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MS TRIBUNAL

دیوان داری دعاوی ایران - ایالات متحدہ

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IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران - ایالات متحدہ
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CASE NO. 286

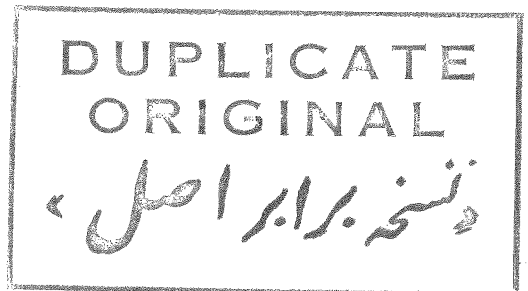
CHAMBER ONE

AWARD NO. 301-286-1

WHITTAKER CORPORATION
(BERMITE DIVISION),
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE IRANIAN NATIONAL DEFENCE
INDUSTRIES ORGANIZATION,
Respondents.



AWARD

Appearances:

For the Claimant: Mr. D.E. Phillips,
Attorney.

For the Respondents: Mr. M.K. Eshragh,
Agent of the Islamic Republic
of Iran,

Mr. A. Noori,
Adviser to the Agent,
Mr. H. Gholami,
Assistant to the Agent,
Mr. G.A. Bayat,
Representative of National
Defense Industries Organiza-
tion.

Also present: Mr. J.R. Crook,
Agent of the United States

1. The claim in this Case arises out of a contract under which the Claimant WHITTAKER CORPORATION (BERMITE DIVISION) was to provide the Military Industries Organization ("MIO"), predecessor to the Respondent THE IRANIAN NATIONAL DEFENCE INDUSTRIES ORGANIZATION ("NDIO"),¹ with fuzes to be used in 20 mm ammunition. The Claimant alleges that MIO refused to accept delivery of the goods in accordance with the Contract. It seeks damages in the total amount of \$479,945.92. NDIO contends that the Claimant failed to perform the Contract. It counterclaims for damages totalling \$2,424,175. A Pre-hearing Conference was held on 2 March 1984 and a Hearing took place on 16 October 1986.

¹ Based on its finding in Section II. B. 2., *infra*, that NDIO, the successor to MIO, is an entity controlled by the Government of Iran pursuant to Article VII, paragraph 3, of the Claims Settlement Declaration, the Tribunal shall refer to NDIO and MIO interchangeably.

I. FACTS AND CONTENTIONS

2. There is no dispute that on 20 July 1978 the Claimant and MIO concluded a Contract pursuant to which the Claimant was to deliver 1,500,000 fuzes at the price of \$1,192,500 to a port on the East Coast of the United States for further shipment by the next available vessel of Arya Lines, the state-owned Iranian shipping company, to the Iranian port of Bandar Shahpour. As contractually required, the Claimant thereafter requested Bank Melli Iran to issue an unconditional delivery guarantee corresponding to 10 percent of the total C&F value of the order in favor of MIO. Payment of the fuzes, on the other hand, was secured by a letter of credit issued by Bank Markazi on 9 September 1978 in favor of the Claimant.

3. The Parties have different views, however, concerning the delivery schedule agreed upon. While the Claimant contends that the Contract provided for a single shipment of all 1,500,000 fuzes by 28 February 1979, NDIO alleges that the Contract envisaged three separate shipments, each of 500,000 fuzes, on or before 31 December 1978, 31 January 1979 and 28 February 1979, respectively.

4. By telex of 17 November 1978, the Claimant informed MIO that, due to both an explosion in a facility involved in the production of the fuzes and a transportation strike, delivery would be delayed. The Claimant, referring to 28 February 1979 as the delivery date, requested a 30 day extension of the letter of credit which was to expire on that day. Furthermore, it offered to ship 500,000 fuzes in January 1979, provided the letter of credit would be amended to authorize such a partial shipment.

5. On 2 and 6 December 1978, MIO sent telexes to the Claimant proposing that the Claimant ship "some part of the subject goods until 28 Feb. 1979" and that the extension of

the letter of credit "be effected for the remainder of goods".

6. The Claimant contends that in the beginning of 1979 it received news indicating that the port of Bandar Shahpour was closed and that Bank Markazi was on strike. It therefore made several attempts to contact MIO to obtain information and, in particular, assurance that MIO would perform its obligations under the Contract.

7. In a letter dated 30 January 1979, the Claimant notified MIO that it had planned to make a partial shipment of 500,000 fuzes on 31 January 1979 but would not do so because it was informed that there seemed to be a problem of getting goods off-loaded at Bandar Shahpour and it considered it inadvisable to ship explosive fuzes when off-loading might be delayed. At the same time, it informed MIO that, having recovered lost production time, it would now have all 1,500,000 fuzes ready for delivery "as originally planned" to an East Coast port of the United States by 28 February 1979 for loading on the first available ship. The Claimant indicated that there was no longer any need to authorize a late delivery. However, noting that shipment could not be completed if the port at Bandar Shahpour was not operating and if Bank Markazi was closed and unable to effect letter of credit payments, the Claimant requested MIO to extend the letter of credit expiration date from 28 February 1979 to 31 March 1979, to advise on the status of port operations, and to cause Bank Markazi to make an advance transfer of funds to Bank of America, the Claimant's advising bank, prior to shipment in order to assure that a payment would not be stopped by "civil disorder".

8. In a letter dated 8 February 1979, the Claimant again informed MIO that it was prepared to ship 1,500,000 fuzes. Noting that it had been told that the port at Bandar Shahpour was closed and Bank Markazi was on strike, it again

requested MIO to advise immediately whether it could receive shipment and, if so, whether Bank Markazi could make an advance transfer of funds against the letter of credit to Bank of America to assure payment.

9. The Claimant repeated these requests in a further letter dated 13 February 1979. Moreover, this letter stated:

"In addition you may wish to exercise another option to completely cancel the above order in writing, recall your Standby Letter of Credit, and release the Performance Bond that Bermite posted to insure shipment".

Finally, the Claimant advised MIO that considering the shipping date of 28 February 1979 it had to receive notification from MIO not later than 19 February 1979. MIO did not respond by this date.

10. On 27 February 1979, the Claimant sent a telex to MIO stating that it had received no response to its recent telexes and letters. It informed MIO that production and testing of the ordered fuzes had been completed on 9 February 1979 but that shipment had not been possible because "scheduled Arya vessels 1) have not made ports calls as scheduled, 2) are not accepting explosive cargo, and 3) strikes have precluded off-loading at Bandar Shahpour". Furthermore, after reiterating its concern that Iranian banking channels had been closed, the Claimant continued:

"If you still wish to take delivery under the referenced order, please have Bank Markazi transfer funds for payment to Bank America and extend L/C to 4/3/79. If you do not wish to take delivery, please cancel the order and release Bermite from its delivery obligation".

11. The Claimant received no response from MIO until 26 May 1979, when MIO sent a telex to the Claimant stating that "due to some changes occurred in the routine way of our production lines we do not need the goods" MIO

further stated that it had already instructed Bank Melli to release the Claimant's guarantee. The telex concluded by stating that "[w]e will contact you for our future needs".

12. There was no further communication between the Parties until this proceeding. The Claimant states that the fuzes remained in inventory until they were sold to other customers for delivery between October 1979 and June 1980.

13. The Claimant alleges that, under the law of California, which it considers applicable, or, alternatively, according to general principles of international commercial law, it was entitled to receive adequate assurances of performance from MIO before transporting the fuzes to an East Coast port in the United States for shipment to Iran. It contends that MIO failed to respond in a timely fashion to its several inquiries and thereby breached and repudiated the Contract. It further argues that the telex sent by MIO on 26 May 1979 constituted a second and independent breach and repudiation of the Contract.

14. The Claimant seeks damages consisting of (i) \$159,324 for lost profits; (ii) \$89,527 as interest on the value of the fuzes while they were in inventory until they were sold; (iii) \$81,607.92 for "additional expenses" which include transportation and storage costs, costs of letter of credit, "excess handling costs" and settlement expenses (which include legal fees and arbitration costs); and (iv) interest at the rate of 12 percent on items (i) and (ii) above which the Claimant calculates to be \$142,487 as of 1 June 1984.

15. Objecting to the Tribunal's jurisdiction, the Respondents allege that the Claimant did not establish its United States nationality within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration. They also deny that NDIO is an entity controlled by the

Government of Iran or any political subdivision thereof in the sense of Article VII, paragraph 3, of the Claims Settlement Declaration. Furthermore, at the Hearing the Adviser to the Agent of the Government of the Islamic Republic of Iran raised the objection that the Claim was not outstanding on 19 January 1981 as required by Article II, paragraph 1, of the Claims Settlement Declaration, because the Claimant had allegedly failed to make a demand before that date.

16. Contending that NDIO is an "independent legal entity" and "directly a party to the claim", the Government of the Islamic Republic of Iran denies that it is a proper Respondent in this Case. It requests the Tribunal to dismiss the Claim and asks for compensation for legal costs in this proceedings. It made no further submission after filing its Statement of Defence on 5 January 1983.

17. As to the merits, NDIO denies that the ports of Iran were closed and that Bank Markazi was on strike in early 1979. It alleges that shipping to Iran, including explosives, by Iranian vessels was possible during the period in question. It argues that the Claimant has failed to prove that the fuzes were manufactured in time to meet the shipment schedule. Contending that Iranian law is applicable, it also denies that the Claimant was entitled to receive any special assurance of MIO's performance. NDIO further asserts that the Claimant's letter of 13 February 1979 and the Claimant's telex of 27 February 1979 gave NDIO the option to terminate the Contract. It contends that it elected to cancel the Contract on 26 May 1979 and released the Claimant's bank guarantee as it became clear that the Claimant would not perform.

18. NDIO has submitted a Counterclaim for damages arising from the alleged failure of the Claimant to perform as required under the Contract. As stated in NDIO's Statement of Defence filed on 25 January 1983, the total amount

of the relief originally sought was \$616,675. In its submission filed 14 August 1984 the Respondent raised this amount to \$2,424,175, consisting of (i) \$257,000 for loss of anticipated profit because NDIO was unable to supply its customers with the fuzes in time; (ii) \$220,000 for damages resulting from its production line being inoperative for 21 months; (iii) \$1,807,500 for costs of replacing the order for the fuzes; (iv) \$71,650 for interest on a "blocked account" connected with the letter of credit; (v) \$13,504 for banking charges for opening the letter of credit; (vi) \$18,746 for costs of credit insurance; (vii) \$23,850 for fees; and (viii) \$11,925 for administrative staff expenses for placing the order. Finally, NDIO seeks its costs of arbitration.

II. REASONS FOR AWARD

A. Procedural Issues

1) Government of Iran as Respondent

19. It is unnecessary to decide whether the Government of Iran is a proper Respondent in this Case, because the Claim is denied on the merits.

2) Amendment to the Counterclaim

20. It is also unnecessary to decide whether the amendment to the Counterclaim is admissible under Article 20 of the Tribunal Rules, because the Tribunal rejects the Counterclaim on the merits.

B. Jurisdiction

1) Claimant's Nationality

21. Based on the evidence submitted by the Claimant, the Tribunal is satisfied that the Claimant is a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration pursuant to the standards set forth in the 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, and the Order of 21 January 1983 in General Motors Corporation, et al. and Government of the Islamic Republic of Iran, et al., Case No. 94, Chamber One, reprinted in 3 Iran-U.S. C.T.R. 1. See also Case No. A20, Decision No. DEC 45-A20-FT (10 July 1986).

2) NDIO as a "Controlled Entity"

22. The Claimant contends that NDIO is part of the Government of Iran or an entity controlled by it in the sense of Article VII, paragraph 3, of the Claims Settlement Declaration. In its submission filed 14 August 1984 and at the Pre-hearing Conference, NDIO asserted that it is a profit-orientated legal entity independent of the Government of Iran.

23. The Tribunal notes that in its Statement of Defence filed 25 January 1983, NDIO stated that it "is the former Military Industries Organization and now is an agency of the Government of the Islamic Republic of Iran". The Tribunal further notes that NDIO was a Respondent in two Awards on Agreed Terms without raising an objection. See Westinghouse Electric Corporation and Islamic Republic of Iran et al., Award No. 177-389-2 (10 May 1985) and Lockheed Corporation and Government of Iran, et al., Award No. 242-829-1 (25 July 1986). Finally, in International Schools Services, Inc. and Islamic Republic of Iran, et al., Award

No. 290-123-1, para. 22 (29 January 1987), the Tribunal held that there was no dispute that NDIO, the same Respondent as in the present Case, "is an instrumentality of the Government of Iran". Thus, the Tribunal holds that it has jurisdiction over NDIO pursuant to Article VII, paragraph 3, of the Claims Settlement Declaration.

3) Claim "Outstanding"

24. It is unnecessary to decide whether the Claim was outstanding as of 19 January 1981 as required by Article II, paragraph 1, of the Claims Settlement Declaration, as the Tribunal dismisses the Claim on the merits.

C. Merits

25. Based on the record before it, the Tribunal finds that the Contract was cancelled by mutual agreement of the Parties in 1979. The Claimant gave the option to cancel the Contract to MIO in its letter of 13 February 1979 and in its telex of 27 February 1979. See supra paras. 9-10 (quoting relevant language). The telex of 27 February 1979 offered MIO the choice either to take delivery on the condition that Bank Markazi transfer funds to Bank of America and extend the letter of credit, or to cancel the Contract if delivery was no longer desired. There were no conditions attached to this cancellation offer, except for the request to release the Claimant from its "delivery obligation," which must be understood to include the release of the bank guarantee securing the performance of this obligation. The Tribunal finds that MIO accepted the offer to cancel the Contract by its telex of 26 May 1979 informing the Claimant that the goods were no longer needed. The last sentence of this telex stating "[w]e will contact you for our future needs" indicates that MIO considered the Contract cancelled. Furthermore, neither Party alleged any breach of contract by the other Party or raised any claim for damages until this Case was filed with the Tribunal.

26. The Claimant notes that MIO's 26 May 1979 telex did not refer to the offer put forward in the Claimant's previous communications but stated that the fuzes were no longer needed because of "some changes" concerning MIO's production lines. This fact is, however, irrelevant since the Claimant had given MIO the choice to cancel the Contract, regardless of the reason. The Tribunal also rejects the contention that the cancellation notice was too late. First, the Claimant's telex of 27 February 1979 did not set any time limit for the acceptance of the offer. Second, under the circumstances prevailing in Iran in early 1979, which the Claimant acknowledges, a response three months later by MIO was still within a reasonable period. This result is confirmed by the fact that the Claimant did not object to the cancellation of the Contract, which MIO, considering that it was the Claimant itself that had given the option, could understand as acceptance.

27. Having found that the Parties cancelled the Contract by mutual agreement, the Tribunal dismisses both the Claim and the Counterclaim. Consequently, it is unnecessary for the Tribunal to consider other issues raised by the Parties relating to the Contract.

D. Costs

28. The Tribunal determines that each Party should bear its own costs of arbitration. The Tribunal dismisses the Government of Iran's request for costs, because, even if it were to be considered as an improper Respondent, it failed to specify its costs and did not actually participate any further in the proceedings after submitting a brief Statement of Defence.

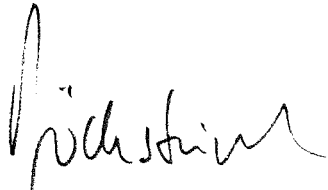
III. AWARD

29. For the foregoing reasons:

THE TRIBUNAL DETERMINES AS FOLLOWS:

- a) The Claim of WHITTAKER CORPORATION (BERMITE DIVISION) is dismissed.
- b) The Counterclaim of the Respondent IRANIAN NATIONAL DEFENCE INDUSTRIES ORGANIZATION is dismissed.
- c) Each Party shall bear its own costs of arbitration.

Dated, The Hague
22 April 1987



Karl-Heinz Böckstiegel
Chairman
Chamber One

In the Name of God



Mohsen Mostafavi



Howard M. Holtzmann
Dissenting Opinion