IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

DUPLICATE ORIGINAL

«نسخه برابر اصل»

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CASE NO. 43
CHAMBER ONE
AWARD NO. 258-43-1

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
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No. 43 شعبه

OIL FIELD OF TEXAS, INC.,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
NATIONAL IRANIAN OIL COMPANY ("NIOC"),
OIL SERVICE COMPANY OF IRAN,
Respondents.

DISSENTING OPINION OF MOHSEN MOSTAFAVI

I consider it necessary for me to set forth my comments with respect to several points on which I do not concur in the present Award:

1. The Award makes only passing mention of the late submissions or the submissions whose filing the Tribunal permitted in contravention of principle, and it fails to clarify the process whereby this came about. Pursuant to the Order dated 15 August, 1985,

> "Each Party shall file by 29 November 1985 copies of any documentary evidence on which it will seek to rely in rebuttal of previously presented evidence, together with a supplemental list of such rebuttal evidence and the location of each such document in the record."

The said Order stipulates that

> "In view of the Hearing, now scheduled to take place on ..., no further extensions will be granted."

Subsequent thereto, the Agent of the Islamic Republic of Iran stated that, owing to the involvement of his Government in numerous cases before the Tribunal and other fora, the Respondents were unable to file their rebuttal, the English version of which was then being typed, by the due date; and he therefore requested a fifteen-day extension. The Tribunal did not agree to this request, and by its Order dated 3 October 1985, it stated that if this memorial were filed after the due date,

> "... the admissibility thereof will be decided by the Tribunal after the Hearing, also taking into account the Claimant's possibility to examine it and submit any rebuttal evidence." /emphasis added/

It thus would appear, on principle, that the Tribunal intended to allow the Claimant the possibility of examining the Respondent's rebuttal and of filing any other rebuttal evidence thereto, regardless of whether the Respondent filed the said rebuttal evidence late or by the due date. In any event, following the above-mentioned Order the Respondent perforce filed a part of its rebuttal on the due date, and filed the other portion thereof, which related to valuation, on 5 December, 1985-- that is, only six days late. By its Order dated 12 December, the Tribunal requested the Claimant to file by 13 January--ie., three days prior to the Hearing (subsequently, of course, the Hearing was postponed for another reason having no bearing on the present issue)-- a submission in response to the rebuttal of the Respondent, including both that which was filed in a timely manner and that which was filed six days late. The last-mentioned Order by the Tribunal stated that

> "The Tribunal will decide after the Hearing on the admissibility of NIOC's submission and of any response that the Claimant might wish to file."

There may be some justification for the Tribunal's deciding afterwards as to the admissibility of the submission filed six days late, even though this delay cannot possibly be imagined to have prejudiced the Claimant's position. But there is certainly no justification whatsoever for the Tribunal to have permitted the Claimant to file a counter-memorial in response to the said rebuttal by the Respondent, or for the Tribunal, not content with this, even to have permitted the Claimant to file a further submission in response to the rebuttal evidence filed by the Respondent by the due date in compliance with the Tribunal order and for the Tribunal, by having accepted the Claimant's submission in this connection, to have tolerated its increasing the amount of its claim even at this latest stage in the proceedings. If it was the intention of the Tribunal that the counter-memorials be filed simultaneously, it was the Tribunal's own order that set 29 November as the date for submission of the Respondent's counter-memorial; and, except for the portion dealing with valuation, the Respondent did indeed file its rebuttal documents precisely on the due date. Therefore, upon the Claimant's being permitted to file a memorial in rebuttal to the Respondent's counter-memorial, no such simultaneous filing of counter-memorials transpired; rather, contrary to principle, it was the Claimant, and not the Respondent, who gained the privilege of filing the final memorial. In my opinion, the Tribunal thereby erred, and there is no doubt that the Respondent has suffered injury as a result.

2. The Award makes only the most cursory mention of the Respondent's defence that the contract had an illegal basis since bribery was involved therein, while in my opinion, in view of the fact that the Respondent elaborated upon this point in detail, the matter should have been examined more thoroughly in the Award. Since my final conclusions do not coincide with those of the majority, I feel that it is necessary to set forth a brief account of the process leading to conclusion of the contract in question.

Early in 1975, NIOC acted through OSCO for the purpose of purchasing a certain quantity of blowout preventer equipment for wells being drilled. To this end, negotiations were held with the Cameron Company, but this company stated that it would take one year to build and ship this equipment. Therefore, it was decided to lease the said equipment for a one-year period. IROS, which was acting on the part of OSCO for the purpose of procuring the equipment and carrying out investigations in order to determine lease prices and conditions, informed OSCO by its telex dated 26 February 1975 concerning the price and conditions bing offered by the Rucker Company, and it even stated that it had reserved four pieces of the necessary equipment. Because the announced prices and lease conditions were found to be appropriate, OSCO carried out the initial steps, inter alia acquisition of an authorization from the contracts committee, towards conclusion of an agreement. However, on 9 April 1975, without there having been any change of decision by OSCO, IROS stated by telex, without making any reference whatever to earlier steps taken, as follows:

> "...booking for rental of 2x7 1/16 and 2x11 inch BOP stacks complete with choke manifold at rental rates DRS 989.00 and DRS 1176 each per day respectively. equipment stated in my letter dated 25 Feb. has been shipped to Houston but will not be assemble tested until written signed purchase order number has been issued. Contract will be signed upon certified documents and shipment to forwarder. In order to hold equipment longer I must have three months advance rental or letter of credit made out to James Drennan Allied Bank of Texas Houston Texas. Your prompt reply will be appreciated. unquote.
> Grateful you authorize three months advance rental urgently and also authorize us to issue letter of intent based on Drennan's quotation of 25 Feb. and let us have RFC's and contract number as soon as convenient if you are in agreement with terms of hire".

In this telex, there is no mention of Rucker's offer, while the very same rates as those offered previously are here proposed as D&S Company's quotation, and agreement to an advance payment for the purpose of concluding the contract is requested. Some days thereafter-- ie. by the telex dated 16 April-- IROS announced that since D&S Company was not registered in the United States and there would be problems with payments and sea transport,

> "We therefore proposed to D & S Services that the hire contract be placed with Oil Field Rental in U.S.A. We have contacted Oil Field Rentals who agree to take over the contract based on D & S Services and who would appoint Mr. Drennan of D & S Services as their London agent in this matter."

The Claimant also confirms that Mr. Drennan acted as Oil Field's intermediary, and that it paid Mr. Drennan a commission after receiving payment (Supplementary Affidavit of Mr. Rauch, p.128). Although the prices quoted by Rucker and D & S (whether or not the latter actually existed) were far lower than those quoted by Oil Field, an Agreement was concluded with Oil Field, even though the Agreement's conditions did not include any special concessions in favor of the Lessee; rather, on the contrary, the Agreement's harsh terms vis-à-vis the Lessee, which shall be discussed below, indicate that all that the Lessee received as a result of this choice was, harsh contract terms and the obligation to pay a higher lease cost.

At the same time, although Oil Field was obliged to certify under oath that

> "... Neither the company nor any of its subsidiaries or affiliates nor any of its officers, directors, employees or agents has paid either directly or indirectly or liability for, any fees, commissions, bonuses, gratuities or other payments or considerations to brokers, agents, finders, or other persons... whether in or out of Iran ..."
> (emphasis added)

and although the said certification was signed and submitted. no mention was made of payment of the commission; this matter, which has now been stated explicitly, was at that time kept secret.

Oil Field's statement in defence, that it had been informed by Cameron Company of OSCO's need for blowout preventer equipment and had immediately sent OSCO its offer to provide the equipment on 26 February 1975, does not solve any problems at all, because whatever its source of information, there still remain numerous ambiguities in other respects, which are quite sufficient in themselves of creating doubt as to the legality of the transaction. If Oil Field did learn from Cameron Company of OSCO's need for this equipment and sent its own offer directly to OSCO, then what possible need could it have had for Mr. Drennan's mediacy and involvement, and just what necessitated his payment of monies by way of commission, and for this matter to be concealed despite the requirement to divulge it under oath?

Furthermore, February 26 1975, the date on which Oil Field allegedly sent its offer to OSCO, is precisely the date on which IROS informed OSCO by telex of the conditions and prices quoted by Rucker Company, and on which it stated that "we have booked four stocks accordingly." Moreover, the case file demonstrates that OSCO subsequently took steps with an end to concluding an agreement with Rucker, including obtaining authorization from the Contracts Committee; and no document with a bearing on this period has been submitted in confirmation of the Claimant's assertion to the effect that

> "On February 26, 1975, Oil Field submitted a bid on the equipment it understood that OSCO wanted. APP. 133. Simultaneously, Oil Field put the equipment on hold, and would not rent it to anyone else."

Oil Field has not submitted any evidence of contemporaneous correspondence in proof of this strange assertion. On the contrary, the available evidence in the case indicates that the correspondence between IROS and OSCO did not even mention Oil Field until the middle of April 1975. Nonetheless, when the Agreement was executed in May, 26 February was fixed as the date on which it took effect. If Oil Field did submit a

bid on the said date, subsequent actions indicate that its bid had not been accepted, because it would appear illogical for a lessee simultaneously to receive bids from two different companies, and yet for no reason, to accept that bid whose terms were injurious to the lessee, and even for it to obligate itself to pay the lease amount from the date on which the bid was submitted, contrary to standard business practice, even though it was not yet known whether or not the bid would be agreed to--unless, of course, it was aware of a series of secret contacts indicating that these terms would be accepted. Since the case file clearly reveals that the possibility of entering into a contract with Rucker was still being discussed in the latter part of April 1975, a strong doubt and misgiving is engendered as to just how steps for the purpose of concluding a contract with Oil Field could possibly have been underway on the other hand, even though no evidence of this has been submitted in this case and, all this aside, as to just how the Lessee could possibly have incurred obligations and liabilities merely by virtue of a bid. The Claimant attributes the need for these obligations to market conditions and the demand for such equipment at that time; and yet, it leaves unanswered the murky question as to why it had to pay Mr. Drennan a commission for serving as an intermediary, even though there was a sellers' market and despite the fact that the Claimant itself alleges that it had learned of Iran's need for this equipment directly from Cameron Company and had contacted OSCO itself, without an intermediary.

When this unusual background is considered together with the harsh terms of the Agreement, strong misgivings as to the legality of this transaction arise, and these remove it from the category of a "favorable transaction" as it is described in the majority's decision. These harsh terms go beyond the "favorable market conditions"; and a brief glance suffices to show that the Agreement fulfilled the conditions of an "arms-length contract. The main features /of the Agreement/ are enumerated as follows:

Whereas the Agreement was executed in mid-May 1975, it was given effect as from 26 February, the Lessee binding itself to pay the lease amount from that date, even though it was on principle not known as of that date whether or not a contract would be concluded with Oil Field.

The Agreement made provision for payment of a three-months advance on first May, whereas it was also provided that the equipment would be tested between May 8 and 22 and that it was to be delivered thereafter.

The Lessee assumed the entire burden of responsibility; the Lessor was only obligated to kept secret the information relating to the said Agreement. As a result, while the price of new equipment of this kind was approximately $2 million in 1975, the Respondent was thereby obligated to pay more than $6 million, without even owning the equipment. Moreover, pursuant to the Agreement it was also liable for either returning it in usable condition, or paying its /replacement/ cost or else regularly paying rent thereon.

Although payment of the monthly rent on this equipment was suspended from late 1978, this delay in payment was due, like that with respect to other obligations of other agencies, to the events surrounding the Revolution. The case file (cf. the Affidavit of Mr. Rauch, paragraph 9) indicates that in June 1979, NIOC paid Oil Field the rent owing on part of the equipment up to December 1978. This clearly demonstrates that there was every intention of paying the outstanding invoices once the new government was established and the executive apparatus in order.

> "On July 12, 1979, however, Oil Field received a telex message from NIOC's representative in London, Iranian Oil Services, Ltd. ('IROS'), stating that the Islamic Court of Ahwaz had instructed NIOC to cease making payments to Oil Field under the Lease Agreement..." (Affidavit of Mr. Rauch, paragraph 9)

The available evidence in the case file indicates that upon discovery of the confidential letter by Mr. Tony Diamond, OSCO's supervisor of drilling contracts, to Mr. Bush, OSCO's general manager of drilling operations, wherein the unusual and unconventional relations culminating in conclusion of the lease agreement are discussed, the Awvaz Revolutionary Court ordered NIOC cease making payments. Although the Tribunal opines that the Diamond letter "is not unambiguous," the information contained therein reveals what out of the ordinary steps were taken in concluding the said Agreement. Therefore, in light of the fact that its attributability to Mr. Diamond has remained uncontested, the text of the letter is quoted below, in order (a) to show whether or not its contents are ambiguous; and (b) to make it possible to learn the circumstances surrounding the actions in question, from someone who had had a part in the process-- someone who did not intend, in writing, to make its contents public, but who rather wrote it by hand, as a confidential communication for the /sole/ information of the manager of drilling operations, whom he sought to inform of events which had been concealed. The text of the letter is as follows:

> "Oil Field Rental Service
>
> Confidential to: H.H. Bush only.
> From: A.R. Diamond
>
> Prior to joining OSCO I had been aware of the BOPE deal between the Company and Oilfield Rentals. The two sources of my information being Alan Rauch, President of Oil Field Rentals and Andrew Wicks of IROS. I had met both of the above during my tenure as the Managing Director of Offshore Drilling Supplies- Aberdeen. I had represented Rauch in the North Sea and had some of his equipment working for Phillips Petroleum in Norway. Wicks was a buyer for IROS in London.
>
> In April '76 I took Rauch out to lunch in London and asked him if my company could represent him in the Middle East area where we wished to become established. He said that it was OK except for Iran where he had a very complicated set up with receipt of money from OSCO and distribution of funds to those who had obtained the work for him. He stated that the

rentals for his equipment were in excess of what he had asked for and a great deal of discretion was required that he personally wanted to deal with.

In August ? 1975 there was an oil show in Aberdeen and my company (ODS) was host to Andrew Wicks a buyer for IROS of oilfield equipment. During the oil show Wicks confided that he had been involved in a deal with a friend from Shell in materials with OSCO, Jim Drennan of Rucker in Iran and that he was receiving for his share a considerable cash flow that he would invest if a good opportunity presented itself. He mentioned that the deal had involved supplying BOPE to OSCO in Iran.

With the above knowledge available we have negotiated a 25% reduction in Oilfield Rentals rates for last year and a 15% reduction in their rates during last month.

The above information concerning individuals was obtained during the course of my oilfield career and not while working for OSCO. I would hope that you would respect my professional integrity by keeping the information confidential and hope the information is of use to you in the way of background.

Tony Diamond
6.9. 1978" (*)

This letter was not an affidavit for the purpose of supporting the claim of either Party to the case. Rather, it was placed at NIOC's disposal without any intention of taking the part of one Party's claim, and at a time when no claim had yet been brought, as a source of information on the preliminary matters which culminated in conclusion of the lease agreement. Therefore, in view of the manner in which this document was obtained, and of the fact that it provides information which is contemporaneous with the time the Agreement was entered into; and since its authenticity has not been impugned and its writer kept the information confidential and for the sole use of a single responsible official, it carries more weight than an af-

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(*) /Minor typographical and other errors appearing in this text are as they occur in the original./

fidavit. Moreover, since its contents were not made public until about July 1979, neither the Agreement's renewal nor the payment of rent up to the time the letter was made public can, due to its /earlier/ confidentiality, be taken to constitute evidence that the Agreement had been implicitly approved. Although the letter does not explicitly refer to "bribery," some of its passages clearly bring to light the corruptness of this transaction and the illegality of its inception, in connection with improper payments for the purpose of encouraging conclusion of the deal.

3. I do not consider the majority's arguments in support of the valuation of the three blowout preventers to be justified. Clearly the majority, having in the present award decided in favor of the Tribunal's jurisdiction over the Claimant's claim against NIOC on the basis of a precedential award by the Full Tribunal, should also use the latter award as its basis in connection with payment of compensation. According to the decision by the Full Tribunal, NIOC may be treated as OSCO's de facto successor /only/ where the principle of "appropriate compensation" is applied as well. Application of the principle of "appropriate compensation" and NIOC's status as OSCO's successor in its liabilities have both been propounded in the latter award, and they cannot be separated, with the Chamber adhering to a part of the award by the Full Tribunal while deriving the remainder of its decision from other Tribunal precedents.

In addition to the foregoing, in refusing to accept the Respondent's valuation carried out by two independent firms, the Tribunal merely contents itself with stating as follows:

> "The appraisal submitted by NIOC was based on the assumption that the equipment was defective--an assumption not borne out by the evidence. If this assumption is discounted, NIOC's appraisal is not significantly different from the values submitted by the Claimant. Also, the insurance proceeds

> on the destroyed blowout preventer reflected a significant sum, which more or less corresponds to the figures given by the Claimant. Based on the foregoing, the Tribunal determines that, as of the beginning of July 1979, the value of the three blowout preventers taken by NIOC was $1,485,692, the amount to which the Claimant is entitled."

By this reasoning, the majority is actuality presuming that used equipment is equal in value to new equipment, an obviously incorrect assumption. Since this equipment stands near heat and is under extraordinarily high pressure, as well as being contaminated with chemical substances, it will naturally become gradually worn-out, no matter what alloys it is made of. The slides shown by the Respondent at the Hearing conference indicated this wear and tear clearly. At the very least, in making its valuation the majority failed to take the factor of aging and wear and tear-- something which is inevitable and highly natural-- into account, and accepted the one-sided valuation made by the Claimant instead.

In accepting the Claimant's valuation, the factor of the demand for such equipment has been grossly exaggerated, as follows:

> "...The evidence shows that as of the beginning of July 1979, the equipment in question was in great demand and that new equipment of the type leased under the Lease Agreement was not readily available. There is evidence that in 1979, one would have to wait eighteen months to obtain a new blowout preventer. In addition, as evidenced by the Lease Agreement, the equipment commanded significant rental income."

While this argument holds for new equipment, the price thereof cannot be assigned to equipment which has been used for years. This equipment was not shipped to the Respondent in new condition, and the Respondent used it for some five years

as well. Furthermore, Article 5.10 of the Agreement makes provision for wear and tear resulting from use of the equipment, by providing that at the expiration of the Agreement, all equipment shall be returned in the same condition as at the time it was delivered, "excepting, however, normal wear and tear occurring as a result of ordinary use of the Equipment." Therefore, the Tribunal should not treat the value of new and used equipment as if they were one and the same, thereby assigning the value of new equipment to equipment which had been used for years, whose useful life had inevitably been diminished, and whose value had depreciated. Therefore, in light of the facts set forth above and of the natural effect of wear and tear on the value of the equipment, the majority's opinion that "the question whether the equipment at issue was used or new is not as such determinative as to its value," cannot possibly be correct. The award requiring the Respondent to pay for old, used equipment at a price equal to that of new equipment in actuality amounts to unjustly enriching the Claimant at the Respondent's expense. Even by the majority's own reasoning, all the Claimant could possibly have been entitled to receive was, comparable and equivalent equipment in place of the equipment allegedly expropriated-- and not better and more sound equipment as awarded by the majority.

The Hague,
Dated 8 October 1986

Mohsen Mostafavi