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** DISSENTING OPINION of Mr Holtzman

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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.

DISSENTING OPINION OF JUDGE HOLTZMANN

Whittaker Corporation (Bermite Division) (hereinafter referred to as "Bermite") seeks damages in this Case for repudiation and breach of a Contract for the sale of military goods to the Military Industries Organization (hereinafter referred to as "MIO") which is the predecessor of National Iranian Defense Industries Organization

(hereinafter referred to as "NDIO"). The majority[1] holds in the Award that no damages are due because the Contract, rather than being breached by MIO, was cancelled by mutual agreement of the Parties. In reaching that conclusion, the Award not only reflects a misreading of the key business documents at issue, but also adopts an interpretation that can only be reached by making the untenable assumption that

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[1]The majority in this Case consisted of the Chairman and Judge Mostafavi. Judge Mostafavi was the proper arbitrator to sign the Award notwithstanding the letter of resignation that he wrote to the President of the Tribunal stating: "Due to personal problems, I am unable to continue my duties with the Tribunal, and I am therefore hereby tendering my resignation. I have also obtained my Government's consent . . . . [T]he appropriate date for my resignation to take effect will be 1st April 1987."

Article 13 of the Tribunal Rules contemplates the possibility of the resignation of an arbitrator and establishes the procedures for appointing a successor. With respect to the resignation of Judge Mostafavi, the Full Tribunal, following its previous practice, determined that (i) the resignation must be submitted to and considered by the Tribunal, (ii) the resignation is not effective until it is accepted by the Tribunal, (iii) the effective date of the resignation is not the date suggested by the resigning arbitrator, but rather a date determined by the Tribunal, and (iv) Judge Mostafavi's resignation would be effective when his successor had been appointed and was available to take up his duties. No successor had been appointed by the date on which the Award was to be signed, and, therefore, Judge Mostafavi's resignation had not become effective as of that date.

Finally, it is to be noted that even if Judge Mostafavi's resignation had become effective by the date of the signature of the Award, he would still be the proper arbitrator to sign the Award in this Case in view Article 13, paragraph 5, of the Tribunal Rules, which states that "[a]fter the effective date of a member's resignation he shall continue to serve as a member of the Tribunal with respect to all cases in which he had participated in a hearing on the merits . . . ." This provision is not contained in the UNCITRAL Arbitration Rules on which the Tribunal Rules are based, but was added by the Tribunal in the exercise of its powers under Article II, paragraph 2, of the Claims Settlement Declaration.

Bermite purposely acted against its own commercial interests. The result is thus incorrect and unrealistic.[2]

I.

A brief review of the factual background of the dispute is necessary to an understanding of the errors in the Award.

As detailed in the Award, on 20 July 1978 Bermite and MIO entered into a Contract under which Bermite was to deliver 1,500,000 fuzes at a port on the East Coast of the United States. Delivery was to be made to a state-owned Iranian shipping company for onward sea transport to the Iranian port of Bandar Shahpour. The price was $1,192,500, and the delivery date for all the fuzes was to be 28 February 1979.[3]

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[2]It should be noted that the Award sidesteps the threshold issue of jurisdiction by refusing to decide whether the claim in question was "outstanding" as of 19 January 1981 as required by Article II, paragraph 1, of the Claims Settlement Declaration. This is done on the ground that since the Claim is dismissed on the merits, it is unnecessary to decide whether the Claim was "outstanding." Based on the record before the Tribunal, I would have found that as of 19 January 1981 a controversy or claim existed between the Parties, regardless of their different interpretations of the circumstances giving rise to the claim. This conclusion is amply supported by the exchange of letters and telexes between the Parties in 1978 and 1979. Thus, I would have found that the Claim was "outstanding" and that therefore the Tribunal has jurisdiction over the Claim.

[3]MIO contended that the fuzes were to have been delivered in three separate shipments of 500,000 fuzes each on or before 31 December 1978, 31 January 1979 and 28 February 1979, respectively. However, the evidence is convincing that the Parties mutually understood that a single shipment of all 1,500,000 fuzes was to be made by 28 February 1979. Indeed, Bermite in a letter of 30 January 1979 notified MIO that it would ship 1,500,000 fuzes by 28 February 1979 "as originally planned." (Emphasis added.) MIO's conduct before and after that letter is consistent with its agreement to that schedule.

In early 1979, Bermite received information indicating that the port of Bandar Shahpour was not accepting shipments due to Revolutionary turmoil and that payment could not be made because Bank Markazi was closed by strikes. In a letter dated 30 January 1979, Bermite informed MIO of its concerns over these circumstances and stated that it could not make delivery if these conditions existed. Bermite therefore asked MIO to extend an existing letter of credit to pay for the fuzes, advise on the status of port operations, and have Bank Markazi make an advance transfer of funds to Bermite's advising bank. MIO failed to respond to this letter, and Bermite thereafter sent similar letters to MIO on 8 February 1979 and 13 February 1979. Still having heard nothing from MIO, Bermite on 27 February 1979, one day before it was due to make delivery, sent MIO a telex which repeated its concerns and requests for information.

28 February 1979 came and went, and Bermite heard nothing from MIO. Then, three months later, on 26 May 1979, MIO sent Bermite a telex which stated that "due to some changes occurred in the routine way of our production lines we do not need the goods . . . ." (Emphasis added.) In order to mitigate damages, Bermite then attempted to sell the fuzes to other customers, and finally succeeded in doing so for delivery between October 1979 and June 1980. Pending delivery to other customers, Bermite incurred the expense of safely storing the hazardous explosive fuzes.

II.

The majority dismisses Bermite's claim based upon the quite surprising finding that Bermite voluntarily offered to cancel the Contract without any payment by MIO. The majority draws this inference from an incorrect reading of two communications by Bermite to MIO in February 1979. It will be recalled that as the date for delivery of the fuzes approached, Bermite sent a number of communications to MIO attempting to find out whether shipment was possible and payment would be made. Among these was a letter of 13 February 1979, expressing Bermite's concerns and requesting assurances of MIO's performance. In that letter, Bermite also asked whether MIO still wished delivery of the fuzes, or preferred "to completely cancel the above order in writing." In a follow-up telex on 27 February 1979, Bermite again stated that if MIO wanted delivery it would have to provide assurances that the Bank Markazi strike would not prevent payment, and that if it did not wish delivery it should "cancel the order." Bermite was, in effect, pointing out that if MIO did not want to fulfill the Contract, it could mitigate damages by promptly cancelling the order, thereby permitting Bermite to seek other customers and to reduce its storage and other expenses.

Bermite did not say, imply, or intend that if MIO decided to cancel the order it would be released, without payment, from the contractual damages that would flow from the cancellation. To construe Bermite's 13 February and 27 February communications to imply an offer of a cost-free release, as the Award does, is to assume wrongly that Bermite would act against its own commercial interests and permit MIO to escape its contractual obligations without making any payment whatsoever, while leaving Bermite to bear

the risk of finding other customers for the fuzes as well as the costs of storing the hazardous material for an indefinite period. In this regard, it must be noted that it is uncontested that Bermite had unused production capacity to fill any orders it might receive from other customers and, in fact, was unable for many months to find others to purchase the fuzes that it had manufactured for Iran.

But even if one were to infer that Bermite had offered MIO the option to cancel the Contract without any payment, MIO never accepted that offer. From 27 February 1979 to 26 May 1979 MIO remained completely silent. The circumstances in February required that Bermite receive prompt information as to whether MIO would fulfill the Contract or not, and in such circumstances it is unthinkable that Bermite intended, as the Award suggests, to set no "time limit for the acceptance of the offer." It is widely recognized that silence cannot ordinarily constitute acceptance of an offer;[4] acceptance must normally consist of a clear and unambiguous declaration communicated to the offeror within a reasonable time. The majority seeks to excuse MIO's three month silence on the ground of prevailing conditions in Iran. That, however, is a defense that was never pleaded, much less proven, by MIO. When MIO finally sent a telex to Bermite on 26 May 1979, it did not refer to any offer made by Bermite and did not purport to accept any offer. Rather, the telex simply repudiated the Contract by stating "we do not need the goods . . . ."

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[4] See, e.g., E. Farnsworth, Contracts § 3.15 (1982); J. Calamari & J. Perillo, Contracts § 31 (1970); A. Guest, Anson's Law of Contract 38 (26th ed. 1984); J. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention 536 (1982); E. Cohn, Manual of German Law para. 160 (1968).

Finally, the majority strains to find support for its erroneous conclusion in the fact that Bermite did not make a demand for damages immediately after MIO repudiated the Contract. Bermite's conduct was, however, both understandable and reasonable in the circumstances. Faced with MIO's intransigence, and recognizing the conditions that existed in Iran in the aftermath of the Revolution, Bermite believed that making demands would be an exercise in futility. When, however, in 1981 the Claims Settlement Declaration provided Bermite the first practical means of pursuing its claim, it promptly initiated this Case.

III.

In sum, the Award misinterprets the business communications between the Parties. It finds an offer by Bermite to release MIO of its contractual obligations that was never made; and it finds an acceptance by MIO that was never given. On that faulty basis, the Award concludes that there was a mutual agreement of the Parties to terminate the Contract, and denies Bermite damages for MIO's breach. In order to reach that conclusion, the majority ignores that there is no demonstrated commercial reason why Bermite would have offered to permit MIO to escape from its obligations without paying any compensation for the damages caused by its breach of the Contract. Unfortunately, again in this Case, as in Aeronutronic Overseas Services, Inc. and Government of the Islamic Republic of Iran, Award No. 238-158-1, paras. 29-48 (20 June 1986), the majority engages in textual analysis that necessarily assumes that the Claimant purposely acted against its own commercial interests and in violation of ordinary common sense. See Dissenting Opinion of Judge Holtzmann with Respect to

Re-engineering and Delay Claims, Aeronutronic Overseas Services, Inc. and Government of the Islamic Republic of Iran, Award No. 238-158-1, pp. 6-7 (20 June 1986). Business documents should not be construed in ways that lead to such manifestly unreasonable results.[5]

Dated, The Hague
22 April 1987

Howard M. Holtzmann

[5]The need for tribunals to judge business transactions in the light of commercial reality is not a new concept. Indeed, it is appropriate for this Tribunal sitting in The Hague to recall the advice attributed to Johann de Witt: "There ought in each City to be at least one particular Court of Justice to decide Matters between Buyer and Seller . . . that the Judges apprehending the way of Trading the better, may give or administer the better Justice . . . ." The True Interest and Political Maxims of the Republic of Holland and West-Friesland 131 (London 1702) (English translation of P. de la Court, Interest van Holland (1662)).