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CLAIMS TRIBUNAL

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** AWARD - Type of Award _____

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

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** SEPARATE OPINION of _____

- Date _____

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** DISSENTING OPINION of Mr Mostafavi

- Date 12 Nov86

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In the Name of God

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CASE NO. 264
CHAMBER ONE
AWARD NO. 264 -264-1

HENRY F. TEICHMANN, INC. and CARNEGIE FOUNDRY AND MACHINE COMPANY,

Claimants,

and

HAMADAN GLASS COMPANY,

Respondent.

DISSENTING OPINION OF MOHSEN MOSTAFAVI

I do not concur in the Award in the present Case in a number of respects, the most important of which I shall argue and elaborate upon below:

1. The Claimant has asserted his claim on the basis of a Schedule containing five claims, to which reference is made in the Award as well. These five claims consist of: (1) local /Iranian/ freight charges, (2) retainage, (3) construction, (4) /extra work performed pursuant to/ change orders, and (5) miscellaneous. As set forth in his Statement of Claim, the Claimant has made demand for a specific amount on each of these claims. In response, the Respondent pleads, inter alia, that it paid the Claimant $363,000 for the Baltimore goods yet never received them, and therefore demands that those goods be

delivered to it or, alternatively that it be reimbursed by that amount, plus additional amounts reflecting their replacement cost. Notwithstanding statements to the contrary made by the Claimant in his memorials or in oral presentations, wherein at times he admitted and at others denied having been paid for the goods, we have come to the unanimous conclusion, on the basis of figures submitted by the Claimant himself, that he did in fact receive payment for the goods and his denial was incorrect. Nonetheless, the majority argues that

> "Teichmann had for its part manufactured or procured the goods and attempted to ship them to Iran. It was prevented from doing so by circumstances amounting to force majeure. This being so, the Tribunal applies the principle that, as between the parties, the loss must lie where it falls-- in this case, with Hamadan. The later resale of the goods by Teichmann was justified once it became apparent that export was impossible, in an attempt to limit the losses suffered. Thus, there was no breach on the part of Teichmann which would require the reimbursement to Hamadan of $363,000 representing the price of the goods. Hamadan is, however, entitled to the benefit of the resale proceeds realised by Teichmann, amounting to $39,974.43..."

According to a document produced by the Claimant, those goods were resold on 9 August 1982. Therefore, the Claimant must establish that it was impossible for him to forward the goods to their Iranian destination at that time, owing to the existence of force majeure conditions; yet, those force majeure conditions reflected in the Claimant's memorials in connection with delivery of the said goods relate solely to the latter part of 1978 or early 1979, and have no effect on periods thereafter. Unfortunately, however, the majority has not only accepted this unsubstantiated assertion but also taken cognizance of a claim lying outside its jurisdictional ambit. Until 19 January 1981, the disputes between the Parties were confined to only those five claims mentioned above. Therefore, in the face of the Respondent's defence that it paid the Claimant for the Baltimore goods yet never received them, the Tribunal should

make a determination as to whether or not payment was actually received for the said goods. Thus the Tribunal should not hear a claim which arose only on 9 August 1982 (that is, on the date on which the goods were resold) and on the grounds that their sale realised less than their original value. In other words, this claim arose out of the fact that the goods were resold on 9 August 1982 for a discounted amount, whereby the Claimant seeks to recover the difference thereof, whereas it is manifest that this claim lies outside the Tribunal's jurisdiction since it arose after 19 January 1981.

As noted above, the Claimant's claims were confined to the five aforementioned items only, which he himself had propounded and demanded in his Statement of Claim filed with the Tribunal. In commenting upon and elaborating the claim brought with respect to the Baltimore goods, Counsel for the Claimant made certain representations at the Prehearing conference which are best considered verbatim and in their entirety:

> "Mr. Kotarba then furnished an explanation as to what had happened with the Baltimore goods. As the shipping company refused to load the goods, and as consequently no bill of lading was issued, no draw-down could be made on the letters of credit for their value. Title to the goods had not passed, and the goods had been moved to a warehouse, where they had stayed for about two years. After being sold in an auction, Teichmann had retained the proceeds of $39,000.00. Mr. Kotarba added that no invoice had ever been sent to Hamadan for payment of the Baltimore goods nor was any claim for their value included in the Statement of Claim. He pointed out that a claim was made for the cost of storing the goods; that claim was made under the "miscellaneous" heading of schedule 8 of the letter of 18 August 1980." (Pre-hearing Minutes, p.6)

In these comments, Counsel for the Claimant makes three points: first, that title to the goods had not passed to Iran; second, that the Claimant had not sent any invoice in this connection and in actuality had asserted no claim thereon; and third, that the Claimant had not received any payment for those goods. In its own investigation, the Tribunal has arrived at the conclusion that payment was received for the said goods. Therefore,

the remaining important point in the statement by the Claimant's attorney, one which the Claimant had made the subject of its last request of the Tribunal, is worth noting; namely:

> "...no invoice had ever been sent... nor was any claim for their value included in the Statement of Claim."

It is thus clear that the Claimant had never made any demand for payment on the Baltimore goods; his five-fold claim also clearly reveals that no such claim was ever asserted. Thus, where the Tribunal has established that the Baltimore goods were paid for and where the Claimant also expressly states that he had not brought any claim in that connection, crediting the Claimant by any amount for those goods actually constitutes an award in excess of the relief sought. Although the amount of the award is less than that demanded in the Statement of Claim, this has no bearing upon the claim relating to the Baltimore goods, for on principle, no claim has been asserted with respect to the deficit resulting from resale of the Baltimore goods, which the Tribunal might indemnify by its award. Therefore, rendering an award in favor of the Claimant on this count is in actuality tantamount to issuance of an award in excess of the amount of the relief sought. In attempting to respond to this problem, the majority argues that

> "At first sight, to allow Teichmann to retain the $363,000 notionally paid might appear to exceed the relief originally sought in its Statement of Claim. But the Tribunal's conclusion on the facts invalidates the underlying assumption on which the plea for relief in Teichmann's Statement of Claim was based: that the goods had not been paid for. The failure to include a specific plea in the alternative to provide for the opposite contingency should not operate to deprive the Claimant of the benefit of a finding of fact by the Tribunal different from the one originally postulated in the Statement of Claim. Similarly, neither party's entitlement is open to the objection that no claim was outstanding at 19 January 1981."

Since it has already been agreed that the $363,000 was paid, there is no sense in characterizing that payment as "notional." Apart from that, however, the issue is far too clear to permit denial of the obvious facts through recourse to semantics. The Claimant has asserted five different claims for each of which a specific amount has been sought in relief, but none of them embodies a demand for compensation for damages arising out of resale of the Baltimore goods at a loss. It must be noted that this claim has not, as the majority interprets it, been asserted in the alternative to any item of the relief /originally/ sought, so as to justify the majority's reasoning. Moreover, if such a claim has been brought subsequently, it arose after 19 January 1981 and is thus outside the Tribunal's jurisdiction. Since this Tribunal has so studiously analyzed the basis of claims and defences in order to dismiss claims by Iranian respondents relating to taxes and social security premiums, and held by various pretexts-- inter alia, that the right to lay claim to such taxes and social security premiums was asserted after 19 January 1981-- that such claims were outside the Tribunal's jurisdiction, it cannot in this instance maintain a contrary argument, in terms lacking in all logic, by holding that a claim which clearly arose on 9 August 1982 lies within the Tribunal's jurisdiction.(1) The Claimant offers the following reason for his sale of the goods in question:

> "Due to increased storage costs and deterioration of the equipment, after several years of unsuccessful attempts to have Respondent accept these goods and after due notice to Respondent, those materials were sold." (Claimant's Memorial No.26, p.32)

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(1) See: Award No. 253-289-1, McLaughlin Enterprises, Ltd., and The Government of the Islamic Republic of Iran and Information Systems Iran.

These assertions are totally without foundation, and the Claimant has failed to produce any evidence in proof thereof. This excuse is, moreover, contrary to that advanced at the Prehearing conference for the purpose of justifying the resale of the goods. Whereas the reason offered in the aforementioned memorial for resale of the goods was, that the Claimant had been unsuccessful in his attempt to have the Respondent accept the goods, the refusal of the shipping company to load them-- and thus force majeure-- was later adduced by way of excuse at the Prehearing conference. Yet, it has not been established that the Respondent did refuse to accept the goods; nor has any evidence been submitted in support of the assertion of force majeure conditions with respect to the date on which the goods were resold-- ie, 9 August 1982. On the other hand, the Respondent informed the Claimant via its telexes dated September 2 and 10, 1980 that owing to the Iranian Revolution and to the changes and upheavals ensuing therefrom, it was unable to obtain a copy of the inventory list of the goods in Baltimore, and was thus requesting that it be sent another inventory list of those goods. Nonetheless, the Claimant refused to comply with the Respondent's request, on the excuse that the inventory list had been sent previously and it would be a waste of time to send another. It then kept those goods, for which it had already been paid, in warehouse for a further two years, eventually selling them for $39,000. In view of the fact that the Respondent has been awarded against for payment of $19,565 in warehousing costs attributable to those goods, it has in actuality been credited with no more than $19,435 (after deducting for the warehousing costs) with respect to goods for which it had paid $363,000. And this decision has been made even though there was no justification for selling those goods on 9 August 1982, a time when all barriers impeding their shipment had been removed; and particularly since the Respondent had informed the Claimant by the above-mentioned telexes fully two years earlier, that it needed the goods, even stating that it hoped that the official responsible for carrying out the contract would pay a visit to the Hamadan factory, so that they could "discuss how further steps on /a/ mutual /basis/ can be taken."

If we take the Claimant's last request and explanation presented to the Tribunal at the Prehearing conference as our criterion, then it is the Claimant that must bear any losses resulting from sale of the goods, since title thereto never passed to the Respondent and because the Claimant himself has expressly stated that he had not brought any claim in that connection. Or, if we take as our basis the Claimant's previous statement that owing to increased storage costs and the Respondent's refusal to accept the goods, the Claimant had sold them after giving due notice, the Respondent cannot be held accountable in this event either, since the Respondent neither received due notice, nor refused to accept the goods-- for no evidence has been produced in support of either of these allegations.

The final point worth noting in this connection is that there was no justification whatsoever for selling goods worth $363,000 for a mere $39,000 on account of only $19,565 in storage costs "due to increased storage costs and deterioration of the equipment," because those goods were not perishable. Moreover, notwithstanding the position of the majority that "the later resale of the goods by Teichmann was justified... in an attempt to limit the losses suffered," this action by the Claimant wilfully and intentionally caused injury to the Respondent.

2. In its Counterclaim, the Respondent states in part that it suffered damage as a result of the use of the wrong type of bricks in the /construction of the/ furnace, and thus requested appointment of an expert, who would give an opinion and assess the amount of damage sustained. This was a clear and logical request, and yet the majority rejected it for several reasons, inter alia on the excuse that the Respondent failed to raise a complaint prior to filing of the Statement of Claim. This argument would seem to be highly remarkable, for since the

majority argues, in sustaining the Claimant's position on payment of the discounted resale price of the Baltimore goods even though the Claimant had not asserted any such claim in his Statement of Claim, that

> "The failure to include a specific plea in the alternative to provide for the opposite contingency should not operate to deprive the Claimant of the benefit of a finding of fact by the Tribunal different from the one originally postulated in the Statement of Claim,"

therefore, when a claim is brought in the Statement of Claim, the request cannot, a fortiori, be rejected on the excuse that no complaint was made prior to the filing of the Statement of Claim. This inconsistency in reasoning and adoption of a biased position vis-à-vis the Claimant and Respondent is unjust and highly improper. Furthermore, just as the Tribunal has observed, there have been obvious problems with the furnace; so, the Respondent's failure to make a complaint on that account cannot be held to constitute evidence that no such problems existed. Moreover, when the Respondent perceives that the Claimant has lodged a claim against him, he has every right to bring his own counterclaim against him. The rejection of the Respondent's request on the basis of this argument is in reality tantamount to depriving him of his right to mount a defence. Yet, the majority has rejected the Respondent's request on the basis of a further argument, in addition to that discussed above. The majority argues as follows:

> "At the hearing, Mr. McIntyre... explained that the type of brick selected had been arrived at against Teichmann's advice, as that particular type of brick had a problematic history..."

Yet the Claimant does not himself make any such statement in his memorials; rather, he expressly concedes that

> "The design of the furnace and the specifications of materials were all in accord with generally accepted engineering practices and procedures, as set forth in the technical specifications as negotiated and devel-

> oped between Teichmann and Hamadan. The proper type of bricks were utilized; and even though they exceeded contract requirements, mullite bricks were used in the one area, called the 'target' area, where high wear and tear was expected. In all other areas, Teichmann used high fired super-duty fire brick rather than magnesium brick because of Hamadan's intention to use vanadium-bearing oil in the operation of the furnace." (emphasis added; Memorial No.26, p.37.) (1)

Thus, if the Claimant alleged in the Hearing conference that "the type of brick selected had been arrived at against Teichmann's advice," then this assertion stands in conflict with his written statements, and in having relied on this assertion as evidence, the majority should explain just why it has preferred it to the Claimant's written statements. Moreover, since we do not have available to us any record of the Minutes of the Hearing conference, there can be no basis for relying upon statements which are merely quoted from memory. But at any event, the question as to why the Claimant failed to advance these comments in his written memorials shall always remain unanswered. The only conclusion that can be drawn is, that the majority was seeking some avenue whereby to reject the Respondent's request in order to avoid the problems associated with appointing an expert; and it found just such an expedient in a certain statement, of which no written record has been filed with this Tribunal; and so it was able, by relying upon it, to avoid becoming caught up in the complication of appointing an expert.

3. The majority has dismissed the Respondent's counterclaim for damages arising out of the non-shipment of the goods that remained in Baltimore in these terms:

> "Hamadan has sought to recover the amount of 177,885,597 Rials which it claims to have expended in procuring replacement components for the goods that remained in Baltimore. The only basis on which such a claim might be entertained would be as damages for a breach of contract on the part of Teichmann. Since the non-shipment of the Baltimore goods was due to conditions of force majeure and not to any such breach, and since-- as has been seen--

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(1) The obscurity of the Farsi text arises from the need to quote the language of the Farsi version verbatim.

> the resale was justified, the counterclaim in this respect is unfounded and must be dismissed."

In view of the fact that the majority's entire argument for dismissing this claim is to be found in the above-cited passage, it would appear that the majority has applied the principle that the Claimant's claim is valid, rather than respecting the principle that the burden of proof rests on the Claimant. Yet, the goods were sold on 9 August 1982, by which time nearly four years had passed since the Iranian Revolution (and even a year and a half since the signing of the Algiers Declaration), and by that time not only had all the trade barriers existing in early 1979 been removed, but the United States had committed itself, on 19 January 1981, "to ensure the mobility and free transfer of all Iranian assets within its jurisdiction." It is therefore totally unclear just where the alleged force majeure came from on 9 August 1982, and why the majority has not required the Claimant to produce evidence in proof of his claim on this point.

Pursuant to Article 0.3 of the contract, in the event of force majeure the Parties undertook to "get together immediately and decide on further steps to be taken." This was a contractual duty, one on the basis of which the party asserting force majeure conditions was required to act. And yet, there is not even a single line in any letter in the case file containing a request by the Claimant that the Respondent meet with him in order to decide what to do with these goods. However, according to statements by the Claimant, in accordance with the provisions of that Article the Parties met together to take decisions throughout the period when force majeure conditions prevailed; and it is stated in paragraph 5 of the Statement of Claim that

> "pursuant to the force majeure provision set forth in Paragraph (b) hereof, Claimants requested meetings with Respondent, and a number of such meetings were held."

Therefore, apart from being a contractual duty, there was a history of such meetings between the Parties for the purpose of taking decisions in cases where force majeure conditions were asserted; whereas the majority has regrettably exempted the Claimant from complying with his contractual duty and from conforming with his previous conduct. Moreover, the assertion of force majeure has been made with respect to a time when the Governments of Iran and the United States had declared, pursuant to Article I of the Claims Settlement Declaration, that

> "Iran and the United States will promote the settlement of the claims described in article II by the parties directly concerned."

It was on this basis that the negotiations, agreements and settlements involving transfers of goods and monies between the parties to disputes were carried out throughout this time in the other claims and cases; and in this respect, there was no obstacle in the way of carrying out this contractual obligation in the present case, either. The Respondent's desire to receive these goods is clear and obvious from its telexes of September 2 and 10, since at the end of the telex dated September 2, 1980, the Respondent voices its hope that the official in charge of carrying out the contract would visit the Hamadan factory, so that they could "discuss how further steps on mutual can be taken /sic/," as well as from the fact that when it was unable to receive the goods, it was obliged to purchase substitute goods from another source and at a higher price, in order to start up the factory.

Although the Claimant alleges that he notified the Respondent of his intention to resell the goods, no evidence has been produced in support of this contention. The plain fact of the matter is that the majority has freed the Claimant of any requirement to adduce evidence and regarded his assertions as proven fact. What I find astonishing is how the majority has satisfied itself on this account (supposing that the Claimant did give notice of his intention to ship the goods, and was willing to do so). For why would the Respondent have been un-

willing to accept its goods, even though it had already paid for them, it needed them in order to start up its factory, and it was eventually compelled to purchase replacement materials from another source instead, and at a higher price as well? The majority has no logical answer to this question. I regret that such unjust awards are issued without any thought being given to the facts of the case, and that such a justified claim is dismissed on the strength of a few unsubstantiated lines.

The Hague,
21 Aban 1365/12November 1986

Mohsen Mostafavi