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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CHAMBER ONE

I.

CHEVRON RESEARCH COMPANY,
Claimant,

and

NATIONAL IRANIAN OIL COMPANY;
Respondent.

CASE NO. 19
AWARD NO. 48-19-1

II.

VSI CORPORATION,
Claimant,

and

IRAN AIRCRAFT INDUSTRIES CORPORATION;
Respondent.

CASE NO. 15
AWARD NO. 56-15-1

[redacted]

III.

CARRIER CORPORATION and OVERSEAS PRIVATE INVESTMENT CORPORATION,
Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, et al,
Respondents.

CASE NO. 387
AWARD NO. 54-387-1

OPINIONS OF HOWARD M. HOLTZMANN RE THREE AWARDS ON AGREED TERMS; CONCURRING AS TO CASE NOS. 19 AND 387, DISSENTING AS TO CASE NO. 15.

INTRODUCTION

These three claims have been settled by Awards on Agreed Terms. Because all of the Awards raise similar

problems, and because they were all issued within a short span of time, I consider it useful to express my views in one consolidated statement rather than in three separate opinions.

By way of background, it should be noted that Article 34, paragraph 1 of the Tribunal Rules provides, in pertinent part, that

> If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall . . . if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. (Emphasis added).

An important point to recognize at the outset is that the Tribunal is not obligated under the Tribunal Rules to record as awards on agreed terms all settlements presented to it by the parties; it records only those which it accepts.

It will be recalled that quite early in its work the Tribunal was called upon to interpret the standards to be applied in accepting or rejecting settlements for which the parties jointly request the issuance of an award on agreed terms. The Full Tribunal concluded that it, or a Chamber, should refuse to record a settlement as an award "if the settlement does not appear to be appropriate in view of the framework provided by the Algiers Declarations." Decision, Case A/1, filed 17 May 1982.

Typically, each Award on Agreed Terms has annexed to it a copy of a "Joint Request for Arbitral Award on Agreed Terms" and a copy of a "Settlement Agreement". Each Award

on Agreed Terms issued by this Chamber states that "[t]he Settlement Agreement is hereby recorded as an Award on Agreed Terms," and further provides that the obligation to pay the settlement amount is to be "satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria, dated 19 January 1981."

I. THE CHEVRON RESEARCH COMPANY CASE (CASE NO. 19)

I write separately in this case in order to call attention to what I consider to be a disturbing tendency of the Chamber routinely to grant requests that Settlement Agreements annexed to Awards be kept secret. In this case, such secrecy has been permitted by the Award, which states:

> The Tribunal determines in accordance with the request of the Parties and pursuant to Article 32, paragraph 5, of the Tribunal Rules that the Settlement Agreement shall not be made public.

Article 32, paragraph 5 does not permit indiscriminate grants of secrecy. Quite to the contrary, this provision expresses the vital principle that "[a]ll awards and other decisions shall be made available to the public," subject only to one sharply limited proviso. (Emphasis added). The proviso states that

> upon the request of one or more arbitrating parties, the arbitral tribunal may determine that it will not make the entire award or other decision public, but will make public only portions thereof from which the identity of the parties, other identifying facts and trade or military secrets have been deleted. (Emphasis added).

Two points are to be observed with respect to this exception to the general rule that all awards are to be made public. First, the arbitral tribunal has full discretion to determine whether or not to grant secrecy. Second, if secret treatment is permitted it is only by way of deletion of "the identity of the parties, other identifying facts and trade or military secrets." Thus, the arbitral tribunal is only authorized to delete certain carefully defined information; it is not authorized to suppress the entire text.

It must also be emphasized that Article 32, paragraph 5 relates to "all awards and decisions." It covers Awards on Agreed Terms and the annexes which are an indispensable part of such awards just as much as it relates to any other award or decision. That is a wise and proper policy. A primary purpose of Settlement Agreements is to provide for payment of settlements from the Security Account established by the Algiers Declarations. Any withdrawals from the Security Account affect the interest of parties in all cases. It is therefore highly inappropriate that a Settlement Agreement annexed to an Award which triggers such a withdrawal of funds should be cloaked in secrecy. At most, any military

and trade secrets can be deleted from the text made public.[1]

In this case, the Tribunal has granted secrecy to a very simple Settlement Agreement which contains nothing which even remotely resembles a trade or military secret. I regret that the decision of the Tribunal to grant secrecy to the entire text prevents my illustrating that fact further.[2]

I concur in this Award, despite the secrecy granted for the Settlement Agreement, because I do not wish in the circumstances of this case to hinder a settlement.

II. THE VSI CASE (CASE NO. 15)

This case illustrates quite vividly the potential dangers of keeping secret the text of a Settlement Agreement annexed to an Award on Agreed Terms.

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[1] The identity of the parties or facts which would lead to their identification can hardly be kept secret, since the Award on Agreed terms must include the names of the parties and, in order for payment to be made, must be notified to the central banks which act as the Escrow Agent and Depository of the Security Account, respectively, as well as to the Agents of the two Governments and eventually to the Federal Reserve Bank of New York. In such a process, granting secrecy for the identity of parties would be entirely unworkable.

[2] The Tribunal was informed at a meeting with the parties that Claimant had joined in the request for confidential treatment only when Respondent urged this as a condition of the Settlement.

The Settlement Agreement in this case provides for the Claimant VSI Corporation ("VSI") to be paid $835,000 from the Security Account. It also provides that, without further payment, the Claimant will ship to the Respondent, Iran Aircraft Industries Corporation ("Iran Aircraft"), various goods valued at a total of approximately $104,000.

The Agent of the Islamic Republic of Iran requested the Tribunal to grant secrecy to the Settlement Agreement, but to include in the Award on Agreed Terms a statement that the settlement agreement provides for the Respondent's "commitment to pay $835,000 and VSI's commitment to immediately ship $104,000 worth of goods to Iran." The Tribunal acceded to the request to mention in the Award the reciprocal commitments of the parties, but correctly determined that the full texts of the paragraphs of the Settlement Agreement containing the reciprocal commitments should not be held secret, but, rather, should be quoted in the Award. Regrettably, the Tribunal permitted the remainder of the terms of Settlement Agreement and certain annexed exhibits to be kept secret.

As quoted in the Award, the provision of the Settlement Agreement which relates to the obligation of VSI to ship $104,000 worth of goods to Iran reads as follows:

> That immediately upon execution of this Agreement Claimant shall ship the $63,092.10 worth of [goods] which Respondent previously ordered from Claimant as set forth in Exhibit (1) attached hereto, including invoices 2218 and 2235; and 2) purchase back the $41,000 worth of finished and unfinished goods as set forth in Exhibit (2) attached hereto, which shall thereupon become the Respondent's property, and such goods shall be treated as Respondent thereafter shall direct

> Claimant. If Respondent requests the completion and delivery of any such goods, the purchase price shall be based upon the standard purchase price of claimant in effect in 1978. All shipments to Respondent shall be to Mehrabad Airport and all shipping charges and expenses shall be borne by Respondent.

I have no objection concerning the shipment of the $63,092 worth of goods mentioned above. I accept the representation by counsel for VSI that the price of the goods was included in the larger amount claimed in the Statement of Claim. That representation is supported by copies of invoices for the goods. It appears that these goods were ordered by Iran Aircraft but were not shipped because Iran Aircraft allegedly stopped paying its bills to VSI. VSI has retained possession of the goods.

The settlement provides for payment of an agreed amount by Iran Aircraft to cover goods previously shipped to it but not paid for, as well as for the $63,092 worth of goods which had not yet been shipped when Iran Aircraft allegedly defaulted in obligations to pay VSI. It appears proper that now that Iran Aircraft is making a settlement payment, VSI should no longer retain possession of purchased goods covered by the Statement of Claim.

I do , however, have serious questions concerning the "$41,000 of finished and unfinished goods" which VSI is to ship to Iran Aircraft as a part of a commitment made in

reciprocation of Iran Aircraft's commitment to pay $855,000 from the Security Account. The $41,000 worth of goods were never invoiced to Iran and, accordingly, were not included in the Statement of Claim as originally filed on October 29, 1981. Nor was any claim for these goods disclosed at the Pre-Hearing Conference held on November 24, 1982. However, a "Hearing Memorial on Legal and Factual Issues," filed by the Claimant on May 30, 1983, just before a Hearing scheduled for June 6, 1983, explains for the first time[3] that "VSI was left at the time it suspended performance with $41,980.45 of finished and unfinished goods in inventory that had been previously ordered by [Iran Aircraft]. This inventory was subsequently sold [by VSI to a third party] for $4,198.05 . . . ." The same Memorial notes that "this amount was not originally included in VSI's Past Due Statement [to Iran Aircraft] on which the Statement of Claim was based." In the Hearing Memorial, VSI requested that "the Tribunal treat [the] Statement of Claim as amended nunc pro tunc" to include $36,915 (i.e., the difference between the $41,908 value of the goods and the $4,198 for which VSI sold them to the third party).[4]

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[3] A summary of documents, filed by the Claimant on March 22, 1983 indicates that documents concerning $41,000 of finished and unfinished goods would be presented in evidence. But there was no explanation of this matter at that time and no indication that the $41,000 was not covered by the Statement of Claim.

[4] The parties on the day the Joint Request was filed belatedly agreed to amend the Statement of Claim to include a claim for $36,915. The Tribunal approved the amendment. I voted against the amendment because I considered that, being made at literally the last minute, it was merely a device to bolster a questionable settlement.

The Settlement Agreement requires VSI to "purchase back" these goods from the third party to which they had been sold for $4,198. The goods "thereupon become the Respondent's property." The Tribunal was informed by counsel for VSI at the Hearing on June 6, 1983 that the third party to which VSI had sold the goods still had them and was willing to reverse the transaction and sell the goods back. The price which VSI is paying to buy back the goods was not disclosed, leaving us to conjecture that it is the original $4,198 price, or something close to it. No reason was given why Iran Aircraft itself did not buy the goods directly from the third party to which VSI had sold them.

These circumstances give rise to the inference that the parties have made an arrangement by which Iran Aircraft is, in effect, using funds from the Security Account to purchase (through VSI) goods now owned by the third party, rather than buying them directly from the third party in a transaction which would have required it to pay with fresh funds. If that is the true nature of the transaction, it does not appear to fall within the framework of the Algiers Declaration, and thus within the standards enunciated by the Full Tribunal in Case A/1 for recording a settlement as an Award on Agreed Terms.

In my view, parties who propose a settlement which poses the type of questions which arise in this case must reasonably demonstrate by explanation and evidence that the transaction is appropriately within the framework of the Algiers Declaration. I do not consider that the parties have done so in this case. Because a settlement is a package, it is not possible to approve part and dissent from part. Therefore, the Settlement Agreement should not, in my view, have been recorded as an Award on Agreed Terms.

I also dissent from the Tribunal's action in permitting the Settlement Agreement, with the exception of two paragraphs, to be kept secret. Because VSI is a wholly owned subsidiary of Fairchild Industries, Inc., which is well-known as a major supplier to the United States military forces, one might suppose that the settlement contained information which includes military secrets. However, every page of the invoices attached to the Settlement Agreement was clearly marked by VSI to show that the goods are "Non-Military." Nor does the Settlement Agreement include any other information which appears to me to have any military significance or to concern trade secrets. If there is any such information, it was up to one or more of the parties to point it out and to convince the Tribunal that deletion of such material was appropriate under Article 32, paragraph 5 of the Tribunal Rules. In any event, as explained above, only the deletion of sensitive portions is permitted by the Rules; in no event can the entire text be suppressed.

III. THE CARRIER CORPORATION CASE (CASE NO. 387)

This is another case in which the parties requested, and the Tribunal granted, secrecy for the Settlement Agreement. Again, and for the reasons expressed above, I consider this to be unfortunate.

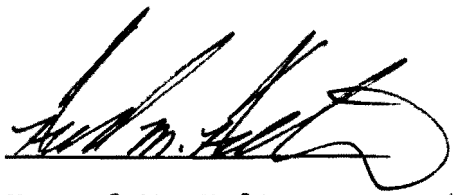
The total secrecy granted by the Tribunal to the Settlement Agreement prevents me from quoting, or even describing, a provision which I would have preferred to see deleted because it is unnecessary and inappropriate within the framework of the Algiers Declarations.

I nevertheless concur in this Award because I do not wish, in the circumstances of this case, to hinder a settlement.

CONCLUSION

For the reasons expressed above, I concur in the Awards on Agreed Terms issued in Case Nos. 19 and 387. I dissent from the Award on Agreed Terms issued in Case No. 15.

Dated, The Hague
17 June, 1983



Howard M. Holtzmann