IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 49

Date of filing 27 July 1983

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18 pages in English. 16 pages in Farsi.

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_____ DECISION. Date of Decision _____

_____ pages in English. _____ pages in Farsi.

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_____ CONCURRING OPINION of _____

Date _____ _____ pages in English. _____ pages in Farsi.

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

[redacted]

Case No. 49

Chamber Two

Award No.ITL 24-49-2

GOULD MARKETING, INC.,
as successor to Hoffman
Export Corporation,

Claimant,

and

MINISTRY OF NATIONAL DEFENSE
OF IRAN,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
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INTERLOCUTORY AWARD

Appearances

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DUPLICATE ORIGINAL
«نسخه برابر اصل»

I. Facts and Contentions

On 12 May 1975, Gould, Inc., through its subsidiary Hoffman Export, Inc. ("Hoffman"), entered into a contract with the Iranian Ministry of National Defense (the "Ministry"). That contract, which forms the subject matter of this claim, was entitled "Purchase Agreement for AN/ARC - 98(V21) and VCS-801-IHF/SSB Radios and Related Test Equipment and Services." The contract called upon Hoffman to provide certain equipment and services to the Ministry, as set forth in eleven separate "line items." The contract had a price of $23,934,030, consisting of $11,463,194 for eight line items which might be classified as "equipment", and the balance for various services related to that equipment.

Of that balance, $8,125,120 was the value assigned by Article 1 of the contract to Hoffman's obligation to provide the Ministry with a ten years' supply (1976-86) of spare parts for the radio sets and $3,467,676 was the value assigned to Hoffman's obligation to provide factory repair services in California for four years for those pieces of equipment which could not be repaired in Iran. Hoffman had a further obligation to provide a field service representative ("FSR") for ten years in order both to train Iranian nationals in the maintenance of the radios and to carry out as many on-the-spot repairs as he could. The cost of the FSR was invoiced separately each year at $87,804 per

year.[1] The contract thus contemplated a complete radio fabrication, testing, installation and maintenance program, in order to assure to the Ministry a reliable assortment of military radios over a ten year period.

The contract set forth a detailed delivery and payment schedule for the eleven line items. Delivery of the radios was to begin ten months after the execution date of the contract; all the radios were to be delivered by the 25th month, i.e., June 1977. Delivery was to be accomplished by Hoffman's shipment of the radios to Bell Helicopter International ("BHI"), located in Texas, as the Ministry's agent for receipt of the equipment. BHI would then ship the equipment to Iran. A training program for Ministry personnel was to be carried out in California beginning in May 1976.

As to the spare parts commitment, Hoffman was initially required to provide spare parts from inventory in California and Iran as needed, beginning in September 1976. Hoffman and the Ministry signed "Modification A" to the contract, dated 19 December 1978, which required Hoffman to make specific estimates "based on usage data compiled to date" of the spare parts which would be needed over a 12-month

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[1] The Minutes of Meetings between Hoffman and the Air Force in December 1975 indicate (paragraph 9d) that a second FSR was eventually to be provided at no additional cost to the Air Force.

period, and, after taking inventory in Iran, ship sufficient spares to Iran within 180 days to assure that the local supply was up to that level.

The payment schedule called for the Ministry to pay $12 million within 10 months of the contract execution date. Thereafter, beginning in September 1976, the Ministry was required to make a series of "milestone" payments of between $400,000 and $1 million each, not including the separate invoices for the FSR. Payment was to be effected by Hoffman's drawing on a letter-of-credit established by the Ministry, upon presentation to the confirming bank of, in the case of equipment, copies of shipping documents and, in the case of factory and spare parts services, a "Certificate of Completion" signed by one of Hoffman's officers.

The letter of credit apparently was not renewed in the summer of 1977 as required by Article 4 of the contract. There is evidence that Hoffman did not object at that time and may have consented to this non-renewal. In any event, Hoffman had received $19,476,818 from the Ministry by virtue of its performance under the contract by the time events began which culminated in the establishment of the Islamic Republic of Iran. Among those events were civil disturbances of sufficient magnitude to cause Hoffman's remaining FSR to depart Iran in December 1978, six months prior to completing his 1978-79 contract. On 30 June 1979, a milestone payment became due of $900,000, payable on submission

of Hoffman's "Certification of Completion" of the first two years' of factory support. By that time, the Ministry also had an outstanding invoice from Hoffman for $117,072 for the cost of an FSR. Neither payment was made. On 10 July 1979, Hoffman sent a telex to the Ministry which stated, in pertinent part:

> You have breached your contractual obligation by failure to provide scheduled milestone and field service payments and by failure to extend the letter of credit as required by the contract. Accordingly, unless you move promptly to cure this defect within 60 days from the date of the added milestone payment, i.e., by 30 August 1979, we shall consider this contract in default and proceed to exercise all of our rights and remedies pursuant thereto.

Under the contract, Hoffman was entitled to charge the Ministry a 10% service charge for late payments; the contract did not state that Hoffman had a right to terminate for nonpayment. The Ministry, on the other hand, was given in the contract (Article VI) the right to terminate with or without cause, by sending Hoffman a written notice of termination. No such notice was ever sent.

Article VI of the contract further provided that, were the contract to be terminated by the Ministry, Hoffman would be entitled "to reimbursement for all actual costs and expenses which shall be properly allocable or apportionable to the performance of this agreement and its termination, plus a reasonable profit," and that for cost determinations,

both parties "will employ the services of a mutually acceptable public accounting firm." The contract further provided (Article V) that Hoffman would not be held in default for failure to deliver or for delays arising out of force majeure conditions during the period those conditions continued, and required that it notify the Ministry in writing of the existence of such conditions "within a reasonable time after the beginning of any delay." No such notice was ever sent.

Hoffman filed this claim seeking $900,000 for the June 1979 milestone payment, $1,000,000 for a milestone payment due 30 June 1981 upon completion of four years' factory support, $766,976 due May 1983 and $1,000,000 due May 1984 for completion of spare parts support to those dates. Hoffman seeks in addition $117,072 for its FSR's unpaid salary for the years 1977-78, as well as evacuation costs for his family, and certain storage charges for equipment sent for repair to California but not returned, plus interest.

Hoffman submitted evidence that it had delivered all the radios and test manuals and had provided all the training services by 20 June 1977. Hoffman also stated that it carried out all factory repairs required on radios shipped to it. Hoffman further admitted that some radios were not returned after repair due to supervening events; of these radios, some were sold to other parties to satisfy an

alleged mechanics' lien and others are being kept in storage. Hoffman asserted that many of the radios and much of the related equipment sent to it were sent not for repair, but for use under another contract, which is the subject of claim no. 50 before this Tribunal. With respect to the spare parts, Hoffman alleged that it had sent 7-8 tons of spare parts in 12-15 containers to Iran, representing 6-8 years' needs based on estimated usage requirements, and that these spare parts were left in Iran and are presumably available to the Ministry.

Hoffman's theory of the case is that the contract has not been terminated by either party, but remains instead in a state of "suspension". Hoffman points out that it has been prevented from continuing its shipments of military goods for repair and modification to and from Iran by a United States Government ban on such shipments pursuant to which the necessary export licenses were either revoked or denied. Hoffman contends, however, that the fault for these conditions lies with Iran, and notes its own willingness to resume its contract performance whenever possible. Hoffman asserts its entitlement to all payments which would have been earned subsequent to 19 January 1981 on two premises: (1) that any failure by it to perform is attributable to Iran; and (2) that unless it obtains recovery of all amounts here, it will be foreclosed from bringing suit elsewhere. Hoffman states that, in all events, its principal obligation was to provide spare parts, and this it has done in advance.

The Ministry defends this claim first by denying receipt of a substantial number of the radios, virtually all of the spare parts, the factory support services and any benefits from the FSR's presence. The Ministry thereby justifies its failure to extend the letter-of-credit and to make any milestone payments from June 1979 on. The Ministry focuses in particular on the question of the spare parts. The Ministry argues that if there were, as Hoffman contends, 6-8 years' worth of spare parts in Iran by October 1977, it would have been unnecessary to enter into "Modification A" in December 1978; the Ministry interprets "Modification A" as requiring Hoffman to begin in 1979 to ship sufficient spare parts for a 12-month period.

The Ministry filed counterclaims against Hoffman amounting to $43,678,093, for refund of excess payments alleged to have been made for contract items, the value of items sent for repair but not returned, the value of a performance bond posted by Hoffman, plus interest and consequential damages. The Ministry made no challenge to our jurisdiction, stating instead that since Hoffman's claim is within the Tribunal's jurisdiction, so is the counterclaim. Hoffman, however, objected to the Tribunal's jurisdiction over the counterclaim to the extent it sought relief in excess of the amount claimed, on the theory that the Tribunal lacks power to issue affirmative awards against United States nationals. As to the merits of the counterclaim, Hoffman denied that it had failed to deliver

equipment and perform required services under the contract, or that the Ministry was entitled to reimbursement of any amounts previously paid.

II. Jurisdiction

The first jurisdictional issue presented is whether the Tribunal has jurisdiction over Hoffman's claim for payments due under the contract subsequent to 19 January 1981. Hoffman's argument on this question is essentially one of equity, to the effect that, if it were not able to claim for those payments, it would be left with no recourse. Hoffman does not allege anticipatory breach of the contract. As the Tribunal held, however, in its award in the case of Kimberly-Clark (Award No. 46-57-2, dated 25 May 1983) a claim, "whether styled as . . . actual or anticipatory breach" is within our jurisdiction only if it arose prior to 19 January 1981 because otherwise it was not "outstanding" on that date as required by Article II, paragraph 1 of the Claims Settlement Declaration. With respect to equity, the Tribunal notes that while the Declaration deprives this Tribunal of jurisdiction over claims not oustanding on 19 January 1981, it does not purport to affect the jurisdiction of any other tribunals.

Thus, the Tribunal holds that the claim for payments due subsequent to 19 January 1981 is not within its jurisdiction.

The second jurisdictional issue is whether the Tribunal has jurisdiction over the Ministry's counterclaim for some $43,000,000 to the extent it exceeds the claimed amount of $5,000,000. Hoffman is of course correct in noting that the Tribunal lacks jurisdiction over claims instituted by Iran against U.S. nationals. Case concerning Jurisdiction of the Tribunal with Respect to Claims by the Islamic Republic of Iran against Nationals of the United States of America, Case A/2 (Decision of 21 December 1981). In case A/2, however, the Tribunal also observed that claims against nationals were admissible in the form of responsive counterclaims "aris[ing] out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim." See Claims Settlement Declaration, Article II(1). Case A/2 is thus no support for Hoffman's contention that the jurisdictional bar on direct claims comprehends a bar on affirmative counterclaims. So long as a counterclaim falls within the requirements of Article II(1), cf. Owens-Corning Fiberglass Corp. v. The Government of Iran (Interlocutory Award No. ITL 18-113-2, dated 13 May 1983), the counterclaim is within our jurisdiction even if it exceeds the amount of the claim.

The Tribunal accordingly holds that it has jurisdiction over the Ministry's counterclaims to the full extent sought, since those counterclaims arise directly out of the contract which constitutes the subject matter of Hoffman's claim.

III. Reasons for Award

Neither Hoffman nor the Ministry contended that it terminated the contract. Hoffman explained that it withdrew its FSR in December 1978 due to the existence of unsafe conditions. While Hoffman acknowledged stopping factory repair services in 1979 because of the Ministry's failure to meet the June 1979 milestone payment, it denied that it was so acting in order to terminate the contract. Instead, Hoffman maintained that the contract was in "suspension". Hoffman further denied the existence of force majeure, on the theory that the unsafe conditions which resulted in the FSR's departure and the disruption in U.S.-Iran relations which followed were not due to events beyond the control of either party, but were acts of the Government of Iran. The Ministry alleged that Hoffman breached the contract by removing the FSR. The Ministry as well denied terminating the contract; it further denied the existence of force majeure excusing Hoffman's nonperformance.

It remains the Tribunal's task to determine from the facts what was the legal situation between the parties at the time performance ceased. By December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic force majeure conditions at least in Iran's major cities. By "force majeure" we mean social and economic forces beyond the power of the state to control through the exercise of due diligence. Injuries caused by the operation at such forces are therefore not

attributable to the state for purposes of its responding for damages. Similarly, as between private parties, one party cannot claim against the other for injuries suffered as a result of delays in or cessation of performance during the time force majeure conditions prevail, unless the existence of these conditions is attributable to the fault of the respondent party.

With respect to the conditions prevailing in Iran which led to the FSRS' withdrawal, there was sufficient evidence of the threats they faced to justify their withdrawal, but Hoffman did not prove that those conditions were attributable to acts for which the government of Iran was responsible. Hoffman was therefore excused from maintaining its FSR in Iran, but it also follows that the Ministry's failure to pay the June 1979 milestone must similarly be excused. The Ministry, having contracted for the availability of a local technician to assure continuous functioning of the radios, was justifiably concerned whether Hoffman could continue to supply that need. Its suspension of its performance obligations as to the payment schedule in June 1979 must therefore be considered a result of the same force majeure conditions which led to the FSRS' departure, in the absence of proof that the Government itself was responsible for the continuation of these conditions until that date. During the months February through June 1979, the Islamic Republic was to some extent in control of the direction of the revolution, but very little evidence was presented in

this case concerning its responsibility for the continuation of conditions that made return of the FSRS impossible. Such evidence was inadequate to show that the force majeure conditions had been transformed during those few months into conditions sufficiently attributable to that Government to make its non-payment in June 1979 a breach of contract.

By the time the revolution occurred, the major portion of the physical items contracted for had been delivered. Since there remained in great part the field and spare parts services to supply, Hoffman's inability to do so due to the social upheaval in Iran justified nonperformance by both parties. Continuing presence of the FSRS had clearly become impossible, at least temporarily, and their absence adversely affected the whole repair operation. In those circumstances, the Respondent cannot be held to have been required to continue payments.

A suspension of both Hoffman's and the Ministry's performance obligations could not continue indefinitely without having some effect on the viability of the contract. By the summer of 1979 Hoffman might reasonably have questioned whether conditions would change in Iran in the near future so as to allow its FSRS to return. Accordingly, Hoffman ceased its factory repair services as well by September 1979 when it had by then become clear that further payments were not forthcoming. The Ministry, for its part,

must have realized, at least by receipt of Hoffman's 10 July 1979 telex, that Hoffman was unlikely to continue performance without payment, nor was the Ministry likely to pay when services were not continuing to be rendered. Although little evidence was presented on this question, the Ministry, presumably, foresaw no realistic hope for resumption of those services in the near future, and therefore saw no need to resume payment. The Tribunal concludes therefore that the continued existence of force majeure conditions had by mid-1979 ripened into a termination of the Hoffman-Ministry contract. Performance had become essentially impossible.

Having reached this legal conclusion, the Tribunal regrets that it is not prepared, without further argument, to decide upon the consequences of that conclusion. The parties have not briefed or argued some of the key issues, and these issues are of sufficient importance for this and other cases so that prudence dictates a cautious approach. Thus, the Tribunal desires further briefing and oral argument on the general question of what consequences should result from the discharge of the contract through frustration or impossibility (to use both terms that are customarily used to describe our legal conclusion). The parties are requested to include responses to the following specific questions: 1) whether they should be left in the situation in which they found themselves after frustration of the contract or whether the Tribunal should conduct an

accounting to determine whether the Claimant has been paid more or less than its performance would justify; 2) if an accounting is to be made, should experts be appointed by the Tribunal; 3) on what bases should any accounting be made (including questions such as: does the U.S. $8,125,120 contract value of spare parts represent the value of the parts themselves or of the service of supply, and what value has been provided by Hoffman; when did the factory repair period begin; what prices were obtained on the equipment sold?); 4) how should any accounting take into consideration the subsequent prohibition by the Government of the United States of exports to Iran of military equipment and services covered by the contract; and 5) to what extent, if any, is equipment sold under this contract and not transferred or returned to Iran related to the other contract which is at issue in case no. 50 between the same parties, and how would such relation affect any accounting?

Accordingly, the Tribunal has decided to hold an oral hearing on these issues and any other remaining matters, which will be consolidated for hearing with the related case no. 50, at 9:30 a.m. on 27 October 1983.

AWARD

The Tribunal awards as follows:

The claim for payments due subsequent to 19 January 1981 is dismissed for lack of jurisdiction.

The contract in question was terminated in mid-1979 by reason of impossibility or frustration.

The consequences of that termination shall be decided by the Tribunal after a further oral hearing on that question and any other remaining matters, which will be consolidated for hearing with the related case no. 50, at 9:30 am on 27 October 1983.

Dated, The Hague
27 July 1983

Pierre Bellet
Chairman
Chamber Two

In the Name of God,

George H. Aldrich

Shafie Shafeiei

Deliberations in this case began soon after the Hearing on 12 January 1983, although they proceeded slowly because of the submission by both parties, with the permission of the Tribunal, of post-hearing briefs. All three arbitrators participated fully in these deliberations, which continued until the end of May. Throughout the deliberations all three arbitrators had been in agreement that July would be fully dedicated to the final deliberations in this and the other pending cases, in view of the 1 August effective date of Chairman Bellet's resignation from the Tribunal.

On 23 June 1983, however, Mr. Shafeiei sent Chairman Bellet a note informing him that he intended to be absent from the Tribunal on vacation until the end of July. The Chairman responded by a note dated 29 June saying that, while a brief vacation was acceptable, Mr. Shafeiei was expected after 5 July. Nevertheless, after a further exchange of notes, Mr. Shafeiei has absented himself until the present and has given no address or telephone number where he could be reached. Only yesterday afternoon, too late to be of any use, did Mr. Shafeiei's legal assistant give the Tribunal a telephone number in another country where Mr. Shafeiei might be reached.

The Chairman has had all the successive drafts of this award since Mr. Shafeiei's departure deposited in his office in due time so that, if he had been present, he could have read and commented upon them, but no comments have been

received. The Chairman also deposited in Mr. Shafeiei's office on 20 July 1983 a letter enclosing the final draft of the present award and informing him of the place and time of signature. Mr. Shafeiei failed to respond to the letter and did not attend the signing. In these circumstances, an arbitral tribunal cannot permit its work to be frustrated. This statement is made pursuant to Article 32, paragraph 4 of the Tribunal Rules of Procedure.

Pierre Bellet
Chairman
Chamber Two

George H. Aldrich

Dated: The Hague
27 July 1983

GOULD