbucon Limited were thus at all relevant times held directly or beneficially by Reliance World Trade Co. Ltd. (or its predecessor or successor).

10. The Tribunal further is satisfied that Reliance World Trade Co., Ltd. itself, according to certificates of incorporation and other corporate documents, was incorporated in the State of Delaware on 17 May 1968 and that for

some period prior to 30 September 1979 the Claimant owned all of the issued and outstanding share of Reliance World Trade Co. Ltd. The Tribunal also concludes that on that date the Claimant contributed these shares to Reliance Consulting Group, Incorporated, and on 21 October 1980 Reliance World Trade Co., Ltd. was merged into Reliance Consulting Group, Incorporated.

11. It also is established that Reliance Consulting Group, Incorporated, was incorporated in the State of Delaware in the United States on 7 February 1974, and that it was a wholly owned subsidiary of the Claimant as of the date of incorporation and has so continued through a corporate restructuring that took place on 8 January 1982.

12. Finally, the evidence submitted shows that the Claimant corporation likewise is a Delaware corporation, that it was established on 24 June 1965, and that it has had a continued corporate existence ever since that date. The evidence further establishes that, at all relevant times, over 98% of the shareholders in the Claimant's shareholders' lists "showed United States of America addresses." In addition, the evidence establishes that in 1979 31.3 percent of the Claimant's issued and outstanding shares were held by holders of 5 percent or more, all of whom had United States addresses, and that in 1981 52.15 percent of such shares were held by such holders.

13. The Tribunal concludes that the evidence submitted by the Claimant meets the jurisdictional requirements of the CSD. See Order of 20 December 1982 in Flexi-Van Leasing Inc. and Islamic Republic of Iran, Case No. 36, Chamber One, reprinted in 1 Iran-U.S. C.T.R. 455; Order of 21 January 1983 in General Motors Corp. and Islamic Republic of Iran, Case No. 94, Chamber One, reprinted in 3 Iran-U.S. C.T.R. 1.

14. The Parties agree that the Tribunal has jurisdiction over the Respondents Iran and NIOC.

15. The Respondents raise a question as to whether NIOC can be held responsible for the obligations of OSCO arising under the Contract (entered into between OSCO and the Claimant). The Tribunal considers that the findings of the Full Tribunal in the Oil Field of Texas, Inc. and Islamic Republic of Iran, Award No. ITL 10-43-FT at 21 (9 December 1982), reprinted in 1 Iran-U.S. C.T.R. 347, 362, that NIOC is the de facto successor to "OSCO's rights and obligations" disposes of this question.

B. Issues Related to the Value of the Claim

16. With reference to Article III, paragraph 3, of the CSD, the Respondents contend that the value of the claim is less than $250,000 and that it therefore should have been presented by the Government of the United States of America. As presented, they contend that it cannot be heard by the Tribunal.

17. In response, the Claimant contends first that the value of the claim in fact is more than $250,000 since pre- and post-award interest should be added to the principal amount sought. Second, the Claimant contends that, at the time it filed the present claim, it also submitted another claim for an amount of $888,336, filed as Case 90. Although the present claim and the claim in Case 90 were not aggregated and the claim in Case 90 eventually was dismissed for lack of jurisdiction, Reliance Group, Inc. and National Iranian Oil Company, Award No. 15-90-2 (8 Dec. 1982), the aggregate amount of the Claimant's claims before this Tribunal at the time of filing exceeded the $250,000 limit imposed by the CSD, justifying review of the present claim.

18. Although the claimed interest creates a certain ambiguity over the value of the claim, the Tribunal rejects the Claimant's argument that the claimed interest should be included in the determination of the value of the claim for the purposes of Article III, paragraph 3 of the CSD. As to the issue of aggregation of claims, the Tribunal notes that at its 24th Meeting, on 18 December 1981, the Full Tribunal decided that several claims filed by the same Claimant could be aggregated "for the purposes of filing." Consequently it is clear that the claims presented by the Claimant before this Tribunal at the time of filing could have been aggregated pursuant to the Full Tribunal's decision. The Claimant has not indicated any reasons for not seeking the Tribunal's leave to do so. The Tribunal notes, however, that it traditionally has invited claimants to request leave to aggregate when it considers such an aggregation necessary. While such an invitation should have been extended in this Case, this was not done. On balance, and under the circumstances of this Case, the Tribunal concludes that it would be unreasonable and inequitable to reject the present claim solely on such a ground.

IV. THE CLAIM

A. The Merits

1) Contractual History

19. It is common ground that, on or about March 1978, representatives of OSCO contacted Inbucon in London to tender on a contract for services. The services consisted of auditing and monitoring certain aspects of an OSCO construction project then underway in the Pazanan District in south Iran ("Pazanan Project"). This project was a massive undertaking and involved the construction of natural gas line units at two sites. The general contractor was an American company, Fluor International, Inc. ("Fluor"). It

appears that, since mobilization, costs of the Pazanan Project had been far greater than Fluor and OSCO had anticipated. OSCO therefore desired to retain a multidisciplinary team of experts to monitor past and present costs of the Pazanan Project for the purposes of identifying any overcharges and errors in bills which it already had paid, substantiating those overcharges and errors so that OSCO could recoup them by backcharging Fluor, and developing procedures for proper cost control in the future.

20. OSCO invited Inbucon to tender on the contract and on 20 April 1978 Inbucon did so. The tender included a workplan according to which the projected work was divided into three phases. OSCO decided to award Inbucon the contract on certain conditions. On 12 July 1978 the Parties executed a letter of intent ("Letter of Intent"). This Letter of Intent stated OSCO's intention to award to Inbucon the Contract ultimately concluded and provided, inter alia:

> The scope of work shall exclude phase I of the work contained in your proposal and shall be on the basis discussed in Ahwaz on Wednesday 14 Tir 2537 (5 July 1978) and in Tehran on Saturday 17 Tir 2537 (8 July 1978).
>
> Your appointment is conditional upon Inbucon assigning to the work a Team Leader and other key personnel who are acceptable to OSCO and we hereby request you to provide us with the names and proposed positions of the advance team in order that our approval may be obtained prior to commencement of the Services. Thereafter you may commence mobilization once our written approval is given. The expenses you incur under the authority of this letter shall be reasonable in relation to our requirements and we reserve the right to terminate the authority of this letter at any time, in which event our liability shall be limited to the reimbursement of such reasonable expenses as you have incurred.

21. It appears that Inbucon proceeded to select the personnel required and that, in the meantime, the Contract was in the process of being executed. OSCO and Inbucon eventually

signed the Contract on 5 September 1978 and 3 October 1978, respectively.

22. Section 1.3 of the Contract provided that it was effective as of 12 July 1978. The services to be performed under this Contract, which according to Section 1.7 thereof were to be completed over a period of twelve months, were described in Section 10 of the Contract, substantially as follows:

10.0.1 The Services of a Multidisciplines [sic] Monitoring Team is required to assist the existing Company [OSCO] Project Team in monitoring the construction contractors efforts during the construction phase of NGL Units 900 & 1000 in Pazanan South Iran. The Team is required to carry out special monitoring tasks and investigations into the construction contractors administrative, contractual, financial, material handling and usage activities together with providing assistance to the Company [OSCO] Project Team as required.

10.0.2 A prime objective of the Monitoring Team shall be to make recommendations as to measures that will minimize the cost to the Company [OSCO] of the prime construction contractors reimbursable operations without jeopardizing the schedule completion dates.

10.0.3 The Team shall consist of a Manager for the Services being provided, suitable multidisciplined engineers, quantity surveyors, accountants and the like. The Team shall be based on site but there shall be a requirement to visit the construction contractors offices in Tehran, Ahwaz, Abadan and possible Holland from time to time as warranted by the task to be performed.

In other parts of Section 10 the Contract spelled out in more detail the various ways in which the assigned tasks were to be addressed.

23. In consideration for providing this monitoring team ("Team") OSCO was to pay Inbucon per month unit rates per Team member pursuant to Section 4 of the Contract. According to that section, the Team was to be composed of, at

most, one person from each of 14 listed "Disciplines." The section also fixed for each of these members a daily unit rate as well as an overtime rate.

2) Approval of Invoices

24. The Claim in this Case is for payment of services rendered pursuant to six invoices covering the period September 1978 through February 1979. The Claimant relies, inter alia, on a letter dated 25 October 1979 from a Mr. Allmark, the Construction Manager of OSCO for the Pazanan Project ("Letter of Approval"). This Letter of Approval is headed "PAZANAN NGL 900 and 1000 - INBUCON" and provides:

> This is to certify that in my capacity as the former Construction Manager for OSCO on the above subject project, I approve the invoices itemized below in respect of work done and services performed by INBUCON.

The Tribunal notes that the itemized invoices correspond to the invoices here at issue.

25. The Respondents dispute that any authorized OSCO personnel gave such approval. With reference to the Letter of Approval, NIOC relies on an affidavit of Mr. Allmark in which he states:

> I did not write a letter of such a nature and have no knowledge of why I should write to OSCO in Ahwaz from the U.A.E. at that time without a letter being sent to me in the first instance requesting certification of Inbucon invoices. A copy of such a request, if one exists would perhaps throw some light on the matter.

26. The Tribunal notes that the Parties cite various contemporaneous correspondence and acts of Mr. Allmark. Because he has made subsequent written statements which at least partially contradict his earlier statements, it is necessary to analyze his statements very carefully. It

should also be noted that Mr. Allmark did not appear to testify at the Hearing.

27. With respect to the Letter of Approval at issue, it is not disputed that OSCO no longer employed Mr. Allmark at the time he wrote it. Furthermore, the letter is contrary to his subsequent affidavit. For these reasons, the Tribunal concludes that this Letter of Approval must be disregarded.

28. Consequently the Tribunal must examine the Claimants possible entitlement on the basis of other evidence presented.

3) The Inception of Performance

29. It is clear and undisputed that the Contract was not finally executed until 3 October 1978. The Claimant contends, however, that the performance of the Team started as of 6 September 1978. The Parties tacitly agree that the Claimant was authorized, pursuant to the Letter of Intent, to commence performance before 3 October 1978 on the stated condition that OSCO previously approve the personnel assigned to perform the services. The issues in dispute concern the effective date of this approval as well as the fulfillment of these conditions.

30. The Claimant contends it is entitled to compensation as of the date when its Team arrived at the site and commenced performance, i.e., 6 September 1978. The Claimant argues that the required approval was obtained prior to 6 September, although it was not formalized in writing until 16 September 1978.

31. The Respondents dispute that the Claimant is entitled to compensation for any work performed prior to 16 September 1978. The Respondents rely on the terms of the Letter of Intent requiring written approval.

32. The Tribunal notes that written approval is contained in a letter dated 16 September 1978 from Inbucon to OSCO. This letter was signed by Mr. Gow, "Temporary Project Director," and was addressed to Mr. Allmark. It listed the names and positions of the "Project Team Personnel" and stated that Inbucon had "passed to [OSCO] prior to the date of this letter copies of each man's abbreviated CV and a job specification for each designated title, with the exception of the writer." The letter stated that Mr. Gow would "remain employed on the project for only as long as OSCO requires, . . . in particular until the Project Manager Mr. Rod Harris is established." Finally, the letter provided that "[y]our acceptance of the team members can simply be confirmed by signing in the box below." A signature appears in the box labeled "Acceptable."

33. This letter of 16 September 1978 evidences not only that OSCO approved the Team members, but also that OSCO had received the required information regarding this personnel prior to 16 September 1978. Furthermore, in his function as Construction Manager Mr. Allmark was presumably required to be present at the site in Pazanan. Consequently he must have been aware that Inbucon's Team members arrived there on or about 6 September 1978. There is no evidence of any contemporaneous objection by OSCO to the fact that Inbucon started to perform prior to the written approval. In view of the foregoing, the Tribunal concludes that the Claimant commenced performance under the Contract on 6 September 1978 and is entitled to compensation as of that date.

4) Performance During September 1978

34. The Claimant contends that the Team on site as of 6 September 1978 performed according to the Contract and to the express satisfaction of OSCO.

35. The Claimant relies, inter alia, on a letter dated 25 September 1978 which Mr. Harris, the Project Manager for Inbucon, wrote to Mr. Allmark outlining plans for the near term operations and seeking and obtaining Mr. Allmark's approval for such operations. This approval was confirmed by a letter from Mr. Allmark to Inbucon dated 26 September. Subsequently, work allegedly proceeded as planned, and, under cover of letter dated 9 October 1978, Inbucon submitted to Mr. Allmark a 31 page document referred to as Inbucon's first report (or "Volume 1"). This report generally outlined the "Description of Work and the planned periods anticipated for those activities shown therein, as previously discussed." On 12 October 1978 Mr. Gow wrote a letter to Mr. Allmark in which after referring (in paragraph 4 of four numbered paragraphs) to the first report, he stated "[i]f we hear nothing from OSCO within 4 days we will assume that we are to proceed as outlined by our Volume 1." In his reply nine days later, on 21 October 1978, Mr. Allmark specifically stated that "[w]e acknowledge having received the above letter [of 12 October 1978] and your comments contained in paragraphs 1 - 4 are valid and noted."

36. Although NIOC does not dispute this contemporaneous evidence, it contends that the report was not accepted. NIOC relies on a statement by Mr. Allmark, not otherwise substantiated, that this report "due to its inadequacies and the tone of the presentation was not accepted." The Respondents further contend that the Claimant did not comply with the Contract because the first report expressly included work referred to as "Phase I" in the "work plan" which Inbucon submitted with its tender, whereas the Letter of Intent expressly excluded Phase I.

37. The Claimant has explained that the work first proposed as an introductory and separate Phase I was necessary for performance of the Contract, although as stated in the

Letter of Intent it was not to be separated as a distinct temporal phase from the other work required.

38. The Tribunal notes that the Letter of Intent also refers to discussions held in Ahwaz and Tehran (see paragraph 20, supra). The Tribunal finds that the Claimant's explanation for the exclusion of Phase I is reasonable and that this was, inter alia, what was discussed and agreed between the Parties during their discussions in Ahwaz and Tehran. In any event, the contemporaneous evidence establishes that OSCO approved the substance of the first report either as being in compliance with the Contract or as constituting an agreed statement of additional or other work which the Claimant was to perform.

5) Performance During October 1978

39. One of the contentious issues related to the employment of Mr. G.A. Shilton on Inbucon's Team. Mr. Shilton's name appears in the 16 September 1978 letter as one of the persons approved by OSCO. The Respondents contend that this Mr. Shilton was "dismissed" from the project as of 3 October 1978. In support, the Respondents rely on a letter dated 5 October 1978 from Mr. Allmark to Mr. R. Harris. This letter was headed "Mr. G.A. SHILTON" and provided, inter alia, that:

> I hereby confirm my decision made after the introductory meeting of your Mr. R. Harris with Mr. K. Klerk of Fluor Continental Ltd., in the presence of Messrs. Stanley (OSCO), Kingsley and Benton (Fluor) on the 3rd of October 1978 to request you to transfer your Mr. G.A. Shilton off this project as quickly as decently as possible.
>
> . . .
>
> Due to your Mr. Shilton's recently terminated employment with Fluor Europe, the nature of the position he held with that organization, the need to maintain the fullest cooperation of our contractor Fluor Continental Ltd., throughout the

> term of your exercise and for you to obtain the best possible results in this regard we believe that your Mr. Shilton's presence in your team would jeopardize your credibility and effect [sic] the conduct and purpose of our ultimate goal.

The Respondents contend that the hiring of Mr. Shilton was in breach of Section 8.10.1 of the Contract, which provided that OSCO "will consider nominations for positions on [Inbucon's] team from personnel who have been employed by the Contractor [Inbucon] a minimum of two years in an appropriate capacity."

40. Except for maintaining its claim for compensation for work performed by Mr. Shilton, the Claimant has failed to rebut the Respondents' contentions in this part.

41. It is undisputed that OSCO approved Mr. Shilton's original assignment. Consequently the Respondents are estopped from alleging breach of contract on the part of the Claimant regarding the qualifications of Mr. Shilton. It is also clear that the Contract did not entitle OSCO unilaterally to dismiss any of the persons assigned to perform Inbucon's services. Based on the evidence submitted, the Tribunal, however, finds that Inbucon, at least by 3 October 1978, was notified that the presence of Mr. Shilton represented a problem for OSCO. Although Inbucon was not contractually obligated to dismiss Mr. Shilton, the Tribunal finds its difficult to presume that Inbucon, faced with such a notification, would have retained Mr. Shilton on its team absent a subsequent agreement with OSCO. It is noteworthy, however, that apart from the submission of Mr. Allmark's letter, there is no subsequent reference to the incident in any of the documents submitted by any Party in this Case. On balance, the Tribunal must conclude that, although OSCO originally may have voiced a complaint in this respect, the fact that Mr. Shilton continued to work on the project suggests that the issue must subsequently have been resolved between OSCO and Inbucon.

42. As to Inbucon's general performance during the month of October, Mr. Gow has stated that Inbucon submitted a second report which also allegedly was discussed with OSCO personnel who "expressed satisfaction" and approved further plans. In somewhat ambiguous terms, Mr. Allmark appears inferentially to acknowledge OSCO's receipt of this Report. Mr. Allmark has further stated that there "is no evidence available from my personal diary nor can my memory recall that myself or any of my site staff expressed satisfaction with the monitoring team's efforts" and that it "is . . . difficult to accept" the allegation of the Claimant.

43. The Tribunal notes that the Contract did not lay down precise requirements for the submission or approval of reports, monthly or otherwise, and NIOC does not allege that the Contract did not encompass the work reflected in the second report. On balance the Tribunal finds that the evidence indicates that OSCO did, in fact, receive Inbucon's second report. The Tribunal finds that the absence of any contemporaneous expressions of satisfaction on the part of OSCO with respect to Inbucon's performance at the time inferentially constitutes an approval of Inbucon's work during the month of October.

6) Performance up to 29 November 1978

44. NIOC contends that Inbucon did not perform satisfactorily during the month of November 1978. It relies on a letter dated 20 November 1978 from Mr. Allmark to Mr. A.J. Stone of Inbucon stating that "we are not satisfied with your company's efforts over the past few weeks and we would ask you to rectify the situation without further delay in our mutual interest." The letter objected to the fact that there were "only two people currently on site" from Inbucon, that the Project Manager, Mr. Harris, had been absent "from site since 16th October 1978" and that "the required additional staff" had not yet arrived.

45. The Claimant contends that it performed satisfactorily during this month. Mr. Gow stated that a third report was prepared covering the activities of Inbucon during November 1978. Claimant further notes that Mr. Harris was absent from Iran as of 16 October 1978, with the approval of OSCO, for the purpose of traveling to the U.K. to interview potential staff and then to the Fluor offices in Haarlem, The Netherlands, to perform contract work. Alternatively, to the extent that the Claimant did not perform satisfactorily during the month of November 1978, it contends that this was caused by force majeure conditions. Although the Claimant did not formally notify OSCO that it was invoking force majeure, the Claimant contends that OSCO was aware of Inbucon's difficulties and acknowledged them. The Claimant points out that communications between Iran and the U.K. during November 1978 were so spasmodic and unreliable as to be virtually non-existent and that there was an airline strike in both international and domestic transportation. Consequently, the Claimant alleges that personnel on scheduled leave in the U.K. and newly recruited additional staff experienced serious difficulties in finding air transportation. Furthermore, according to the Claimant, Inbucon experienced serious difficulties in obtaining the required work permits for its personnel.

46. In regard to the Claimant's contentions regarding Mr. Harris, the Tribunal finds that OSCO was aware of, and indeed had approved of, Mr. Harris' trip to the U.K. While Mr. Harris at that time did not visit the Fluor office, in the view of the Tribunal Mr. Harris then was performing other work of behalf of OSCO. The Tribunal finds it further established that the delays incurred in the return of Inbucon personnel and in the mobilization of the newly hired personnel were due to reasons beyond Inbucon's control. The Tribunal thus concludes that, to the extent Inbucon did not comply with the contract by not having an adequate number of

personnel present, it was excused for cause of force majeure.

47. The Tribunal notes that the record contains no allegation, either contemporaneous or otherwise, on the part of the Respondents that the work which the personnel present at the site actually performed was unsatisfactory. The Tribunal infers from this lack of objection that OSCO approved the work performed.

7) The Evacuation from the Site on 29 November 1978

48. It is undisputed that at the end of November 1978 all Inbucon personnel then in Iran were evacuated. Based on contemporaneous evidence, the Tribunal further finds it established that as of 29 November 1978 Inbucon was no longer present at the site in Pazanan (see paragraph 51, infra).

49. The Claimant contends that the turmoil then prevailing in Iran caused this evacuation. According to the Claimant, "the security situation deteriorated rapidly" from 15 November 1978 onwards. Mr. Gow stated that the fenced compound containing the project headquarters was stormed.

50. The Respondents take somewhat conflicting positions in this respect. According to undenied contemporaneous telexes, Mr. Allmark recognized and agreed that it "was advisable no staff sent until we inform you OK" because "internal travel difficult and uncertain at present." However, in a written statement to the Tribunal Mr. Allmark asserts that "no major security problems existed" at that time. According to the Respondents, the Claimant's departure from Iran constituted a breach of contract. The Respondents have further submitted an "Interoffice Memorandum" dated 6

December 1978 from Mr. Allmark to his superiors (stating that)

> On 29th November 1978 the staff of Inbucon left the site and eventually returned to U.K.
>
> No notice was given other than a word to my secretary that they were going to Ahwaz.
>
> On the 28th November 1978 three additional staff arrived on site from the U.K. and they also left with the others on the 29th.
>
> Past performance by this Company on this project coupled with this recent irresponsible action forces me to recommend that their contract be terminated. Please take action in this regard.

51. The Tribunal finds it established that by the end of November 1978 the conditions in Iran were such as to justify the Claimant's evacuation of its personnel as of 29 November 1978. Consequently the Tribunal does not find that the evacuation of the Inbucon personnel constituted a breach of contract. The Tribunal further notes that, in spite of Mr. Allmark's recommendation that the Contract be terminated, there is no evidence that any further action was taken by OSCO in this respect. The Tribunal concludes that OSCO, despite this recommendation, did not find cause to terminate the Contract. Inferentially this also supports the conclusion reached by the Tribunal that OSCO was not dissatisfied with Inbucon's actual performance during November 1978 (see paragraph 48, supra).

8) Performance as of 29 November 1978

52. The Claimant alleges that following its departure from Iran it continued to perform the Contract in the U.K. According to the Claimant, the Contract clearly stated that the task of the Claimant was to assist in cost control efforts rather than to be supervising engineer. Since Inbucon was able to gather sufficient material during the previous months of work, the Claimant argues that Inbucon

was able to perform these services in the U.K. as well as at the site in Pazanan. In any event, the Claimant contends that a representative of OSCO, a Mr. Watson, had specifically instructed Inbucon by telex on or about 10 December 1978 that no personnel should return to Iran pending further notice from OSCO. The Claimant further contends that the same Mr. Watson authorized Inbucon to continue its performance in London. Mr. Gow stated that Mr. Watson met with Inbucon personnel in London on 21 and 29 December 1978 and agreed that work under the Contract should proceed in the U.K., prospectively to be supplemented by visits to Iran, when possible, and to The Netherlands. By letter of 11 January 1979 the Claimant further urged OSCO to arrange access to the Fluor offices in Haarlem, The Netherlands, and this was discussed in a further meeting with Mr. Watson of OSCO in London on 22 January. Such arrangements were never made. Inbucon sought instructions on how to proceed, declaring its willingness to proceed with the work. Finally, by letter dated 5 February 1979, Inbucon concluded that, in the absence of any such instructions, the team had to be demobilized and the work according to the Contract discontinued.

53. The Respondents contend that the Claimant was neither entitled nor able to perform work under the Contract other than at the site in Pazanan. The Respondents rely on the express terms of the Contract and argue specifically that the scope of the services under the Contract were such that Inbucon's personnel were required to supervise the construction work in Pazanan and that this obviously could not be done in the U.K. The Respondents specifically dispute that Mr. Watson had any authority to construe, vary or amend the Contract between OSCO and Inbucon.

54. The Tribunal initially finds that the Contract did not authorize the Claimant to perform compensable work in the U.K. Consequently the Claimant's entitlement to

compensation hinges on whether OSCO and Inbucon agreed to amend the Contract or reached a separate agreement to that effect. The Claimant's contentions rest on an alleged agreement with Mr. Watson, who the Claimant contends was the representative of OSCO. The Tribunal notes that none of the contemporaneous documentation invoked by the Claimant emanates from this Mr. Watson. In addition, the Tribunal deems it relevant to note that the Claimant has neither submitted any affidavit testimony nor presented Mr. Watson as a witness before the Tribunal, and the Claimant has given no reason for not doing so. Even assuming that Mr. Watson was authorized as the Claimant contends, the Tribunal finds it further unexplained why the Claimant did not submit the invoices here at issue for Mr. Watson's approval. Contractually Inbucon was required to submit invoices by the end of each month for OSCO's approval. On balance, the Tribunal concludes that OSCO and Inbucon did not agree to amend the Contract and did not reach any separate agreement entitling the Claimant to compensation for the services allegedly rendered in the U.K. as of 29 November 1978.

55. The Tribunal notes that the Claimant also has argued that OSCO is liable for the quantum meruit value of the services performed and costs incurred by Inbucon. The Tribunal rejects this argument because, as just stated, work performed in the U.K. after 29 November 1978 was neither requested nor accepted.

9) Termination of the Contract

56. The Tribunal notes that of the Claims that are before it, none requires the Tribunal to determine any issues related to the termination of the Contract.

10) Damages

57. The Tribunal has found that the Claimant is entitled to compensation for services rendered from 7 September 1978 up to and including 28 November 1978. The Tribunal finds that the three invoices here relevant are valid in respect to the personnel named therein to the extent that they and the rates claimed for them fall within the parameters of the Contract (Section 4).

58. The amounts claimed for the personnel noted do not fall within the parameters of Section 4 of the Contract in the opinion of the Tribunal in the following respects:

59. Sums claimed for Mr. Gow acting as Temporary Project Director appear to the Tribunal not to have been contemplated by the Contract. No such position is recognized in Section 4, the most senior position being limited to a single "Project manager". A sum is already claimed for a Project manager, Mr. Harris, for all days worked by any personnel beginning with the date of mobilization in September and continuing until the activities of Mr. Gow ceased (and beyond as well). The Tribunal believes that the activity of Mr. Gow must be regarded as an overhead item absorbed by Inbucon relating to the commencement of contract operations, doubtlessly similar to other activities for which Inbucon paid.

60. The daily rate for the Project Manager under Section 4 of the Contract is 23,270 rials per day, rather than 23,700 as claimed.

61. The Tribunal believes that Mr. A.J. Stone should be allocated a daily rate of 20,700 rials as claimed in the first invoice, for September 1978, rather than the rate of 21,770 rials later claimed. Although the higher rate is allowed under Section 4 of the Contract for an Assistant

Project Manager, the title assigned to Mr. Stone in the post- September Invoices, the Contract allows for only one such position, which is already charged for Mr. G.A. Shilton beginning with September. It appears to the Tribunal that the Claimant was aware that it was entitled only to the lower amount for Mr. Stone because Mr. Stone is listed in the 16 September 1978 letter (and hence was accepted by OSCO) as "Senior Cost Engr. & Planning", a category calling for the lower rate under Section 4 of the Contract. Indeed, Inbucon billed for him at the lower rate in the September 1978 invoice under the title of "Planning & Schedule Supervisor."

62. Four individuals, Messrs. Sturgeon, Oliver, Muir and Aspinall, appear for the first time in the November invoice. The Respondents contend that "[o]n the 28th November 1978 three additional staff arrived on the site from the U.K. and they also left with the others on the 29th." (See, paragraph 51, supra). Based on this unrebutted evidence, the Tribunal finds that these four individuals were not present at the site for a period of time necessary for them to have performed any valuable services.

63. The Tribunal thus finds that the total value of the invoices for September, October and November 1978 should be 7,906,380 rials.

64. The Tribunal notes that Section 8.04 of the Contract provided that all amounts due to the Claimant were subject to Iranian withholding tax. The Tribunal further notes that, in this Case, neither one of the Parties has addressed the issue of whether or not this contractual provision would be applicable. The Tribunal is unable to determine how the Parties applied this provision in practice as none of the invoices arising under the Contract were paid. Under these circumstances the Tribunal finds that the Respondents' silence on this issue cannot be construed as a waiver of the

express contractual entitlement to withhold 5.5% from any amount due to the Claimant. Consequently the Tribunal deducts 5.5% from the amounts found outstanding and awards the Claimant 7,471,529 rials.

V. CURRENCY OF PAYMENT

65. The Claimant contends it is entitled to payment in United States dollars rather than the Iranian rials provided for in the Contract. It further contends that the applicable rate of exchange should be 70 rials/U.S. dollar. The Respondents dispute that the Claimant would be entitled to payment in dollars under the Contract.

66. It is well established that the Tribunal will give effect to a valid and enforceable provision regarding the currency in which the Claimant was entitled to payment. See McCollough & Company, Inc. and Ministry of Post, Telegraph and Telephone, Award No. 225-89-3 at 41-44 (22 April 1986). However, since the funds held in the Security Account are in United States dollars, awards rendered by this Tribunal which are to be satisfied by payment out of this account are only payable in this currency. In the absence of any provisions to the contrary, awarded Iranian rials must be converted to United States dollars on the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account, at the conversion rate then prevailing. The Tribunal notes that the present conversion rate, according to the latest published rate[1] available prior to the issuance of this Award, is 71.2393 Iranian rials/United States dollar ("Present Conversion Rate"). The Tribunal finds that the level of depreciation of the Iranian

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[1] As of 2 September 1987, published on 4 September 1987 in The Financial Times, London.

rials since the breach of contract is such that it does not entitle the Claimant to any adjustment to the satisfaction awarded it in this Case. See id. The Tribunal determines that the Iranian rial amounts awarded the Claimant shall be converted into United States dollars at the Present Conversion Rate.

VI. INTEREST

67. The Claimant seeks interest on the amounts awarded in this Case, but has not claimed entitlement to any specific rate of interest. In accordance with its earlier practice the Tribunal finds that the Claimant is entitled to interest in this Case. By application of the principles announced in McCollough, supra, at 33-41, the Tribunal determines that the fair rate of interest is 10%.

68. The Tribunal notes that the Claimant has not established in this Case that the invoices at issue were submitted to OSCO, or its successor in interest NIOC, prior to the filing of the Statement of Claim in this Case. Consequently the Tribunal determines that interest is due as of the date of the filing of the Statement of Claim, i.e., 18 November 1981.

69. In conclusion the Tribunal awards the Claimant interest from 18 November 1981 at the rate of 10% on all amounts due.

VII. COSTS

70. The Claimant has sought compensation for its costs of arbitration in this Case.

71. Under the circumstances, the Tribunal deems it appropriate to require each party to bear its own costs of arbitration in this Case.

VIII. AWARD

72. For the foregoing reasons

THE TRIBUNAL AWARDS AS FOLLOWS:

a. The NATIONAL IRANIAN OIL COMPANY is obligated to pay to RELIANCE GROUP, INCORPORATED the sum of 7,471,529 (seven million four hundred and seventy-one thousand five hundred and twenty-nine) Iranian rials, plus simple interest due at the rate of ten percent (10%) per annum (365 day basis) from 18 November 1981 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

b. This obligation shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981. The Escrow Agent is hereby instructed to pay such amount in United States dollars after conversion of this amount by application of the conversion rate of 71.2393 Iranian rials/United States dollar.

c. All other claims are dismissed.

d. Each party shall bear its own costs of arbitration.

73. This award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague
10 September 1987

Michel Virally
Chairman
Chamber Three

In the Name of God

Charles N. Brower
Concurring and
Dissenting Opinion

Parviz Ansari Moin
Concurring in part,
Dissenting in part