IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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** CONCURRING OPINION ~~of~~ + Dissenting : Judge Ansari

- Date 31 Jan '91

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** SEPARATE OPINION of _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

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.

CONCURRING AND DISSENTING OPINION
OF JUDGE PARVIZ ANSARI

I dissent to certain parts of the Award in the present Case. The main areas in which I dissent include the findings of the Award on the issue of the Tribunal's jurisdiction and the standing of Phibro Corporation ("Phibro") as Claimant. I concur in the dismissal of the claims against the Government Trading Corporation (GTC) and the claim concerning the vessel Dimitrios.

Jurisdiction

Phibro contends that the Metal Transport Corporation (MTC) is a corporation duly organized and existing under the laws of the State of New York. Phibro further contends that MTC is wholly-owned by it. Neither of these contentions has been substantiated.

The Tribunal's practice shows that the primary evidence for the existence and status of a United States corporation is its certificate of incorporation, which is issued by the office of the Secretary of State of the relevant state. For example, Phibro has produced such a certificate to establish its own existence and good standing. However, Phibro has not produced a certificate of incorporation and good standing for MTC, even though either Phibro or MTC could easily have submitted such a document. Absent such certificate, it is impossible to establish, with any degree of certainty, the existence and United States nationality of MTC.

Phibro relies on several statements made by its own employees, in order to prove its ownership of MTC. Firstly, however, it must be noted that these statements have been made by interested parties and are not supported by any independent evidence. Therefore, they cannot be regarded as probative evidence of ownership. Secondly, the contradictory remarks made in these statements as to the nature of Phibro's ownership makes it unreasonable to rely on such statements as credible evidence of ownership.

These statements offer three different and contradictory accounts of Phibro's ownership of MTC. Richard Di Donna, Phibro's Associate General Counsel, describes the situation as follows: "... at all times during the calendar years 1977, 1978 and 1981, and all subsequent years,

all the issued and outstanding stocks of Metal Transport Corporation... owned by Phibro-Salomon Inc..." The Statement of Bernard Bernstein, Phibro's Assistant General Counsel, on the issue of the ownership of MTC reads as follows: "During the period in question, 1977, 1978 and from January to May 1981, Engelhard Minerals & Chemicals Corporation directly owned 100% of common stock of Metal Transport Corporation." While both of these statements refer -- one implicitly and the other expressly -- to direct ownership of MTC by Phibro, a further statement, made by Keith Anzel, describes Phibro's ownership as being indirect. Anzel states that "at all times during the calendar years 1977, 1978 and 1981, and all subsequent years, all the issued and outstanding stock of Metal Transport Corporation... was and continued to be to this date, owned indirectly by Phibro-Salomon Inc." The statement of Arthur Anderson & Co. refers to Phibro's ownership as beneficial ownership: "In our opinion, Phibro-Salomon Inc. was the beneficial owner of 100% of Metal Transport Corporation as of December 31, 1977, 1978 and 1981."

In view of the foregoing, I believe that Phibro, by failing to produce MTC's certificate of incorporation or to prove its contention that it owns 100% of MTC's shares, has not met its burden of proof, and its Claim should thus be dismissed.

There are several further deficiencies in Phibro's documentation that preclude this Chamber from finding in favor of its jurisdiction over the claims:

(i) All of the above-mentioned statements refer to calendar years 1977, 1978 and 1981. There is no mention of the years 1979 and 1980. Therefore, there is no proof that the claim was continuously owned.

(ii) Bernstein's statement specifically refers to the years "1977, 1978 and from January to May 1981...", while the statements of Di Donna and Anzel refer to "calendar years 1977, 1978 and 1981, and all the subsequent years."

(iii) Phibro's contention that Philipp Brothers was an unincorporated division of Phibro is supported only by two statements made by Richard Di Donna, Associate General Counsel of Phibro, and another Phibro employee.

Parties to the demurrage dispute

I believe that the dispute over demurrage is subject to the forum selection clause in the contract for the sale of sugar concluded between Sangam and Etka (Sale Contract), which refers any disputes to the Iranian courts. Under Article 5 of the Sale Contract, Etka undertook to "ship the goods in two cargos of 12000 up to 13000 metric tons (10% more or less) at seller's option during April/May, 1977." Furthermore, the contract was on a C&F basis, which required the seller to ship the goods and pay the expenses. The Guide to Incoterms, published by the International Chamber of Commerce, defines the seller's duties with respect to the shipment of goods in a C&F contract as follows: "Contract on usual terms at his own expense for the carriage of the goods to the agreed port of destination by the usual route, in a seagoing vessel (not being a sailing vessel) of the type normally used for transport of goods of the contract description, and pay freight charges and any charges for unloading at the port of discharge which may be levied by regular shipping lines at the time and port of shipment."

The record shows that MTC entered, in place of Sangam, into the Charter parties with the shipowner for the shipment of sugar to Etka. The clear terms of the contract, particularly Sangam's duty to ship the goods and to pay the

charges, leads -- absent any indication to the contrary -- to the simple and unavoidable conclusion that in chartering the ships, MTC merely acted as Sangam's agent.

Apart from the foregoing, all the facts and evidence in the Case, as well as the contemporaneous and subsequent conduct of the parties, including MTC, is supportive of this view. The rather substantial exchange of correspondence and direct negotiations between Sangam and Etka long after the occurrence of demurrage, without any reference to MTC, clearly establishes that it was Sangam's intention, and the parties' understanding, that MTC's role was merely that of an agent for Sangam.

I refer briefly to some of the evidence:

(i) It was Sangam that, by its letters of 30 September 1978 and the accompanying documents (including two debit notes of the same date), requested the payment of demurrage.

(ii) It was Sangam that pursued its claim for demurrage by sending telexes dated 11.6.79, 7.8.79, 28.8.79, 28.5.80, and 11.9.80 to Etka.

(iii) It was Sangam that, through the exchange of telexes dated 24.6.79 and 24.7.79, accepted Etka's suggested figure of $207,000 as a final settlement of the demurrage dispute for both the Bayville and Dimitrios vessels.

(iv) Sangam sent its representative, Mr. S.R. Zaiwalla, to Tehran in order to negotiate with Etka on the demurrage issue. Mr. Zaiwalla, who is apparently a solicitor, confirmed Sangam's acceptance of the settlement amount in a letter dated 10 August 1979.

(v) By its letter of 6 February 1979, Sangam guaranteed that the vessels Bayville and Dimitrios had not left Bandar Shahpour, and accepted responsibility for the diversion.

MTC's absence from all these developments is very significant; indeed, there is not a single reference to MTC in all this correspondence. The evidence relating to the conduct of the parties involved, including MTC, strongly supports the conclusion that MTC never considered itself as having a right of demand against Etka. There is no evidence -- nor has it been alleged -- that MTC or Phibro ever attempted to present, or considered the possibility of presenting, a demand for demurrage to Etka prior to the commencement of the present litigation before the Tribunal.

Therefore, it is only Sangam, as the principal party to the Charter parties at issue, that has a right of recovery against Etka, subject to the terms of the Sale Contract, including the forum selection clause. MTC's right of recovery -- if any -- lies against Sangam, based on the arrangements between them pursuant to which MTC entered into the Charter parties on behalf of Sangam.[1]

One of the consequences of the fact that MTC acted as Sangam's agent is that in signing the guarantee clause of the Charter party for the vessel Bayville, MTC did so in

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[1] Both Etka and the other Respondent (GTC) requested the submission of any contract or other document that would clarify the nature of the relationship between Sangam and MTC: "It has been established that Metal Transport Corporation could not have acted for execution of the Vessel charter Agreement without Sangam's information. In our earlier submission we urged strongly that the Agreement between Sangam and Metal Transport Corporation should be submitted to the Tribunal. Etka repeats this request here again." Despite this, Phibro refused to disclose the nature of the relationship between Sangam and MTC, and did not submit the requested materials.

its capacity as Sangam's agent. Therefore, the principal guarantor responsible vis-à-vis the shipowner was Sangam. This conclusion is strongly supported by the aforementioned evidence and circumstances of the Case. In the correspondence between Sangam and Etka subsequent to the demurrage incident, Sangam invariably represents itself as the entity which is primarily responsible for payment of demurrage to shipowner, and it is Sangam that was repeatedly approached by the demandants for the settlement of demurrage. There is evidence showing that Sangam even guaranteed, and accepted responsibility for, shipowner's performance vis-à-vis Etka, under the Charter parties. In its letter of 6 February 1979 to Etka, Sangam stated: "We hereby guarantee that vessels Bayville & Dimitrios which tendered N.O.R. on 5.10.77 & 8.10.77 did not leave Bandar Shahpour port to another port without Etka/Seaman pak/pso permission till discharge completed. In case it is found to the contrary, we undertake responsibility of diversion to whatsoever." The fact that Sangam accepted responsibility, and guaranteed shipowner's performance under the Charter parties vis-à-vis Etka, leaves no room for doubt that Sangam was the principal party to all aspects of the Sale Contract and chartering of the ships, including the guarantee of payment of demurrage to shipowner.

In the light of the evidence and the circumstances of the Case, and particularly Sangam's contention that it paid demurrage to the shipowners, the most reasonable conclusion is that Phibro was in fact paid for the demurrage for which it is now claiming before the Tribunal. It is not disputed that as Sangam's agent, MTC has a right of recovery against Sangam. From the date on which the demurrage occurred until 18.1.82, the date on which the Statement of Claim was filed, i.e., a period of nearly four years, MTC and/or Phibro had an opportunity to pursue the claim for demurrage

against Sangam or Etka, in the event that MTC and/or Phibro felt entitled to pursue such a demand against Etka.

If Phibro was, in fact, not paid for the demurrage, one would have expected it to have brought some kind of demand or legal action in order to make recovery on the demurrage. There is no evidence whatsoever to indicate that such a demand for payment of demurrage was ever made to either Sangam or Etka. Phibro does not even argue that it made such a demand; nor did MTC ever avail itself of the arbitration procedure contemplated in Article 31 of the Charter parties.

These facts support Etka's contention that Phibro had already collected the demurrage from Sangam prior to commencing the present litigation, and that Phibro is seeking to use this Tribunal as a vehicle for collecting the demurrage that Sangam, by virtue of its British nationality, cannot claim.

The manner in which Phibro presented its claim lends further credibility to Etka's suggestion. It is significant that in its Statement of Claim, Phibro represents itself as being the principal party to the Sale Contract, by stating that "In 1977, Philipp Brothers sold, and Etka purchased, approximately 25000 metric tons of white sugar through their nominee, Metalco, C/O Sangam limited. Etka agreed to pay demurrage, if any, at the port of discharge." In its later submission, and after the Respondents raised exceptions to the Tribunal's jurisdiction based on the forum selection clause contained in the contract, Phibro chose to emphasize MTC's role as charterer of the vessels, and it thereby changed its line of argument by stating that "Phibro's claim, however is not based on the contract between Etka and Sangam." The manner in which Phibro changed its argument, especially with respect to facts and events of which it should have been fully aware, demonstrates that

Phibro is prepared to misrepresent the facts in order to ensure that the Tribunal will accept jurisdiction over the Claim.

In the alternative, it can be concluded from the preceding argument that by failing to avail themselves of the arbitration mechanism provided for in Article 31 of the Charter party, which was readily available to them, and by failing to pursue their claim for nearly four years, MTC and Phibro in effect waived any claim that they might have had against Etka.

With regard to interest, I have previously stated my opinion in other cases, and do not reiterate those comments here. See McCollough & Company, Inc. and The Ministry of Post, Telegraph & Telephone et al, Award No. 225-89-3 (22 April 1986), Separate Opinion of Judge Parviz Ansari, reprinted in 11 Iran-U.S. C.T.R. 45-52.

The Hague,

31 January 1991/ 11 Bahman 1369

Parviz Ansari Moin