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ORIGINAL DOCUMENTS IN SAFE

Case No. 261

Date of filing: 18 July 88

** AWARD - Type of Award _____
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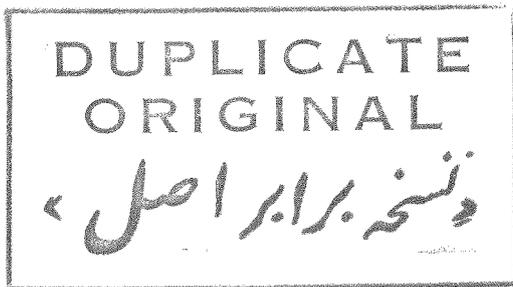
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** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of _____
- Date _____
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** DISSENTING OPINION of _____
- Date _____
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** OTHER; Nature of document: Concurring and Dissenting opinion
of Judge Brouwer
+ Annex
- Date 18 July 88
14 pages in English _____ pages in Farsi

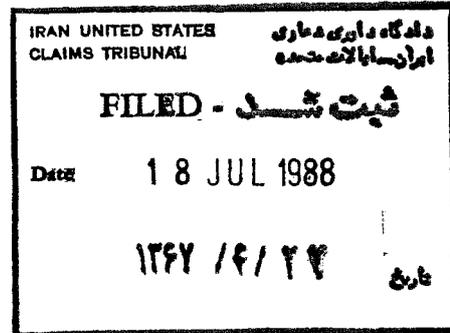


CASE NO. 261
 CHAMBER THREE
 AWARD NO. 377-261-3

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AVCO CORPORATION,
 Claimant,

and
 IRAN AIRCRAFT INDUSTRIES,
 IRAN HELICOPTER SUPPORT AND
 RENEWAL COMPANY,
 NATIONAL IRANIAN OIL COMPANY AND
 THE ISLAMIC REPUBLIC OF IRAN,
 Respondents.



CONCURRING AND DISSENTING OPINION OF JUDGE BROWER

1. For the usual reason, that of needing to form a majority, I concur in the Award, notwithstanding my sharp differences with its conclusions in two important respects: (1) As to U.S.\$1,608,593.83 of the invoice claims (U.S.\$1,082,061.33 against Respondent IACI and U.S.\$526,532.50 against Respondent IHSRC) I believe the Tribunal has misled the Claimant, however unwittingly, regarding the evidence it was required to submit, thereby depriving Claimant, to that extent, of the ability to present its case; and (2) the award of interest to IACI and IHSRC on their counterclaims from the respective dates of the Paris Agreement and the Vienna Meeting, rather than from the dates on which demands for return of the advance payments were made, constitutes an excessive and unjustified award of interest to the Respondents.¹

¹I also believe the Tribunal should have taken action in respect of three letters of credit.

I.

2. The present Award rejects certain claims on the ground of insufficiency of evidence which, in my view, the Tribunal previously had advised Claimant would indeed suffice, and without giving Claimant an opportunity to meet the changed standard (or even notifying it thereof).

3. The Statement of Claim filed 19 January 1982 demanded, inter alia, U.S.\$11,199,969 for invoices rendered to Respondent IACI but allegedly unpaid by it. This demand was comprised of U.S.\$8,764,977 in invoices rendered under an Export Distributor Franchise Agreement ("Export Agreement") executed on various dates in August 1976 and U.S.\$2,434,992 for "billed accounts receivable" under an Engine Overhaul/Repair Agreement ("Repair Agreement") executed on 24 May 1976. In addition, the sum of U.S.\$1,112,499 was claimed against Respondent IHSRC for unpaid invoices under (A) three contracts designated C7BHMC1157, C7BHMC1158 and C7BHMC1159 ("1157, 1158 and 1159"); (B) Purchase Order No. C8YFSR 5190;² and (C) miscellaneous orders given under a Basic Ordering Agreement of 21 November 1977.

4. As the pleadings and events regarding these two Respondents, IACI and IHSRC, are somewhat different it is appropriate that they be recited separately.

5. In its Statement of Defense filed 14 June 1982 (para. A.2.c.) IACI responded to the claim of U.S.\$8,764,977 under the Export Agreement simply by stating that the

claim . . . is not considered acceptable as it is not supported by details of the amount claimed.

²This Purchase Order was not expressly designated in the Statement of Claim but its amount was included in the sum of U.S.\$1,112,499 claimed.

No comment can be made without prior knowledge of such details.

In answer to the claim of U.S.\$2,434,992 under the Repair Agreement the IACI Statement of Defense stated only (para. A.2.h.) that

. . . [P]ayment was dependent upon receipt of invoices specifying the nature of services performed by the Claimant. The Respondent has received no such invoices even to this date. Those transmitted by the Claimant lacked acceptable supporting documents.³

6. The IACI Statement of Defense annexed, however, hundreds of pages of documentation of transactions between the Parties, and noted (at p. 2 of its Statement of Counterclaim) that in "an effort to resolve existing disputes and with the view to settle the outstanding accounts, the Parties met in Paris in April 1980" and at that time executed "a Letter of Agreement," which also was annexed ("Paris Agreement"). That Agreement, dated 11 April 1980, referred to "communications between [IACI and Claimant] with respect to . . . outstanding accounts" and stated in the first paragraph:

As per attachment No. 1 IACI's records show \$10 117 667.05 as valid and approved Lycoming [division of Claimant] invoices. To pay this account, it was decided [to offset it against unliquidated advance payments made to Claimant by IACI].

7. Against this background of the Parties' mutual knowledge of their respective claims and allegations Claimant's Memorial was filed with the Tribunal 15 October 1984 including "all documentary evidence on which it intend[ed] to

³One might wonder how it could be alleged both that no invoices had been received and that "[t]hose transmitted" were insufficiently supported.

rely" for disposition of its demands. See Order of 28 June 1984. In support of its claims under the Export Agreement and the Repair Agreement, totalling U.S.\$11,199,969, the Claimant annexed as Exhibit B to its Memorial copies of its accounts receivable ledger (with a covering summary) giving with respect to each individual invoice the date, order number, reference number, charge and any credit. The ledger was authenticated by affidavits of responsible personnel of Claimant.

8. It is interesting, particularly against the background of the Parties' dealings, as reflected in the IACI Statement of Defense and the Paris Agreement, that when thus presented with such a detailed and authenticated listing of accounts receivable IACI had only the following to say in the Memorial (p. 4) it was obliged to file 5 February 1985 detailing any defense it might have to Claimant's assertions:

AVCO Lycoming's IACI accounts receivable (Exhibit B to the Memorial) consist of statements drawn up by Claimant and may not be cited against Respondent ICI [sic]. Accounts receivable are denied.

In other words, when the time came for Respondent IACI to submit its detailed arguments and evidence it essentially offered no defense other than a general denial.

9. The situation was somewhat different, but not materially so, with respect to the claims against Respondent IHSRC. This Respondent did not offer even a general denial to the

invoice claims totalling U.S.\$1,112,499⁴ in its Statement of Defense filed 14 June 1982.⁵

10. When Claimant filed its Memorial on 15 October 1984 presenting its arguments and evidence it annexed to the Memorial as Exhibit C copies of its accounts receivable ledger relating to IHSRC (with a covering summary), just as was done with respect to the claims against IACI. This accounts receivable ledger likewise set forth in respect of each invoice claim the date, order number, reference number, charge and any credit. It, too, was authenticated by affidavits of responsible corporate officers.

11. In its Memorial filed 5 February 1985 IHSRC addressed itself to the Claimant's accounts receivable ledger by stating (p. 18):

That ... the statement of accounts receivable are inadmissible was dealt with in [the previously cited portion of IACI's Memorial].

The Memorial of IHSRC went on to attach a number of exhibits encompassing various documentation of the transactions between the Parties. IHSRC did express itself at greater length (p. 19), although not with greater specificity:

Anyway, responding to the claims reflected in the invoices of sundry purchase orders requires the

⁴The Statement of Defense of IHSRC, like that of IACI, annexed hundreds of pages of documentation of the transactions between the Parties.

⁵Apparently Claimant never had a meeting in Paris with IHSRC, as it had had with IACI. There is evidence in the record, however, that discussions were held with both IACI and IHSRC in Vienna in September 1981. The Tribunal has found they were inconclusive, however. The fact of such a meeting suggests nonetheless that the Parties were familiar with the Claimant's demands and any defenses that IHSRC might assert.

evidence substantiating delivery to be examined. The evidence would consist of invoices certified by the local Chamber of Commerce, bill of lading, certificate of inspection of quality of goods, and certificate of origin. These must be presented by Claimant for examination, upon completion whereof the authenticity or otherwise of its assertions will be established. In the event such documents are not produced, insofar as the figures indicated in the sundry purchase orders are mere allegations, they are denied.

12. Thus the position of IHSRC, like that of IACI, was not one of specific denial of the claims, of which it clearly had specific knowledge, but rather one of simply challenging the accounts receivable ledger submitted by Claimant as insufficient to make out a prima facie case.

13. With the Case in this posture the Tribunal held a Pre-Hearing Conference on 17 May 1985. Pursuant to the Order of the Tribunal of 15 February 1984, in order to prepare the Tribunal and the Parties properly for a subsequent Hearing, it was ordered that at such Pre-Hearing Conference

the following matters will be considered:

(g) whether voluminous and complicated data should be presented through summaries, tabulations, charts, graphs or extracts in order to save time and costs;

14. As set forth in the Tribunal's Order of 6 June 1985, however:

On 17 May 1985 the Iran-appointed Member of Chamber Three, Judge Parviz Ansari Moin, did not appear to participate in the scheduled Pre-Hearing Conference. This absence occurred without notification and without any expressly official explanation to date.

Representatives of Claimant were present. Representatives of Respondents Iran and NIOC also were present at the Tribunal premises at the time the

Pre-Hearing Conference was scheduled to begin but chose not to participate in the conference.

. . . . [T]he Tribunal proceeded with the Pre-Hearing Conference in this case notwithstanding the absence of the Respondents and the Iran-appointed Member of Chamber Three. The Pre-Hearing Conference and the simultaneous translation thereof, including all questions and answers, was tape recorded for use by the Tribunal and the parties in this case.⁶

15. At the Pre-Hearing Conference counsel for Claimant expressly asked for "guidance" from the Tribunal as to whether further evidence supporting the invoice claims would be necessary.⁷ Referring to Exhibits B and C to Claimant's Memorial, i.e., Claimant's accounts receivable ledgers, counsel stated to the Tribunal as follows:

In the interest of keeping down some of the documentation for the Tribunal we have not placed in evidence as of yet the actual supporting invoices. But we have those invoices and they are available and if the Tribunal would be interested in seeing them we can obviously place them in evidence or we can use a procedure whereby an outside auditing agency, uh, certifies to the amounts of the, uh, summaries vis-à-vis the underlying invoices. Both of those approaches can be taken. But I want to assure the Tribunal that all of the invoices reflected in our exhibits to the memorial . . . exist and are available.

⁶By subsequent communication from the Chairman of Chamber Three to the Tribunal Co-Registrars filed 24 May 1985 it was ordered, inter alia, that "A copy of the tapes (Farsi, English and Floor) should be served to each of the parties (including all separate Respondents), as well as to each of the two agents." The Tribunal Registry records include receipts for such service.

⁷A transcript of the relevant portions of the official tape recording of the Pre-Hearing Conference is annexed to this Opinion.

16. After noting that the Respondents "obviously have had those invoices all along" counsel for the Claimant stated he would

like the Tribunal's guidance as to whether, uh, you would like this outside certifying agency to go through the underlying invoices and certify as to the summary amounts or that the Tribunal feels at this point that the, uh - that you would rather have the, uh, raw data, so to speak - the underlying invoices. Uh, we're prepared to do it either way.

17. The then Chairman of Chamber Three (Mangård) engaged in the following colloquy with Claimant's counsel (Cordiano):

Mangård: I don't think we will be very, very much enthusiastic getting kilos and kilos of invoices.

Cordiano: That, that's what I thought so ...

Mangård: So I think it will but help us ...

Cordiano: We'll use...

Mangård: to use the alternative rather.

Cordiano: Alright...

Mangård: On the other hand I don't know if, if any, if there are any objections to any specific invoices so far made by the Respondents. But anyhow as a precaution maybe you could ...

Cordiano: Yes, sir.

Mangård: Get an account made.

18. With the permission of the Tribunal the Claimant on 22 July 1985 filed Claimant's Supplemental Memorial, which in pertinent part stated (p. 5):

In response to the Tribunal's suggestion at the Prehearing Conference, Avco's counsel has retained Avco's independent auditor, Arthur Young & Co., an

internationally recognized public accounting firm, to verify that the accounts receivable ledgers submitted to the Tribunal accurately reflect the actual invoices in Avco's records.

19. An affidavit of a partner of Arthur Young & Co. was attached and verified that the accounts receivable ledgers submitted by Claimant tallied with the original documents (with the exception that documentation of the entry of \$240.14 of 31 May 1977 in respect of IACI could not be found).

20. Thus when this Case came actually to be heard by the Tribunal (with a new Chairman of Chamber Three in the meantime) (1) IACI had made a general denial and IHSRC had made no denial of the invoice claims addressed here in their Statements of Defense; (2) both these Respondents concededly had in their possession detailed documentation of the transactions between the Parties, as evidenced by the copious attachments to their Statements of Defense (and, in the case of IHSRC, its Memorial), as well as the fact of the Paris Agreement and the Vienna Meeting; (3) Claimant had identified specifically the precise invoices in issue (with details thereof) through submission of authenticated accounts receivable ledgers with its Memorial; (4) Respondents had made no specific denials of the invoice claims in their responding Memorials; and (5), most importantly, Claimant, upon its specific request, subsequently was led by the Tribunal to believe that the only further support for the claims that would be necessary would be to have an independent auditor certify that the documents reflected in Claimant's accounts receivable ledgers existed and tallied with those ledgers.

21. At the Hearing itself Judge Ansari initiated the following colloquy (Transcript of Hearing, pp. 107-08):

JUDGE ANSARI: May I ask a question? It is about the evidence. It was one of the first or one of

the few cases that I have seen that the invoices have not been submitted. So what is your position in this point about the substantiation of the claim?

MR. CORDIANO: Your Honor, this point was raised at the pre-hearing conference in May of last year.

JUDGE ANSARI: I was not there.

MR. CORDIANO: I remember that you weren't there. I think we were kind of lonely that day. We were on one side of the table, the other side was not there. . . . We could have produced at some point the thousands of pages of invoices, but we chose to substantiate our invoices through . . . the Arthur Young audit performed specifically for this tribunal proceeding.

The matter was not pursued further by the Tribunal at the Hearing. Respondents, of course, argued that the authenticated accounts receivable ledgers, as verified by Arthur Young & Co., were insufficient as evidence, but any such objection must be deemed waived by virtue of their failure to attend the Pre-Hearing Conference at which the issue was addressed and determined.

22. Since Claimant did exactly what it previously was told to do by the Tribunal⁸ the denial in the present Award of any of those invoice claims on the ground that more evidence should have been submitted constitutes a denial to Claimant of the ability to present its case to the Tribunal.

23. The extent of this practical failure to grant the Claimant the hearing to which it is entitled is substantial. The authenticated accounts receivable claims of Claimant

⁸I feel differently about the Award's rejection of Avco's claims for incidental damages against the Respondents. While these claims rest on a proper legal basis they are not supported by any documentary evidence at all but rather only by conclusory statements in the affidavits of the Claimant's personnel.

against IACI, which total U.S.\$11,199,728.38 (the U.S.\$11,199,968.52 claimed reduced by the item of U.S.\$240.14 not verified by Arthur Young & Co.), are honored by the instant Award only to the extent of the U.S.\$10,117,667.05 conceded by Respondent IACI in the Paris Agreement, leaving an unrecovered difference of U.S.\$1,082,061.33. The similarly based amounts sought against IHSRC totalling U.S.\$1,112,493.78 have been honored in the present Award only to the extent of U.S.\$585,961.28 (comprised of U.S.\$401,461.28 granted in respect of Contracts 1157, 1158 and 1159 and U.S.\$184,500.00 in respect of Purchase Order number C8YFSR 5190), leaving an unawarded difference of U.S.\$526,532.50. Thus to the extent of U.S.\$1,608,593.83 Claimant for all practical purposes has been denied an opportunity to present its case.⁹

II.

24. The Award measures the interest Avco is to pay IACI on its counterclaim from the date of the Paris Agreement on the ground that at that time "the Parties met with the intention to clear outstanding claims between them" (para. 136, n.1) and such meeting constituted "a claim for return of the outstanding advances," id. On the same basis the Award measures the interest Avco is to pay IHSRC on its counterclaim from the date of the Vienna Meeting.

25. I, however, believe that interest on IACI's counterclaim for repayment of advances should have been measured from the date IACI called the bank guarantee relating to

⁹Given that a majority of the Chamber under its present Chairman entertained doubt about the sufficiency of the evidence, as detailed in the present Award, and even if the guidance given at the Pre-Hearing Conference were deemed to be ambiguous, the appropriate step would have been to grant the Claimant an opportunity to submit the evidence that it is now faulted for not providing.

such advances (Guarantee No. 78/7), i.e., 21 December 1981, rather than from the date of the Paris Agreement, i.e., 11 April 1980. Under the Paris Agreement such unliquidated advances remained in the hands of Claimant, which held them free of interest pursuant to the Parties' contracts, pending reconciliation of outstanding accounts. It is clear that no demand for their return was made prior to 21 December 1981, IACI having until then opted otherwise, through the Paris Agreement and the September 1981 Vienna Meeting. The 21 December 1981 call of the guarantee, however, clearly must be construed as a demand for payment. See FMC Cooperation and The Ministry of National Defense, Award No. 292-353-2 (12 February 1987). Similarly, interest on IHSRC's counterclaim for repayment of advances should be calculated from the date of filing of its Statement of Defense (containing its Statement of Counterclaim) on 25 June 1982, which constituted IHSRC's first demand for payment, rather than from the date of the apparently abortive attempt at settlement in Vienna in September 1981.¹⁰

III.

26. While I concur in the Award's dismissal of Avco's claim on bank guarantee 78/7 for lack of jurisdiction, I believe that it nonetheless would have been advisable to determine in the context of the discussion of the merits that no further purpose exists for the guarantee and that the

¹⁰I note that the Award grants the Respondent IHSRC interest only up to the date of the Award consistent with its express demand. See Statement of Defense at 8 (Doc. 14); IHSRC's Memorial at 31 (Doc. 133). In principle I have preferred the awarding of interest up to the date of payment, see Concurring and Dissenting Opinion of Judge Brower in Exxon Corporation and National Iranian Oil Company Award No. 332-154-3 (28 October 1987), but I concur in this aspect of the Award in light of the clear precedent in this Chamber, see Exxon, at para. 69, supra.

Respondents are no longer entitled to any funds therefrom. On 21 December 1981 IACI issued a demand for payment on the bank guarantee. In turn, on 3 January 1982 the issuing bank presented a demand for payment on a letter of credit, opened by Avco with Manufacturers Hanover Trust Company of New York ("Manufacturers Hanover") in order to secure the bank guarantee. According to the Claimant, pursuant to this demand on the letter of credit the funds were paid into a blocked account under United States Department of Treasury Regulations and thus are still in the possession of Avco or Manufacturers Hanover.

27. Since the call under this guarantee was after 19 January 1981 the Tribunal lacks jurisdiction over any claim based on such call. See Ford Aerospace and Communications Corp and The Air Force of the Islamic Republic of Iran, Award No. 236-159-3 (17 June 1986), reprinted in 11 Iran-U.S. C.T.R. 184. The Tribunal, however, has jurisdiction over disputes concerning Avco's performance under the Export Distributor Franchise Agreement prior to termination. Since the Award in any event completes the performance by Claimant of any remaining contractual obligations, in my view the Award should have stated expressly that the purpose for the guarantee, which was to secure such performance, no longer exists and thus the Respondents have no legal right to any funds that may be deposited in the blocked account pursuant to the call under the guarantee. Such a statement

would make explicit what is implicit in this Award, namely that Avco is empowered to retain the funds it allotted to the blocked account pursuant to the call.¹¹

Dated, The Hague
18 July 1988



Charles N. Brower

¹¹This procedure has been followed by the Tribunal in similar circumstances previously. FMC Corporation and The Ministry of National Defense, Award No. 292-353-2 at para. 47 (12 February 1987); Ford Aerospace and Communications Corp. and The Air Force of the Islamic Republic of Iran, Award No. 236-159-3 at paras. 43, 562 (17 June 1986), reprinted in 11 Iran-U.S. C.T.R. 184.

This ruling should also have been made applicable to letters of credit nos. 3772 and 7173469, issued on behalf of Avco to secure further bank guarantees.

ANNEX TO CONCURRING AND DISSENTING
OPINION OF JUDGE BROWER TO AWARD IN CASE NO. 261

Partial Transcript of Pre-Hearing Conference
in Case No. 261 held on 17 May 1985

. . .

Cordiano: I, I -- again Dean Cordiano [counsel for Claimant] -- the, the exhibits that we put in in with the memorial are accounts receiv - part of the exhibits are accounts receivable ledgers that, uh, are taken directly from the business records of Avco. We've given you a summary sheet as well as the backup accounts receivable ledgers. In the interest of keeping down some of the documentation for the Tribunal we have not placed in evidence as of yet the actual supporting invoices. But we have those invoices and they are available and if the Tribunal would be interested in seeing them we can obviously place them in evidence or we can use a procedure whereby an outside auditing agency, uh, certifies to the amounts of the, uh, summaries vis-à-vis the underlying invoices. Both of those approaches can be taken. But I want to assure the Tribunal that all of the invoices reflected in our exhibits to the memorial and this would be - this is our memorial dated 12 October 1984. That would be Exhibit B and Exhibit C. This relates to

Iran Aircraft and Iran Helicopter. Those invoices exist and are available.

Brower: Well, these uh, uh, copies of your accounts receivable sheets which appears Exhibit B and C. They list the numbers - actual numbers of the invoices - invoice numbers of the invoices that were rendered so that, uh ...

Cordiano: Oh I did ...

Brower: No, in, uh, you would take a position I suppose that, uh, even in the absence of the invoices themselves being submitted to this Tribunal these accounts receivable sheets with the dates of invoices, numbers of the invoices and amounts of the invoices should be adequate to have put the Respondents on notice of what is claimed so they could, uh, check their own records and if they had a dispute about a particular invoice they, uh, would have a quite complete basis to come - come forward.

Cordiano: Dean Cordiano. Yes, exactly, Mr. Brower. These are contemporaneous business records made in the ordinary course by Avco and I might also say that, uh, they were provided to the Iranians so these are documents that the Iranians have had and have had for some time. Uh, not only have they been put on notice of the amounts but they, they've obviously have had those invoices all along.

. . .

Cordiano: Uh, I, I would just like to run through three or four other items that, that I had on the, uh, on the pre-hearing items and then I'll certainly be done with my presentation. I'll field any other questions. We would like the opportunity to file a further memorial addressing both the, the nationality of Avco, the, uh, counterclaims by the Iranian Respondents, specifically how the Tribunal should deal with any offset of the unliquidated, uh, down payments - advance payments. I would like to ask for 60 days for the submission of that memorial. That will probably consist of a brief and certain exhibits. And I would like the Tribunal's guidance as to whether, uh, you would like this outside certifying agency to go through the underlying invoices and certify as to the summary amounts or that the Tribunal feels at this point that the, uh - that you would rather have the, uh, raw data, so to speak - the underlying invoices. Uh, we're prepared to do it either way

Mangård: I don't think we will be very, very much enthusiastic getting kilos and kilos of invoices.

Cordiano: That, that's what I thought so ...

Mangård: So I think it will but help us ...

Cordiano: We'll use...

Mangård: to use the alternative rather.

Cordiano: Alright...

Mangård: On the other hand I don't know if, if any, if there are any objections to any specific invoices so far made by the Respondents. But anyhow as a precaution maybe you could ...

Cordiano: Yes, sir.

Mangård: Get an account made.