IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 474
CHAMBER THREE
AWARD NO. 503-474-3

PHIBRO CORPORATION,
Claimant,

and

MINISTRY OF WAR-ETKA CO. LTD.,
GOVERNMENT TRADING CORPORATION and
THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

AWARD

Appearances:

For the Claimant	:	Mr. Harold Levy, Counsel.
For the Respondents:		Mr. Ali H. Nobari, Agent of the Government of the Islamic Republic of Iran; Mr. Nozar Dabiran, Legal Advisor to the Agent; Mr. Ali Ghasemi, Legal Assistant; Mr. Javad Laleh Parvaran, Attorney for Government Trading Corporation; Mr. Mohammad Alavi, Attorney for Etka Co. and Ministry of Defence; Mr. Mousa Khayr-Abadi, Representative of Ministry of Defense.
Also present	:	Ms. Lucy F. Reed Agent-Designate of the Government of the United States of America; Mr. Michael F. Raboin, Deputy Agent of the Government of the United States of America.

I. INTRODUCTION AND PROCEDURAL HISTORY

1. The Claimant, PHIBRO CORPORATION ("Phibro"), through its unincorporated division Philipp Brothers ("Philipp"), and through Metal Transport Corporation ("Metal Transport"), a wholly-owned subsidiary of Phibro, entered into a series of contracts and charter-parties for the sale and transport of sugar to Iran. The receivers and purchasers of the sugar were the MINISTRY OF WAR-ETKA CO. LTD. ("Etka") and Foreign Transactions Company ("FTC"), now GOVERNMENT TRADING CORPORATION ("GTC"). This claim arises out of the alleged failure by Etka and GTC to pay demurrage to the shipowners resulting from these shipments and Phibro's subsequent payment of the amounts due, which totalled U.S.$541,753.11.[1]

2. On 18 January 1982 the Claimant filed a Statement of Claim naming Etka, GTC and THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("Iran") as Respondents.

3. Etka, GTC and Iran each filed a Statement of Defense on 10 January 1983. The Ministry of National Defense, which is not a named Respondent in this Case, also filed a Statement of Defense on the same day.

4. On 19 August 1983 Phibro amended its Statement of Claim and filed its Reply to the Statements of Defense.

5. On 6 December 1983 Etka filed a "Comment on the Amendment of Claim of Phibro Corporation and Supplementary Statement of Defence." On 13 December 1983 GTC filed a "Replication to the Claimant's Statement Registered on August 19, 1981."

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[1] Originally claimed as U.S.$551,786.46.

6. On 5 December 1984 the Claimant filed its Summary of Evidence and Brief. Etka and GTC filed responses thereto on 2 May 1985. Rebuttal Memorials were filed by the Claimant on 11 November 1985 and by Etka and GTC on 28 February 1986.

7. On 9 May 1986 the Claimant submitted Supplementary Evidence in Support of its Reply Brief. On 21 May 1986 the Respondents objected to this submission and requested the right to respond. By Order dated 3 June 1986, the Tribunal authorized the Respondents to submit further documents in response to the Claimant's submission. On 16 January 1987 Etka submitted its Response thereto.

8. A Hearing in this Case was first scheduled for 30 June 1986 but was postponed at the request of the Parties to permit settlement negotiations to proceed. On 23 November 1987, the Claimant submitted information to the Tribunal concerning the status of such negotiations.

9. On 29 January 1988 GTC filed a document which purported to establish that a settlement had been reached between the Parties and requested the Tribunal to dismiss the Case. On 15 February 1988 the Claimant filed its objection to such dismissal. The Tribunal denied GTC's request by Order of 8 April 1988.

10. By Order dated 26 April 1988, the Tribunal scheduled a Hearing in this Case for 15 December 1988. The Hearing was again postponed and rescheduled for 19 September 1989, on which date the Hearing was held.

II. JURISDICTION

A. Nationality

1. The Claimant

11. Phibro states that it is a United States corporation

organized and existing under the laws of the State of Delaware and qualifying as a United States national within the meaning of Article VII, paragraph 1 of the Claims Settlement Declaration. As evidence of its nationality Phibro submitted a copy of its certificate of incorporation and good standing from the State of Delaware dated 28 July 1983. This certificate establishes that the Claimant was incorporated under the name of Engelhard Industries, Inc. and has continued in existence under various names, including that of Phibro Corporation, its name at the time of the filing of the Statement of Claim. Phibro also submitted proxy statements for 1977, 1978 and 1981, together with an affidavit from Richard Di Donna, Associate General Counsel of Phibro, attesting that more than fifty percent of the voting stock of Phibro is held by persons with addresses in the United States.

12. Phibro asserted in its pleadings, and confirmed at the Hearing, that Philipp is an unincorporated division of Phibro, without a separate corporate identity. Phibro also submitted a statement from the public accounting firm of Arthur Andersen & Co., confirming that "[Phibro] was the beneficial owner of 100% of Metal Transport Corporation as of December 31, 1977, 1978 and 1981," together with a certificate from the Associate General Counsel of Phibro confirming, inter alia, that Metal Transport is a corporation duly organized and existing under the laws of the State of New York. The record further contains affidavit testimony by the Secretary of Metal Transport; no certificate of incorporation has been submitted for this corporation.

13. The Tribunal finds sufficient evidence in the record to establish that Phibro is a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration and, in the absence of any

evidence to the contrary, that Philipp is an unincorporated division of Phibro and that Phibro's subsidiary Metal Transport is also a United States national.

2. The Respondents

14. GTC does not contest that it is a controlled entity within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration. Etka asserts, however, that it is not controlled by the Iranian Government as alleged. The Tribunal notes that Etka was the claimant in Refusal to Accept the Claim of ETKA ORGANIZATION, Decision No. DEC 78-Ref 43-1 (14 July 1988), in which it was described as "affiliated with the Ministry of Defence of the Islamic Republic of Iran." The Tribunal holds that Etka is a proper respondent in this Case.

B. Forum Selection Clauses

15. Etka and GTC challenge the Tribunal's jurisdiction based on the forum selection clauses contained in the original contracts for the sale of sugar between Sangam Limited ("Sangam") and ETKA and GTC. Those contracts contain forum selection clauses stating that "[a]ny dispute which is not settled in a friendly manner will be referred to the Iranian legal Authorities" and that "[e]ventual disputes must be settled in Iranian courts." Citing the Tribunal's decision in Continental Grain Export Corporation and Government Trading Corporation, et al., Partial Award No. 75-112-1 (5 Sept. 1983), reprinted in 3 Iran-U.S. C.T.R. 319, the Respondents assert that these clauses preclude the exercise of jurisdiction by the Tribunal.

16. The Tribunal finds, however, that these claims are not brought pursuant to the original sugar sales contracts but rather arise out of the payment made pursuant to the separate charter arrangements between Metal Transport and the

shipowners. These forum selection clauses therefore do not apply.

C. Ownership of the Claims

17. Etka and GTC raise a number of arguments concerning the ownership of the claims. First, they allege that, assuming that Metal Transport is the owner of the claims, Phibro has failed to establish that it can claim on Metal Transport's behalf. Metal Transport, however, charged Phibro's Philipp division for all amounts paid for demurrage. The Tribunal finds, therefore, that Phibro is the proper party to bring these claims. Cf. Rexnord Inc. and The Islamic Republic of Iran, et al., Award No. 21-132-3, p. 7 (10 Jan. 1983), reprinted in 2 Iran-U.S. C.T.R. 6, 9; Richard D. Harza, et al. and The Islamic Republic of Iran, et al., Award No. 232-97-2, para. 22 (2 May 1986), reprinted in 11 Iran-U.S. C.T.R. 76, 84.

18. Etka and GTC also maintain that these claims arise out of the original sugar contracts between Sangam and GTC and ETKA and that Sangam, an English company, is therefore the owner of the claims. As noted, however, these claims do not arise out of the original sugar contracts but rather out of the payment made pursuant to Metal Transport's charter arrangements with the shipowners and this argument therefore must be rejected. Consequently, the Respondents' further argument that at the time these claims arose they were owned by the shipowners to whom the demurrage was first due and that they therefore have not been continuously owned by United States nationals must fail also.

19. The Tribunal therefore finds that it has jurisdiction over the claims.

D. Jurisdiction over Counterclaims

20. Jurisdictional issues relating to the counterclaims are examined in the relevant sections below.

III. THE MERITS

A. The Claims and Counterclaims involving Etka

1. Factual Background

21. On 20 March 1977, Etka entered into a contract with Sangam for the purchase of 24-26,000 metric tons of sugar on a cost and freight ("C&F") basis. The sugar was to be shipped in two consignments in April and May 1977. Etka was required to "guarantee speedy berth allocation and discharge rate of 1000 Metric tons per weather working day of 24 hours consecutively, Fridays and holidays excluded." Article 1 of the contract provided for demurrage to be for Etka's account "as per Charter Party or Booking Note." The contract also provided in Article 10 for a letter of credit to be opened by Etka in favor of "Metalco c/o Sangam Limited." It was explained at the Hearing that Metalco is the chartering arm of Sangam and that it has no connection with Metal Transport or the Claimant.

22. On 9 June 1977 Philipp sold 12-14,000 metric tons of sugar to "Metalco c/o Sangam Limited" allegedly to enable Sangam to fulfill part of its contract with Etka. On 1 August 1977, Philipp entered into a second contract with Sangam for the remainder of the sugar for Etka. Under both contracts, the sugar was to be delivered to a port in Iran and demurrage was agreed at U.S.$0.25 per long ton "for account of buyer." Any disputes arising under the contracts between Philipp and Sangam were to be resolved in the Iranian courts.

23. On 1 August 1977 Metal Transport chartered the vessel "Bayville" under a sugar charter-party to deliver one of the shipments to Etka. Demurrage was agreed at U.S.$3,000 per day. Article 24 of the sugar charter-party stated that "demurrage or despatch to be settled directly between Owners and Receivers at discharging port(s). Should Owners not receive demurrage discharge port within sixty days after completion of discharge then Charterers to remit same after presentation of valid timesheets."

24. The sugar was shipped on the Bayville on 31 August 1977 as evidenced by the bill of lading. The Bayville arrived in port in Iran in October 1977 and issued a notice of readiness on 5 October 1977. The vessel was eventually discharged with a delay of nearly seventy-four days, incurring demurrage. In addition, 2,855 bags of sugar were missing when unloaded and the appropriate "shortlanded certificate" was issued on 18 April 1978 -- this forms the basis of Etka's first counterclaim in the amount of U.S.$52,000.

25. On 28 February 1978, Metal Transport was invoiced for the charter fees for the Bayville, including demurrage incurred of U.S.$239,190. At the Hearing, it was explained that Phibro disputed this amount of demurrage, and that the parties eventually agreed to U.S.$220,935.40.[2] After certain agent's fees due to Phibro from the shipowner were set off against this amount, Metal Transport paid the net sum of U.S.$212,098 in two installments on 3 May and 18 August 1978 and debited Philipp's account accordingly.

26. The second shipment to Etka was freighted aboard the vessel "Dimitrios," chartered by Metal Transport under a sugar charter-party dated 24 August 1977. Demurrage was agreed at U.S.$0.25 per metric ton and Article 24 of the

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[2]Also stated to be U.S.$220,935.42 and U.S.$220,935.41.

sugar charter-party provided that "Charterers are responsible for the payment of demurrage at both ends. If the Vessel is on demurrage for more than 30 days then Charterers to pay Owners on account after 30 days every 10 days in advance [illegible] final demurrage to be settled within 30 days after presentation of documents."

27. The Dimitrios arrived in Iran and issued a notice of readiness on 8 October 1977. The vessel incurred nearly forty-three days delay and demurrage charges of U.S.$155,936.11. Metal Transport was invoiced for the charter of the Dimitrios, including demurrage, on 3 January 1978 and paid the balance due to the shipowner. Metal Transport then charged the demurrage to Philipp and an internal debit was entered between Metal Transport and Philipp.

28. Several months later, on 30 September 1978, Sangam billed Etka directly for U.S.$264,860.42 demurrage in respect of the Bayville, and U.S.$208,901.04 in respect of the Dimitrios. A number of telexes were exchanged between Etka and Sangam and on 11 June 1979 Etka offered to pay Sangam U.S.$207,000 in settlement of these two claims. Sangam accepted this proposal by telex dated 24 July 1979. No evidence of payment of this sum by Etka has been submitted to the Tribunal and at the Hearing Etka was unable to confirm that payment had been made.

2. The Claims

a. The Claimant's Contentions

29. Phibro bases its claims against Etka on what it describes as "internationally recognized legal principles which permit Phibro to recover against Etka for having paid demurrage owed by Etka." Phibro argues that Etka was primarily liable for the demurrage and that, when Etka

failed to pay, Phibro was required to make payment as guarantor under the terms of the sugar charter-parties. Consequently, Phibro contends that it has a direct right to be reimbursed by the principal debtor, that is, Etka. Phibro notes further that Etka does not deny that it was liable to pay any demurrage incurred in respect of these shipments or that it failed to do so.

30. With respect to both of its claims against Etka, Phibro argues that Etka had a duty as receiver to discharge the vessels within the time provided in the charter-party or, in the alternative, within a reasonable time, and to pay demurrage for any delay. As Etka was in breach of these obligations, Phibro was obliged to pay the demurrage and therefore has suffered loss. Phibro relies on Section 2, Article 1 of the Civil Responsibility Act of Iran, which allegedly provides that anyone who intentionally or carelessly inflicts injury on another is liable to compensate the injured party for any damage arising from that injury.

31. In the case of the Bayville, the terms of the sugar charter-party made Etka primarily liable for the payment of demurrage and, if Etka failed to pay, Phibro then was obligated to reimburse the shipowner for the amount of the demurrage. This provision was incorporated into the bill of lading and notice of readiness, both of which were accepted by Etka. Phibro argues that its undertaking to pay the demurrage pursuant to this provision thus created a guarantee relationship between Etka, Phibro and the owner of the Bayville. Phibro argues that because it was acting as guarantor its payment to the shipowner gives rise to a right of action against the principal debtor (Etka) for the amount paid plus interest. Phibro contends that Etka's acceptance of the bill of lading and the notice of readiness for each shipment establishes consent to Phibro's guarantee and, relying on Article 685 of the Iranian Civil Code, asserts that, in any event, the guarantor's consent is not required

by Iranian law. Finally, Phibro contends that under Article 709 of the Iranian Civil Code payment by the guarantor creates a right of reimbursement against the principal debtor.

32. Alternatively, Phibro argues that Etka should be obligated to reimburse it for the demurrage arising from both shipments on the equitable principle that unjust enrichment gives rise to a liability to compensate. See Sea-Land Service, Inc. and The Government of the Islamic Republic of Iran, Ports and Shipping Organization, Award No. 135-33-1 (22 June 1984), reprinted in 6 Iran-U.S. C.T.R. 149 ("Sea-Land"); Benjamin R. Isaiah and Bank Mellat, Award No. 35-219-2 (30 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 232 ("Isaiah"). Phibro asserts that the principle of unjust enrichment is recognized in Articles 301 and 303 of the Iranian Civil Code and that to permit Etka to avoid liability would grant it a benefit that it did not anticipate.

33. Phibro concludes that Etka is responsible for the demurrage: (i) under principles of implied contract and equity; (ii) because the contract it entered into with Sangam evidences that it had intended to be responsible for the demurrage; and (iii) because under established commercial practice demurrage is for the receiver's account. Finally, Phibro challenges Etka's assertion that Sangam has paid the demurrage or that Sangam has settled the issue of demurrage with Etka.

b. Etka's Contentions

34. Etka denies the existence of any contractual link between it and Phibro or that an implied contract of guarantee existed between them. Etka asserts that Iranian law does not permit the incorporation of a charter-party into a bill of lading. Etka contends that Sangam should have executed the charter-party, not Metal Transport, and

therefore any claim Metal Transport may have lies against Sangam, not Etka, and that Sangam is the only party that may pursue a claim against Etka. Etka asserts further that, even if Phibro was a guarantor of the debt, Article 267 of the Iranian Civil Code provides that Phibro has a right to reimbursement only if payment was made with Etka's permission.

35. Etka also denies that Phibro has a right to reimbursement based on the principle of unjust enrichment. Etka argues that the Tribunal's decision in Isaiah is not relevant to this Case as Etka has not obtained any benefit. See Isaiah, Award No. 35-219-2, reprinted in 2 Iran-U.S. C.T.R. 232. Etka asserts that because the claims are of a contractual nature, as they are based on the contracts entered into between Sangam, and Etka and Metal Transport, the theory of unjust enrichment is improperly invoked by Phibro.

36. Finally, Etka challenges the calculation of the demurrage claimed and asserts that Phibro has failed to evidence payment by Philipp to Metal Transport.

c. The Tribunal's Decision

(i) Bayville

37. The shipment aboard the vessel Bayville was subject to specific contractual provisions concerning both the payment of demurrage and the action to be taken in the event that the receiver, Etka, failed to pay. First, Article 1 of the purchase contract between Etka and Sangam provided for demurrage to be for Etka's account "as per Charter Party or Booking Note." The contract between Sangam and Philipp provided for delivery to take place in Iran and for demurrage to be paid at U.S.$0.25 per long ton. The sugar charter-party entered into between Metal Transport and the shipowner stated in Article 24 that "[d]emurrage or despatch

to be settled directly between Owners and Receivers at discharging port(s). Should Owners not receive demurrage discharge port within sixty days after completion of discharge then Charterers to remit same after presentation of valid timesheets." The charter-party also contained a cesser clause stating that "[c]harterer's liability to cease when cargo is shipped and Bills of Lading signed, except as regards payment of freight, deadfreight and demurrage (if any)."

38. A charter-party is a contract between shipowner and charterer. Strictly speaking, the word "demurrage" applies to a period of additional time allowed to the charterer to unload the vessel in consideration of an additional payment. Sometimes, as in the case of the Bayville, no further time is expressly allowed but it is stipulated that demurrage is to be paid at a set rate per day for every day the ship is detained. See 43 Halsbury's Laws of England, para. 469 (1983).

39. In this case, the only contract between the shipowner and Etka is that contained in the bill of lading, of which Etka could only be an endorsee, not being named as consignee therein. See Halsbury, para. 496. Such a contract may be implied as a matter of fact from the presentation of the bill of lading and the taking of delivery. See Carver, Carriage by Sea, para. 1954; Scrutton on Charterparties, Art. 14. The bill of lading does not itself refer to demurrage. Etka was not a party to the charter-party and, therefore, was not subject to its terms, whether it knew of its existence or not, unless the charter-party was incorporated into the bill of lading by express reference. See Halsbury para. 534. Phibro asserts that the terms of the charter-party were so incorporated and thus bind Etka to pay demurrage.

40. The Tribunal finds that the terms and conditions of the charter-party relating to the Bayville were incorporated in the bill of lading by express reference. The bill of lading bears the endorsement that it is "[s]ubject to all clauses, conditions, exceptions and stipulations of charter party dated London, 1st August 1977." However, not all conditions of a charter-party will be incorporated into the bill of lading. As is stated in Halsbury, "[t]he conditions which are to be treated as incorporated are those which are to be performed by the person who has received the bill of lading and is taking delivery of his goods, such as those relating to the payment of demurrage at the port of discharge . . . ." Halsbury, para. 535. The Tribunal finds that the language of incorporation is clear and explicit and that it effectively incorporated the demurrage provisions into the bill of lading.

41. The demurrage provision so incorporated, however, did not relieve Metal Transport of its obligation to pay demurrage; rather it provided specifically that if Etka did not pay within sixty days Metal Transport was obligated to pay the shipowner. This obligation was expressly confirmed by the cesser clause. Therefore, when Etka failed to pay, Phibro was under a legal obligation to make payment to the shipowner as the guarantor of Etka's obligation in this respect. By its acceptance of the bill of lading, Etka became bound by its terms, including the demurrage provisions from the charter-party, and thereby including the guarantee of its obligations by Metal Transport. Based on these provisions, the Tribunal finds that Etka was under a directly enforceable obligation to reimburse Metal Transport for any payment made under such a guarantee. Thus, the claim that arose in favor of Metal Transport against Etka when the shipowner received payment from Metal Transport

for the demurrage does not result from an assignment by the shipowner of its right vis-à-vis Etka, but instead constitutes a directly enforceable claim for reimbursement under the guarantee. It is also separate and distinct from Metal Transport's contractual right of recovery under its contract with Sangam. Phibro is entitled to recover the monies paid on either basis and the existence of another remedy does not bar a claim based on the guarantee.

42. Concerning the amount of demurrage, although Phibro was invoiced for U.S.$239,190, the amount eventually agreed to was U.S.$220,935.40, as confirmed by the time-sheet submitted with the Statement of Facts. See supra para. 25. Phibro has demonstrated that Metal Transport paid the agreed demurrage, less agent's fees due to Phibro, to the shipowner and debited this amount to Phibro's Philipp division. Phibro therefore has evidenced to the satisfaction of the Tribunal both the amount and payment of this part of the claim.

43. Etka challenges the calculation of demurrage, arguing that, while the charter party mentions a discharge rate of 750 tons per day, Phibro's computations are based on 1000 tons per day; that Phibro disregarded the provision relating to the commencement of laydays for discharging; that the calculation encompassed holiday periods that pursuant to the charter-party should have been excluded; that Phibro applied the wrong rate of demurrage; that the calculation included rain days that pursuant to the force majeure clause in the charter-party should have been left out; and that it is based on an erroneous date of berthing. Etka further asserts that Sangam has paid the demurrage and claimed it from Etka. See supra para. 28. It was argued at the Hearing that the Statement of Facts issued by the Port Authority is dispositive of the delay actually incurred. The Tribunal notes that the Statement bears the stamp and signature of the receiver. Moreover, the Tribunal has not found any

evidence to show that the Statement of Facts is in error or that it conflicts with the terms of the charter-party or with the time-sheet indicating the amount of U.S.$220,935.41. The Tribunal therefore accepts these documents as conclusive of the demurrage incurred. Etka was unable to confirm at the Hearing that it had already settled this claim with Sangam and this defense must fail.

44. The Tribunal therefore awards Phibro the sum of U.S.$220,935.40 in respect of the claim concerning the Bayville.

(ii) Dimitrios

45. The sugar shipped aboard the Dimitrios formed part of the total amount purchased by Etka from Sangam under the contract of 20 March 1977, and as such was subject to the same provision that demurrage was to be for Etka's account "as per Charter Party or Booking Note." The charter-party relating to the Dimitrios provided in Article 24 that "Charterers are responsible for the payment of demurrage at both ends. If the Vessel is on demurrage for more than 30 days then Charterers to pay Owners on account after 30 days every 10 days in advance [illegible] final demurrage to be settled within 30 days after presentation of documents." Thus, whereas the contract foresaw a direct obligation for Etka to pay demurrage, under the charter-party this obligation appeared to rest on Metal Transport. The bill of lading for this shipment is not in evidence.

46. Phibro seeks to recover for the Dimitrios demurrage on the theory that Etka was unjustly enriched by the payment of the demurrage. As the Tribunal stated in Sea-Land, to have recourse to this principle:

> [t]here must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and

> no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.

Award No. 135-33-1 at p. 28, reprinted in 6 Iran-U.S. C.T.R. at 169.

47. In its decision in Schlegel Corporation and National Iranian Copper Industries Company, the Tribunal observed that

> in an earlier case, the Tribunal allowed a claim based on unjust enrichment to be made in a situation where the claimant and the respondent, contractually unrelated, both had contracts with a third party against whom the claimant had a direct contractual remedy. See Benjamin R. Isaiah and Bank Mellat, Award No. 35-219-2 (30 March 1983)[, reprinted in 2 Iran-U.S. C.T.R. 232.] The Tribunal recognizes, however, that the absence of a binding contract between the party enriched and the party impoverished does not necessarily make available remedies based on unjust enrichment, particularly in construction sub-contract cases. In a situation somewhat similar to the present case, the Tribunal held that "[t]he circumstances of the instant case have not been shown to be such as to justify any exception from the established principle that generally a subcontractor has no direct right as against the party with whom the contractor has a Contract."

Award No. 295-834-2, para. 13 (27 March 1987), reprinted in 14 Iran-U.S. C.T.R. 176, 181 ("Schlegel"). The Tribunal, taking into account the fact that Schlegel "made reasonable efforts under difficult circumstances to attempt to recover the sums owed to it," concluded that the facts of that case satisfied the conditions of unjust enrichment. Award No. 295-834-2, at para. 17, reprinted in 14 Iran-U.S. C.T.R. at 183.

48. As stated by the Tribunal in Sea-Land, the equitable foundation of the rule against unjust enrichment "makes it necessary to take into account all the circumstances of each specific situation" in deciding whether the principle

permits recovery. Id. (quoting E. Jiménez de Aréchaga, International Law in the Past Third of a Century, Recueil des Cours, pp. 299, 300 (1978).) Assessing the circumstances of the present Case against the background of the Schlegel and Sea-Land decisions, the Tribunal observes, inter alia, that in the charter-party relating to the Bayville, Metal Transport undertook only to guarantee a payment obligation that lay primarily with Etka, whereas with respect to the Dimitrios, Metal Transport agreed in the charter-party to be responsible for the payment of the demurrage without any reference to a corresponding obligation on the part of Etka. The Tribunal further notes that the record contains no evidence of any attempt by Metal Transport or Phibro, prior to the filing of the present claim with the Tribunal, to collect from either Sangam or Etka the amount that Metal Transport paid to the owner of the Dimitrios.

49. Considering the foregoing factors in the context of the principle of unjust enrichment, the Tribunal, taking into account all the specific circumstances of this Case, finds that Phibro's claim relating to the Dimitrios must fail.

3. The Counterclaims

50. Etka counterclaims for U.S.$52,000, the value of sugar allegedly shortlanded from the Bayville in October 1977, as evidenced by the shortlanded certificate. Etka contends that it paid for the full cargo of sugar under the letter of credit opened in favor of Metalco. Etka also counterclaims for flannel cloth purchased from Sangam under an undated contract, which is alleged to have been of inferior quality, and claims damages of U.S.$650,000.

51. The Tribunal finds that neither of these counterclaims arise from the same "contract, transaction or occurrence" as the claims. In both cases the counterclaim arises from the

purchase contract entered into between Etka and Sangam. Etka's remedy lies either against Sangam, the party directly responsible under the two sales contracts, or against the carrier, but not against Phibro or its subsidiary, Metal Transport. The Tribunal therefore dismisses the counterclaims for lack of jurisdiction.

B. The Claims and Counterclaims involving GTC

1. Factual Background

52. FTC, the predecessor to GTC,[3] telexed Sangam on 2 June 1977, inviting it to submit proposals for the sale of 36,000 metric tons of crystal sugar to be delivered in three shipments in June, July and August 1977 and, by separate telex of the same date, to make an offer to sell an unspecified quantity of cube sugar for delivery from June to September 1977. The telexes outlined the basic contractual conditions to apply, including the rate of discharge, and provided for demurrage to be paid by GTC at the rate of U.S.$0.25 per long ton if the sugar was shipped on a C&F basis. Any dispute was to be "settled in Iranian courts."

53. Sangam allegedly responded to both telexes with offers on 4 June 1977. Only one of those telexed offers, relating to the cube sugar, is in evidence. Sangam's offer included alternative prices for shipment on C&F or liner terms and stated that "[i]n the event of liner terms, you will be saving on discharge expeneses [sic], and also on demurrages." GTC also submitted in evidence a third telex of 4 June 1977 from Sangam offering one additional cargo of crystal sugar. GTC accepted Sangam's offer to provide one cargo of crystal sugar and the cube sugar offer, both on a C&F basis, by two telexes dated 6 June 1977.

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[3]All further references in this Award will be to GTC.

54. Phibro alleges that in order to fulfill its contract with GTC, Sangam, acting through Metalco, purchased 10-12,000 metric tons of crystal sugar and 5,000 metric tons of processed cube sugar from Philipp. This purchase contract is not in the record.

55. The crystal sugar was shipped aboard the vessel "Kahikatea" which is said to have been chartered by Metal Transport for the purpose of shipping the sugar to GTC. This charter-party is not in evidence. The cube sugar was shipped to Iran on 30 September 1977 under a liner bill of lading aboard the vessel "Klavdia," chartered by Metal Transport, with demurrage agreed at U.S.$3,500 per day "to be settled directly between Owners and Receivers at discharging port(s)."

56. The Kahikatea docked in Iran and issued a notice of readiness on 27 October 1977 and allegedly incurred delays of ten days and demurrage charges of U.S.$32,430.90.[4] No evidence of the calculation of the demurrage has been submitted to the Tribunal. The statement of facts for the Kahikatea bears the endorsement: "According to our Tallies with Receivers receipt 1294 BAGS Short only." No short-landed certificate was issued in respect of this shortfall, which forms the basis of one of GTC's counterclaims in the amount of U.S.$96,064.

57. The Klavdia arrived in port and issued its notice of readiness on 9 November 1977. The vessel was allegedly subjected to delays of thirty-four days in unloading and incurred demurrage of U.S.$132,450.70.

58. Metal Transport was invoiced for the charter of the Kahikatea on 12 January 1978, including demurrage of

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[4]Also stated to be U.S.$31,160.

U.S.$31,160. The invoice was paid in full on 17 March 1978 and an equivalent amount was debited to Philipp's account. The charter fees for the Klavdia were paid by Metal Transport on 28 February 1978, including demurrage of U.S.$132,450.70 as per the "Final Freight Account," and this amount also was debited to Philipp's account.

2. The Settlement Negotiations

59. GTC has submitted documents to the Tribunal that, it asserts, establish that it entered into a settlement with Phibro pursuant to which Phibro agreed in 1986 to withdraw the claims currently before the Tribunal. These documents are telexes sent to GTC by Phibro through Derby Company of London. One of these, sent in October 1986, states: "We agreed to withdraw the claim currently before The Hague Tribunal in its entirety" and another, dated July 1987: "Litigation Counsel [has been] instructed to withdraw the referenced claim." GTC contends that Derby Company is a subsidiary of Phibro and that Mr. Scollay, the person who sent the telexes, acted as Phibro's representative when concluding two agreements with GTC in Tehran in 1986. GTC asserts that it was a condition of those agreements that the claim before the Tribunal would be withdrawn.

60. Phibro acknowledges that Derby Company is an affiliated company but argues that it is an independent organization and that, as it is not a party to these proceedings, any settlement it may have entered into is not binding upon Phibro. At the Hearing, Phibro acknowledged that the principal traders of Derby and GTC had met and additional business was agreed. Phibro asserts that the new business did not materialize due to GTC's failure to open the necessary letter of credit and thus the goods were sold elsewhere. As the conditions of the settlement were not satisfied, Phibro contends that it is not bound by the telexes submitted by GTC.

61. After reviewing the documents before it, the procedural record as to the settlement negotiations, and the explanations presented at the Hearing, the Tribunal concludes that an agreement was reached between Derby Company and GTC, a condition of which was the withdrawal of the claims now under consideration.

62. The Tribunal therefore dismisses the claims and counterclaims involving GTC.

IV. INTEREST AND COSTS

63. The Claimant seeks interest on all amounts awarded from the time the claims arose, plus costs. Following the principles and guidelines set down in McCollough & Company, Inc. and The Ministry of Post, Telegraph and Telephone, et al., Award No. 225-89-3 (22 Apr. 1986), reprinted in 11 Iran-U.S. C.T.R. 3, the Tribunal awards the Claimant interest at the rate of ten percent per year on the sum of U.S.$220,935.40 awarded to run from the date on which the Statement of Claim was filed, that is, 18 January 1982.

64. The Tribunal determines that, given the outcome of the claims and counterclaims, each party shall bear its own costs of arbitration.

V. AWARD

65. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(a) The Respondent MINISTRY OF WAR-ETKA CO. LTD. is obligated to pay to PHIBRO CORPORATION the sum of Two hundred twenty thousand nine hundred thirty-five United States Dollars and Forty Cents

(U.S.$220,935.40), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 18 January 1982 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account, which obligation shall be satisfied by payment 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.

(b) All other claims and counterclaims are dismissed.

(c) Each party shall bear its own costs of arbitration.

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

Dated, The Hague,
18 January 1991

Gaetano Arangio-Ruiz
Chairman
Chamber Three

In the Name of God

Richard C. Allison

Parviz Ansari Moin
Concurring in Part
Dissenting in Part