

268

ایران - ایالات متحدہ

IRAN-UNITED STATES CLAIMS TRIBUNAL

DUPLICATE  
ORIGINAL

نسخہ برابر اصل

CASE NO. 35  
CHAMBER THREE  
AWARD NO. 166-35-3

R. J. REYNOLDS TOBACCO COMPANY,  
Claimant,  
and  
THE GOVERNMENT OF THE ISLAMIC REPUBLIC  
OF IRAN and IRANIAN TOBACCO COMPANY (ITC),  
Respondents.

FINAL AWARD

Appearances:  
For Claimant:

Mr. C. Stephen Heard,  
Attorney  
Mr. Peter J. van Every  
Mr. Robert F. Hermann  
Mr. Peter M. Schuler  
Mr. Hamid Sabi

## For Respondents:

Mr. Mohammad K. Eshragh,  
Agent of the Islamic Republic of  
Iran  
Mr. Nematollah Mokhtari,  
Legal Adviser to the Agent  
Mr. Hasan Moadi,  
Attorney for ITC  
Mr. Mostafa Shiatolaemah,  
Mr. Hossein Honarbakhsh,  
Members of the Board of ITC  
Mr. Mansaur Ahmadi,  
Technical Representative of ITC  
Mr. Karim Partovi,  
Legal Adviser to ITC

## Also Present:

Mr. Arthur Rovine  
Mr. John Crook  
Agents of the United States  
of America  
Ms. Jamison Selby  
Deputy Agent of the  
United States of America

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	1 MAR 1985 ۱۳۶۳ / ۱۲ / ۱۰
No.	35
	تاریخ
	شماره

## I. Procedural History

The Tribunal rendered a Partial Award in favour of Claimant R. J. Reynolds Tobacco Company against Respondent Iranian Tobacco Company ("ITC"), which was Award No. 145-35-3, on 6 August 1984. That award was for \$36,294,667.66 for cigarette products sold and delivered and for certain interest and costs. Referring to the only remaining issue in this case, the Tribunal stated:

As previously stated, the Tribunal retains jurisdiction over the issue of whether or not Claimant is entitled to interest also for the period 22 November 1979 to 16 November 1981. The Tribunal notes that a granting of Claimant's claim for interest for that period may necessitate a revision of the average labor rate here applied, due to the fluctuation of the relevant three months labor figures, and therefore a revision of the interest amount herein granted. The Tribunal retains its jurisdiction to make such revisions, if necessary, in the Final Award.

The Tribunal by its Order of 7 August 1984 invited the parties "by no later than 15 October 1894 to file any briefs and evidence they wish the Tribunal to consider on the issue concerning interest specified in the Tribunal's Partial Award in this case and over which the Tribunal has retained jurisdiction."

Claimant R. J. Reynolds Tobacco Company filed its "Memorial In Support of Claim for Pre-Petition Interest" on 15 October 1984.

Respondents' requests for extension of their filing date were granted by Tribunal's Orders of 18 October 1984 and 28 November 1984, the latter granting an extension for filing of Respondents' brief until 14 December 1984.

Respondents filed their Memorial with the Tribunal on 14 December 1984.

The Tribunal in its Order of 8 February 1985 provided as follows:

Noting that the Claimant filed a Memorial on [the issue of interest] on 15 October 1984, while the Respondent ITC, after two granted extensions, filed its Memorial on 14 December 1984;

noting further that the submission filed by ITC in effect contains arguments and evidence in rebuttal of certain points raised in the Claimant's Memorial and that therefore the Claimant may wish to have an opportunity to comment on ITC's submission;

the Tribunal hereby invites the Claimant to file any such comments no later than 25 February 1985.

The Claimant filed its additional comments on 21 February 1985.

## II. The Previous Award

The Tribunal in its Partial Award in this case concluded "that ITC owes Reynolds U.S. \$36,294,667.66 for unpaid tobacco products."

Claimant contended that it was entitled to interest based on the terms and conditions appearing on the Order Acknowledgement form used in connection with the goods that are the subject of the claim:

Buyer [ITC] agrees to pay to Seller interest at three months libor [London International Offering Rate] (as quoted by the Financial Times of London) plus 2 per cent p.a. on all sums and for the duration such sums remain unpaid in excess of the agreed payment terms. Seller's occasional or continued omission to claim interest hereunder shall not be construed as a waiver.

Claimant sought interest from 22 November 1979, the date when according to Claimant it became clear that ITC would not pay the debt.

ITC disputed that interest should be paid at all. It argued that the provision referred to by Claimant was not binding because, inter alia, it was never enforced in the past.

The Tribunal concluded that the Claimant is entitled to simple interest according to the terms set forth in the contract. The Tribunal noted that "[a]ccording to Claimant it should be calculated from November 22, 1979 because ITC defaulted on that date by failing to make U.S. \$14.1 million in payments against the outstanding amounts." The Tribunal also observed that:

As far as the evidence before the Tribunal shows, a demand for interest from that date, however, was not made until 16 November 1981 when the Statement of Claim was filed with the Tribunal. The evidence before the Tribunal also appears to indicate that, in the practice of the Parties during their many years of commercial relations, Reynolds had refrained from claiming interest, and had accepted payments even though ITC often was in default.

The Tribunal concluded that such possible conduct of the Parties must be considered simultaneously with the specific language of the interest provision that "[s]eller's occasional or continued omission to claim interest hereunder shall not be construed as a waiver". However, because no majority had yet been formed within the Tribunal on the question, the Tribunal rendered a Partial Award on all other issues in the case retaining jurisdiction over the pre-petition portion of the claim for interest.

### III. Claimant's Contentions

Claimant states that R. J. Reynolds Tobacco Company ("RJRT") "from 1970 through 1978, . . . did 'refrain' from claiming interest from ITC." Claimant also observes, however, that RJRT "formally demanded interest from ITC in United States court actions commenced on November 29, 1979 -- just seven days after ITC defaulted on its payment obligations to RJRT".

Claimant contends that each invoice, including those for the goods in question, referred to the "order acknowledgement for General Terms and Conditions of Sale." Claimant argues that that portion of the interest clause appearing on the Order Acknowledgement form which reads "[s]eller's occasional or continued omission to claim interest hereunder shall not be construed as a waiver" means at least that "the occasional or continued omission to claim interest does not waive . . . subsequent entitlement to interest." (Emphasis added). Claimant observes that Tribunal's Partial Award is consistent with this interpretation inasmuch as interest is granted subsequent to 16 November 1981, the date of the Statement of Claim's demand for interest. Consequently, Claimant contends that its 29 November 1979 demand for interest in U. S. courts clearly entitles it to the interest claimed and that "the practice of the parties prior to November, 1979 is irrelevant to RJRT's entitlement to pre-petition interest."

In addition Claimant observes that the overwhelming practice of the Tribunal has been to grant interest from "the date the claim arose -- i.e., the date of Claimant's loss or respondent's default or breach." In Claimant's view, such practice is in this case especially appropriate because "ITC deprived RJRT of its money for five years" and thus "ITC had the interest-free use of RJRT's money. . . ."

#### IV. Respondents' Contentions

Respondents, noting that the interest granted by the Tribunal's Partial Award in this case was contractually based, argues that the General Conditions, a part of the Order Acknowledgement form and which contain the interest provision, were first received - if ever - by ITC on 15 October 1979 and thus can not apply to previous transactions, is not a "formal contract", and were, regardless of the other objections, allegedly breached in at least one respect by Claimant and thus can not now be relied upon.

Respondents contend that "for years . . . the question of interest was never raised", that indeed in early 1979, Claimant not only did not demand interest but agreed in writing to grant 3% reduction in the principal amount claimed", and that the 7 May 1979 letter wherein Claimant stated that it may demand interest was only conditional. In addition, Respondents observe that Claimant's petition in U.S. courts "neither referred to the General Conditions of Sale nor appended its copy to the petition." Respondents therefore argue that Claimant in its U.S. court petition did demand interest generally but not "according to the General Conditions."

Respondents also contend that international tribunals are not obliged to grant interest, have "in a number of cases" refrained from doing so, and "in case of its awarding, [done so] from the date of issue of the Award." Such practice is particularly appropriate, Respondents contend, when as in the instant case, "Respondent was forced to wait for sometime for arbitral proceedings" thereby raising the possibility of a "force majeure" situation.

#### V. Reasons for Award

The Tribunal, in its Partial Award, has already determined that Claimant is entitled to interest based upon the clause in the "General Terms and Conditions of Sale" in the acknowledgement form used in connection with the goods that are the subject of the claim. Additional evidence submitted by Claimant clearly establishes that these terms and conditions had been supplied ITC at least as early as December of 1977 and were referred to in various invoices for the cigarettes in question. Furthermore, certain copies of invoices submitted by ITC to the Tribunal contain references to the General Terms and Conditions again indicating that ITC had received these terms and conditions during the course of the business dealings in issue. In the absence of any evidence suggesting that the parties expressly agreed

upon changes in or the elimination of these terms and conditions, they should be deemed applicable to all of the sales in issue. That acknowledgement form constituted a part of the contract between the parties.

This Tribunal has in other awards awarded as damages the contractually agreed upon interest rate. See, e.g., William L. Pereira Associates, Iran v. Islamic Republic of Iran, Award No. 116-1-3 (19 March 1984). Moreover, in many cases, the Tribunal has awarded interest from the date of the breach of the obligation. See, e.g., Id.; Intrend International, Inc. v. Iranian Air Force, Award No. 59-220-2 (27 July 1983).

An item of consequential injury which any claimant may suffer is the loss of the use of money which rightfully belongs to that claimant during the period between the accrual of the claim and the award. Indeed, the respondent in such cases has been unjustly enriched by having wrongfully had the use of the claimant's money during that period. Interest on the amount of the claim is the standard measurement of claimant's damage for being wrongfully deprived of its money.

In the instant case, the Tribunal has held that at least as of November of 1979, ITC breached its agreement to pay monies to Claimant's subsidiaries. Interest must be included as an element of the damages in order to compensate Claimant for the damages it suffered by virtue of ITC's breach of contract.

It normally should not matter whether Claimant did not demand interest in the past when late payments were made by the Respondent. Ultimately, in the past, payments were made. Not demanding interest in the past should not necessarily signify that a claimant has waived its right to interest for future breaches of contract constituting a total refusal to make payments that are owing. This is

particularly so where, as in the instant case, the parties expressly agreed that Claimant's "omission to claim interest hereunder shall not be construed as a waiver." There is no reason for ignoring such an explicit, agreed-upon term.

Thus, based on the circumstances of this case, it cannot be said that Claimant waived its right to that portion of its damages which is measured by interest.

Moreover, in May of 1979, Claimant notified Respondent that if a large unpaid balance were not paid in accordance with a schedule, interest might be charged. That schedule was not met. On 29 November 1979, Claimant commenced actions in United States courts and demanded interest. It is not required in United States Federal Courts to specify the basis for or computation of the interest.

Thus, to the extent Claimant had any duty to give notice that it would seek interest, it did so.

Remembering that the Tribunal reserved its jurisdiction to revise the overall applicable interest rate, the Tribunal determines that Claimant is entitled to simple interest payable by ITC at the rate of 15.11 per cent i.e., 13.11 per cent equalling the average three months libor rate between the last quarter of 1979 and the second quarter of 1984, plus 2 per cent, upon \$36,294,667.66 from 30 November 1979<sup>1</sup> up to and including the date on which the Escrow Agent instructed the Depository Bank to effect payment out of the Security Account for Partial Award 145-35-3. Noting that

---

<sup>1</sup>The precise date of the actual breach and the notice are not clear and thus the Tribunal computes interest from the last day of November.



the Claimant has already received simple interest at the rate of 13.54 per cent upon \$36,294,667.66 from 16 November 1981 up to and including the date on which the Escrow Agent instructed the Depository Bank to effect payment out of the Security Account for Partial Award 145-35-3, the Tribunal awards Claimant \$12,412,746.51 as the remaining interest due.

Each party shall bear its own costs of arbitration.

FINAL AWARD

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

Respondent IRANIAN TOBACCO COMPANY is obligated to pay and shall pay to Claimant R. J. REYNOLDS TOBACCO COMPANY the amount of TWELVE MILLION FOUR HUNDRED and TWELVE THOUSAND SEVEN HUNDRED and FORTY SIX United States Dollars and Fifty One Cents (U.S. \$12,412,746.51).

Such payment shall be made out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

This Final Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague

1 March 1985

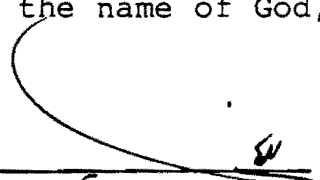


Nils Mangard  
Chairman  
Chamber Three



Richard M. Mosk

In the name of God,

  
Parviz Ansari Moin  
Dissenting Opinion