IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 35

CHAMBER THREE

AWARD NO. 145-35-3

R. J. REYNOLDS TOBACCO COMPANY,

Claimaint,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN AND IRANIAN TOBACCO COMPANY (ITC),

Respondents.

CONCURRING OPINION OF RICHARD M. MOSK

I concur in the Tribunal's partial award in this case.

THE PROCEEDINGS

Claimant's subsidiaries (claimant and its subsidiaries shall be referred to as "Reynolds") sold cigarettes and cigarette products to Respondent Iranian Tobacco Company ("ITC"), a major government-owned company, which apparently has a monopoly with respect to the cigarette business in Iran.

As Reynolds' cigarettes were popular in Iran, ITC was desirous of purchasing those cigarettes, agreed to pay for them, agreed to other terms on Reynolds' purchase orders and re-sold the cigarettes to Iranian consumers at a profit.

For no ostensible reason, ITC did not pay Reynolds for cigarettes it had purchased. Reynolds had sent invoices and statements of account and had requested payment. There is no evidence of ITC's objections to the invoices or to statements of account until it was apparent that a claim would be filed with this Tribunal. Even then, ITC only disputed a small portion of the claimed amount. Apparently, discussions took place after November of 1979 concerning payment, but ITC failed to make payments, even for amounts that ITC admitted were due.[1]

Based on the evidence, the counterclaims lacked merit. Indeed, the counterclaims do not appear to state facts which would constitute legally valid claims even if all of the allegations in the counterclaims were true. Moreover, there is no indication that ITC had ever raised any of the allegations in

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[1] The dissenting member suggests that the Reynolds' commencement of civil actions in United States courts in spite of an arbitration clause in the purchase orders was a breach of contract, which purported breach constituted a defense to the claim. Respondents could have sought an order compelling arbitration and staying the court actions. The failure to assert a right to arbitration can constitute a waiver of that right. The parties, by agreeing to arbitrate, did not necessarily agree not to go to court. Moreover, the failure to comply with an arbitration clause is not a material breach of a contract excusing performance by the other party.

the counterclaims with Reynolds prior to filing the counterclaims with the Tribunal.

This case did not involve difficult technical questions. There were few witnesses. The case basically involved an amount owing for cigarettes and cigarette products and some issues which were primarily legal covering jurisdiction and the counterclaims. In short, the case was not a complicated one.

The claim was filed on November 16, 1981. There was a pre-hearing in October of 1982. There was a full hearing in May of 1983. There was an additional hearing on March 1, 1984. There were a number of submissions by the parties. These submissions covered every issue discussed by the Tribunal. Respondents were granted numerous extensions of time for filing materials.[2] The Tribunal deliberated extensively on this case.

This case, which might well have been resolved summarily in a court of law, has been pending approximately 2-3/4 years and is still not completed. That the amount involved is relatively large did not complicate the case or necessitate additional proceedings or time.

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[2] I dissented from a number of orders which delayed this case. See 1 IRAN-U.S. C.T.R. 119; 2 IRAN-U.S. C.T.R. 124; 3 IRAN-U.S. C.T.R. ___ (dissents from orders filed on June 10, 1983; September 12, 1983; October 23, 1983; December 21, 1983.)

Every effort was made to delay a resolution of this case.[3] Such a practice, although not commendable, should not be surprising, especially to American lawyers who are quite familiar with the delaying tactics of defendants in litigation. Municipal systems are often powerless to deal with such tactics due to court congestion and an ever-increasing caseload. But the Tribunal had ample time to hear and resolve this case.[4] Moreover, ITC only has one case pending before the Tribunal.[5] Thus it has not been burdened with a heavy caseload.

I see no reason why the issue left unresolved by the Tribunal could not have been decided. The Tribunal could have requested any further information or material it desired at the hearings or at any time during the several year period that the case has been pending. The continued failure to decide fully this case is not justified.

I also note that I have reservations about separating a case into segments and then deciding it piecemeal at different

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[3] That Respondents attempted to delay the case suggests ITC lacked confidence in the merits of its counterclaims.

[4] This Chamber has not conducted a complete hearing on a case since mid-December of 1983 and has none scheduled until September of 1984.

[5] It settled one other case. Phillip Morris Incorporated v. The Government of the Islamic Republic of Iran v. The Iranian Tobacco Company, Award No. 11-95-3 (21 September 1982). I am not aware of any "small claims" against ITC pursuant to Article III, paragraph 3, of the Claims Settlement Declaration. Unfortunately those cases are making little progress in the Tribunal.

times and possibly with different majorities. I have acquiesced in this practice in this case in order to avoid a further delay in the disposition of the matters resolved by this partial award.

That it is taking so long to resolve this relatively simple case unfortunately may portend the course of proceedings in other Tribunal cases involving substantial sums and more complex factual and legal issues.

It is universally recognized that an undue delay of proceedings is not only unwise but unjust. The International Court of Justice has stated that it "remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay". Barcelona Traction Light & Power Co., Ltd. (Belgium v. Spain) Second Phase, 1970 I.C.J. 3, 30, 31. One conclusion that emerged from the Mexican Claims Commissions was that, "[i]t is important for Commissioners to bear in mind that expeditiousness of adjudication is of prime importance". A.H. Feller, The Mexican Claims Commissions 318 (1935).

In many systems there are means to insure that legal decisions are rendered within a prescribed or reasonable period of time. See, e.g., Civil Procedure Code of Iran, §641 (Sabi trans. 1973); Stockholm Chamber of Commerce, Arbitration in Sweden 121 (2nd ed. 1984); California Const. Art. 6, § 19 (a

judge may not receive salary "while any cause before the judge remains pending and undertermined for 90 days after it has been submitted for decision."); Rules For the ICC Court of Arbitration, Article 18(1); Canon IV(B), Code of Ethics for Arbitrators in Commercial Disputes (Amer. Bar Assoc. and American Arb. Assoc. 1977); see also Mangård, "A Scandinavian System of Settling Consumer Disputes Out of Court" in The Art of Arbitration 233, 235 (J. Schultsz & A. Van Den Berg eds. 1982) (arbitration is "fairly speedy").

The Governments of Iran and the United States, in the Claims Settlement Declaration, suggested that the Tribunal was "to conduct its business expediously." Article III, paragraph 1.

To carry out its obligation the Tribunal has provided that it should attempt to render awards within 90 days after the case is closed.[6] After the hearing in March of 1984,[7] the Chairman assured the parties that an award would be issued within the 90-day period. The Tribunal by acquiescing to almost every request for delay by Respondents, no matter how unjustified, has unduly prolonged this proceeding.

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[6] "1. The Tribunal members should commence deliberations within one week of the conclusion of any hearing. 2. The Tribunal shall endeavor to issue an award within 90 days from the date the case is closed." Iranian Assets Litigation Reporter, December 16, 1983, p. 7601.

[7] I believed that this second hearing was unnecessary and dissented from the Order setting that hearing.

In view of the unfortunate amount of time devoted to this case by the Tribunal and the almost unlimited opportunities of the parties to make submissions, it is inconceivable that anyone could possibly assert that a member of the Tribunal or a party has not had a sufficient opportunity to participate fully in the proceedings.

I do not wish to rebut in detail the remarks which adjoin the dissenting member's signature on this partial award. My failure to do so should not be construed as an admission as to the truth or validity of any of those remarks. The case has been fully deliberated. The parties submitted material on all of the issues resolved by the Tribunal. Also one member of the Tribunal does not have a right to have an issue or case transferred to the plenary Tribunal. That is a matter to be decided by the Chamber. Presidential Order No. 1, reprinted in 1 IRAN-U.S. C.T.R. 95.

JURISDICTION

The Tribunal has concluded properly that the corporate entity, which was the domestic international sales corporation ("DISC"), could be disregarded and that therefore R.J. Reynolds Tobacco Company was the proper claimant under the Claims Settlement Declaration. Reynolds disclosed the existence of the DISC, but argued, inter alia, that it should be disregarded for jurisdictional purposes. For almost a year, the parties submitted material on this issue. Indeed, Respondents submitted

materials prepared by their United States lawyers. The parties and the Tribunal dealt with this issue extensively over a lengthy period of time. The issue received far more attention than it deserved.

The evidence before the Tribunal showed that R.J. Reynolds Tobacco International Export, Inc., the DISC, had the minimum, or barely more than the minimum, attributes necessary to satisfy the requirements to qualify as a DISC. A DISC was simply an authorized device which permitted a United States company engaged in exporting to defer certain income for income tax purposes. Just as was stated about a DISC in a United States case, the particular DISC in the instant case had a "corporate veil" which was "so diaphanous that it did not require piercing." Farkar Co. v. R.A. Hanson Disc. Ltd., 583 F.2d 68, 71 (2d Cir. 1978).[8]

I do not believe it was necessary to pierce the corporate veil of the DISC to conclude that R.J. Reynolds Tobacco Company was a proper claimant.

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[8] "The normal rules for determining whether an entity has the substance necessary to justify treatment as a corporate entity are not applicable to a DISC." Gordon, "Domestic International Sales Corporations (DISC)" in BNA, Tax Management - Foreign Income Portfolios, No. 264-3rd A-3 (1983).

In Title VIII, Section 801 of the United States Tax Reform Act of 1984, the DISC was in large part replaced by a different type of entity known as a foreign sales corporation (FSC). Income deferred by virtue of a DISC, to a great extent, was forgiven. Title 26 U.S.C. §§ 921-927. That the DISC concept could be so drastically altered so as to lead to the prompt disappearance of most DISCs shows that the entity itself had little substance.

Article VII, paragraph 2, of the Claims Settlement Declaration provides that claims of nationals of the United States include

> claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement.

R.J. Reynolds Tobacco Company can maintain as an indirect claim the claims of R.J. Reynolds Tobacco International, S.A. (the Swiss company) because R.J. Reynolds Tobacco Company had, through its DISC, stock ownership of or other proprietary interests in R.J. Reynolds Tobacco International, S.A. sufficient to control it. Cf. Dow Chemical France, et al. v. Isover Saint Gobain, Interim Award, Sept. 23, 1982 (Sanders, Goldman and Vasseur, arbs.), IX Yearbook Commercial Arbitration 131, 136-137 (1984). That such a proprietary interest or control might be through a wholly-owned subsidiary does not make that interest or control any less significant.

In Copperweld Corp. v. Independence Tube Corp., ___ U.S. ___, 52 U.S.L.W. 4821 (June 19, 1984), the United States Supreme Court held that there cannot be an intra-enterprise conspiracy under antitrust laws. In so holding, the

Court suggested there was no reason to distinguish for purposes of antitrust liability a wholly-owned subsidiary from a corporate division. There is also no reason to make that distinction for purposes of jurisdiction before the Tribunal. As the United States Supreme Court stated:

> [I]n reality a parent and a wholly-owned subsidiary always have a 'unity of purpose or a common design.' They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

52 U.S.L.W., supra at 4826.

Any corporate entity within the corporate family which can, by virtue of its stock or proprietary ownership in a juridical person control the non-United States subsidiary, should, under the Claims Settlement Declaration, be able to maintain the claim of that subsidiary as an indirect claim before the Tribunal.

The Claims Settlement Declaration provides in effect that the indirect owner of the claim can bring a claim only if the direct owner of the claim is unable to assert that claim before the Tribunal. It is the non-United States entity that is the direct owner of the claim. The Claims Settlement Declaration distinguishes the "juridical persons" in which a claimant

has an ownership interest from the "corporation or other entity" which owns the claim directly, which is controlled and which, because it is a non-United States entity, cannot bring its claim to this Tribunal. The use of different terms suggests that "juridical persons" in which the stock is held need not necessarily be the "corporation or other entity" which is controlled and which cannot itself bring the claim. Thus, so long as the United States corporation can "through ownership of capital stock or other proprietary interests in juridical persons" control the non-United States entity, even if through other United States subsidiaries, the United States corporation can maintain the claim before the Tribunal. R.J. Reynolds Tobacco Company through "ownership of capital stock" in a "juridical" person, the DISC, controlled R.J. Reynolds Tobacco International Export, Inc., a Swiss company that was "not itself entitled to bring a claim" before the Tribunal. Accordingly, R.J. Reynolds Tobacco Company indirectly owned the claim and that claim is a claim of a United States national over which the Tribunal has jurisdiction.

Respondents' suggestion that only the actual United States shareholder of the non-United States corporation can maintain an indirect claim of that non-United States corporation makes little sense. Such an interpretation would serve no useful purpose and would elevate form over substance. That more than one entity within the corporate family could maintain the claim does not mean that duplicate claims could be brought or that there could be a double recovery. That the Claims Settlement Declaration provides that there may be a direct and

an indirect claim suggests that the parties to that Agreement recognized that more than one entity may have a claim, but that only one of those entities can proceed before this Tribunal.

Accordingly, I would have held that the Claimant was a proper party, not only for the reason given by the Tribunal, but also by virtue of my interpretation of the Claims Settlement Declaration. The Tribunal expressly did not resolve this interpretation issue.

Although I agree with the Tribunal's conclusion that it lacked jurisdiction over various counterclaims, I adhere to my view that if a claim is based on a contract, the Tribunal has no jurisdiction over a counterclaim not arising out of that contract, even if the counterclaim may arise out of a transaction of which the contract is a part. American Bell International, Inc. v. The Government of the Islamic Republic of Iran, et al., Award No. ITL 41-48-3 (Concurring and Dissenting Opinion of Richard M. Mosk) (11 June 1984). The dissenting member, in his statement, questions the relevance of the fact that neither the facts nor the evidence in connection with the claim would dispose of any of the issues related to the License Agreement which is the subject of the counterclaims over which the Tribunal held it had no jurisdiction. The Tribunal points to this fact as one of several factors supporting its conclusion that the counterclaims do not arise out of the same transaction that is the subject of the claim.

CONCLUSION

I concur in the Tribunal's partial award in this case.

Richard M. Mosk

6 August 1984