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AIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 366 Date of filing: 18 Feb 88

** AWARD - Type of Award _____

- Date of Award _____

_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of Judge Parviz Ansari

- Date 18 Feb 88

6 pages in English _____ pages in Farsi

** DISSENTING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

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_____ pages in English _____ pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

ایالات متحده -

366-134
۳۶۶-۱۳۴

In the Name of God

CASE NO. 366
CHAMBER THREE
AWARD NO. 325-366-3

ENDO LABORATORIES, INC.,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
TRASSPHARM TRADING COMPANY,
IRAN WALLACE COMPANY,
DAROUPAKHSH, and
BONYAD MOSTAZAFAN,

Respondents.

SEPARATE OPINION OF JUDGE PARVIZ ANSARI

I find myself obliged to record my views with respect to certain parts of the present Award (1) :

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(1) As to the finding that the Tribunal has jurisdiction over Trasspharm Trading Company on the ground that it is an entity controlled by Iran, in my opinion the necessary evidence has not been produced in order to establish such control over the said company, which was a party to the transaction at issue in this claim. Even supposing that the documents submitted as evidence that a supervisor was appointed over Iran Wallace Company prove that it is a controlled entity, this will not affect the status of Trasspharm. Nor is Dr. Nilforushan's telex dated 15 January 1980 to the Claimant, to which the Award refers and on the basis of which it is argued that Daroupakhsh in practice considered Iran Wallace and Trasspharm to be the same entity, sufficient evidence that Trasspharm was a controlled entity because: firstly, the said telex refers only to Iran Wallace, and contains nothing which might support the conclusions reached in the Award; and secondly, the finding in the Award is based on the unproven assumption that the Claimant had been dealing solely with Trasspharm.

1 - In paragraphs 43, 45 and 50 of its Award, the majority holds that the Respondent is liable for payment of the price of the third shipment which, the Claimant alleges, was donated gratuitously to a public welfare institution of the Mexican Government. Upon an examination of the facts and evidence in the Case, I believe that there is insufficient reason for reaching such a conclusion; I also hold that in determining the amount of the Respondent's liability, the majority has incorrectly interpreted the evidence.

2 - By way of preliminary, it must be observed that clear and conclusive evidence has not been submitted in proof of the allegation that goods relating to the third shipment, and in the quantity and value asserted by the Claimant, were ever actually produced. The Respondent has objected to this point in its pleadings, and it would have been relatively easy for the Claimant to produce evidence in this connection if the claim were valid and such evidence did exist. Consequently, the Claimant's failure to do so should be taken as constituting prima facie evidence that the claim is invalid.

3 - Even assuming that there really was a third shipment, the Case file contains no evidence whatsoever that it was donated to a public welfare institution of the Mexican Government. Notwithstanding objections by the Respondent, which requested that any evidence to this effect be produced during the course of the proceedings, none was ever forthcoming. Not even the precise date of this alleged event has been specified; the Claimant makes the general assertion that it took place in the Spring of 1980.

The Claimant contends, and the majority agrees, that the Claimant's submission of a pro forma invoice and offer of sale, and acceptance thereof by Trasspharm, gave rise to a binding contract between the Parties with respect to the entire amount of the pharmaceuticals listed on the pro forma invoice. Incidentally, the conclusion to which this argument leads is, that the pharmaceuticals in the third shipment belonged to the Respondent when they were allegedly donated (cf. paragraph 5, infra).

However, we see that although the Parties were corresponding with one another during the time in question (Spring of 1980) (2), in the course of which the issue of the Claimant's claims was brought up, that correspondence makes no mention of the possibility of selling or donating the Respondent's property (the pharmaceuticals in the third shipment) to a third party. Since this matter was exceedingly important in view of its financial and commercial implications and also its ramifications under the governing law, it is most improbable that at a time when the Parties were exchanging commercial correspondence, the Claimant did not think it his duty, or else forgot, to give effective notice on such an important matter (viz., gratuitously transferring and donating the Respondent's property worth $228,000 to a third party), and then demanded payment for those goods from the Respondent. Therefore, not only is the claim that the third shipment was donated merely an unsubstantiated assertion, but all indications point to the opposite conclusion.

4 - Aside from whether or not the pharmaceuticals were really donated, the excuse advanced in justification of donating them is unconvincing. Apparently the sole reason was that a portion of the pharmaceuticals' shelf life had expired. The shelf life of the liquid was stated as three years, and that of the tablets, five years. Accepting the Claimant's statement that the pharmaceuticals were produced in December 1978, it can be deduced that when the drugs were donated, the liquid pharmaceuticals still had over 18 months of their shelf life remaining, and the tablets, three and one-half years. In any case, even if there were some justification for donating the liquid pharmaceuticals out of concern that they would spoil, there was no such urgency in the case of the tablets, since their remaining shelf life when allegedly donated exceeded that which the liquid pharmaceuticals had when produced.

5 - An important question passed over in silence by the majority's Award, or perhaps dismissed as insignificant is, under the rubric and provisions of what governing law did the Claimant take these measures, and what are the criteria and ramifications of that unknown governing law? Assuming that every

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(2) Respondent's telexes dated 19 and 30 March 1980, the latter of which refers to Claimant's telex no. 19, dated 20 March 1980.

reasonable and prudent seller is required to mitigate his losses where the circumstances and/or the law permit him to do so, he must exert his best efforts, within reason and customary practice, in order to minimize those losses. In the instant Case, I strongly believe that:

First - If it was the Claimant's duty to mitigate the loss, whether on the basis of law or customary practice, he has not properly discharged that duty, because donating merchandise not only fails to mitigate the loss, but effectuates the loss and imposes it on the Respondent.

Second - If it was not the Claimant's duty to mitigate the loss, he committed a material breach of his contractual obligations in donating the merchandise to a third party, an act which makes the seller liable to the buyer.

6 - Even if, in arguendo, we accept the unlikely assumption that the Claimant was justified in donating the goods in the third shipment, the majority's interpretation of Claimant's letter of 23 April 1981 (3), wherein it is stated that Claimant was owed $80,773.08 for the said shipment, is most unfortunate; so too, is the fact that it has awarded more than twice that amount against the Respondent, with respect to this part of the claim.

On its face, this letter clearly contains a statement of the Respondent's supposed debt to the Claimant, and expresses the latter's hope that their commercial relations can be renewed once this debt is settled. The majority's

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(3) The letter in question, which appears in Exhibit 30 to Document 12, reads in full as follows:

> "In the interest of renewing our commercial transactions in a near future, we are enclosing with this letter a detailed statement of Trasspharm Trading Co. account.
>
> As you can see, Trasspharm still owes us $80,159.56 plus $80.773.08 worth of finished product which last year we were forced to give away to a public welfare institution in view of the fact that it was specifically manufactured for this customer, not to mention the problems and costs to keep products stored a long time in our warehouse.
>
> We would kindly appreciate hearing from you in regard to these outstanding items so that we can settle this debt and continue our business relationship."

interpretation of a single phrase at the beginning of the letter, as meaning that the figure of $80,773.08 was a settlement offer made "in the interest of renewing... commercial transactions," disregards the literal meaning of the letter.

The said letter refers to the above amount under the heading of "detailed statement of Trasspharm Trading Co. account," as well as "outstanding items"; contrary to the majority's opinion, this indicates a final and unconditional statement of accounts and amounts owing.

Furthermore, the telexes exchanged by the Parties show that the Respondent was itself interested in engaging in commercial transactions with the Claimant, and that it had so stated. In addition, the final portion of Claimant's letter of 23 April 1981, wherein it states its hope "that we can settle this debt and continue our business relationship," can be interpreted as meaning that it was in fact the Claimant who had made settlement of the abovementioned debt a precondition to recommencing the Parties' business relationship, in answer to the Respondent's having expressed an interest in continuing that relationship.

7 - In view of the foregoing, the Respondent has no debt in connection with the goods relating to the third shipment. Even if, in arguendo, such an obligation could be imposed on the Respondent in this respect, that possible obligation would not exceed the amount stated in the letter of 23 April 1981 (cf. footnote no. 3, supra).

8 - With regard to my dissent to assessment of interest, and my concurrence with the decision not to award costs of arbitration, I see no need to reiterate my previous Opinions. See: Separate Opinion of Judge Parviz Ansari in McCollough & Company, Inc. and The Ministry of Post, Telegraph and Telephone, et al, Award No. 225-89-3; and Concurring Opinion of Judge Ansari in H. A. Spalding, Inc. and Ministry of Roads and Transport of the Islamic Republic of Iran, et al, Award No. 212-437-3. I must, however, add in this connection that interest should be calculated as from no earlier than 23 April 1981, the dies a quo, particularly with regard to the third shipment, because (assuming that the Claimant is correct in asserting, and the Tribunal

in holding, that the abovementioned merchandise was ready for shipment) no demand was made for payment thereon prior to the date of the letter in question.

Dated, The Hague,

18 February 1988

Parviz Ansari