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STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 52 Date of filing: 18 March 1986

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of Mr MOSTAFAVI

- Date 18 March 86
14 pages in English 11 pages in Farsi

** DISSENTING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

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- Date _____
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In the Name of God

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 52
CHAMBER ONE
AWARD NO.215-52-1
DATE: 18 March 1986

BLOUNT BROTHERS CORPORATION,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, IRAN HOUSING COMPANY,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه دایری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 18 MAR 1986 تاریخ
۱۳۶۴/۱۲/۲۷
No. 52 شماره

DISSENTING OPINION OF MOHSEN MOSTAFAVI

My dissent to this Award is not limited to those matters set forth hereinbelow. Here, however, I confine myself to those points of particular relevance to this Case, because I have previously commented upon such matters as costs of arbitration, social security premiums and taxes, and there is no need for repetition. I shall therefore discuss the new issues, as follows:

1. In this Case, the issue of whether or not American companies may bring claim on behalf of Iranian companies against the Government of the Islamic Republic of Iran is raised for the first time. In Case No. A/22, the Agent of the Government of the Islamic Republic of Iran, invoking the authority conferred by Article VI, paragraph 4 of the Claims Settlement Agreement, requested an interpretation

of Article VII, paragraph 2 thereof in this connection, which also involved the question of whether or not the provisions of the said Article apply to Iranian companies as well. Although the Tribunal has already laid down precedent with respect to the indirect claims of non-Iranian companies, in the case of such a claim by an Iranian company there exists no precedent directly relevant to the present issue and examining the issues and problems arising from the possibility of bringing such a claim. On principle, these issues have not been raised in those proceedings cited as precedent in the Case, because at any event, the Tribunal's jurisdiction was therein rejected. It is therefore in the instant Case, that the issue of the Tribunal's jurisdiction or lack of jurisdiction over claims of American companies on behalf of Iranian companies against the Government of the Islamic Republic of Iran necessarily arises. It is this issue that confronts us with the subject of diplomatic protection, an accepted principle of international law, and which makes it imperative that the ramifications thereof be studied further. Article VI, paragraph 4 of the Claims Settlement Agreement grants the two Governments signatory thereto the right to request the Full Tribunal to interpret any ambiguous provisions of the Agreement. If, however, a Chamber wishes to render its own decision prior to that of the Full Tribunal, on the excuse that the Tribunal's work would otherwise come to a halt, such an action in fact constitutes a deprivation of the right of the Government requesting the interpretation, embodied in Article VI, paragraph 4. This is particularly the case here, where neither the work of the Tribunal, nor even of the Chamber shall thus be brought to a halt; because we know that there are so many cases ready for adjudication that there will never be a hiatus in the Tribunal's workload. Furthermore, the case cited as precedent (Award No. 187-325-3) antedates the request for an interpretation, when the Chambers were not bound to await a decision by

the Full Tribunal. Besides the fact that the issue is novel and important, there is also absolutely no means of remedying a decision by the Chamber, should the Full Tribunal render a contrary decision. Moreover, this issue could easily have been brought before the Full Tribunal within a short time by setting a tight schedule for submission of memorials; this is particularly true here, where Chamber One was seized of the matter, since it is also the Chairman of this Chamber who would set the schedule and issue Orders relating to cases before the Full Tribunal. Furthermore, if the decision in this matter was taken in reliance on the presumption that the Full Tribunal will also make a ruling to the same effect, it must nonetheless not be overlooked that respect for principle dictates that the Chamber await the decision of the Full Tribunal. For that, at any rate, would have precluded the possibility of injury; nor would the Chamber have acted in violation of principle and procedure. On the other hand, since a decision to the contrary can certainly not be ruled out, there will be absolutely no way to remedy /the Chamber's decision/. At any event, the Chamber must not preempt the Full Tribunal and take a decision on an issue pending before the latter. Thus, the Chamber's action in taking a decision on the issue is objectionable in several respects. If the Full Tribunal makes a contrary finding, the Chamber shall have been in error, and also in violation of principle because it ought to have awaited a decision by the Full Tribunal. And even if the Full Tribunal's decision corresponds to that of the Chamber, there is still no denying that it is a violation of principle and logically improper to preempt the Full Tribunal in an issue on which the latter is supposed to render a decision. For this reason, I shall here refrain from stating my opinion on the merits of this issue, in order not to make a prejudgement thereon.

2. Note 1 to Article 2 of the Contract provided that it was the duty of BBC to obtain a construction permit from

the municipality. The Respondent has explained that besides being necessary in order for construction to commence, and to give the works legal validity, a construction permit is also a prerequisite for obtaining a certificate of completion of work, which is one of the documents needed in order to sell a building; it adds that for this very reason, it has so far been unable to sell a single house. The Award holds that:

> "Although BBC was unable to produce the permit itself in evidence, Mr. Honan stated at the hearing that, while he had never personally seen the permit, his colleagues at BCJ had confirmed to him that it had been obtained, as required by law, before construction began. Mr. Honan said that such a document was likely to have been kept in the local site office at Bushehr with other important contract papers, and was thus among the documents to which BCJ no longer had access after it left Iran." /emphasis added/

In point of fact, the Chamber has resorted to suppositions and hypothetical considerations in the face of a material fact-- viz., the failure to produce the construction permit. In analyzing the Chamber's reasoning, we are faced with a number of deficiencies, as follows: firstly, with respect to Mr. Honan's testimony, on principle a court may take cognizance of only that testimony which is founded upon what the witness has himself observed, that testimony is not admissible which is founded upon statements made to him by others. Mr. Honan states that he did not personally see the construction permit, but one of his colleagues had said that it had been obtained. We are uninformed as to the identity of that colleague; nor has the Claimant brought him forth as a witness. Therefore, the utterances of such an anonymous individual cannot be invoked; rather, the words of Mr. Honan, who explicitly states that he has not personally

seen the construction permit, must be relied upon. Moreover, great weight must be given to his statement because Mr. Honan was the person most closely involved in matters relating to construction of the Project, and he served in Bushehr as Project Manager from 1977 until the completion of the works and his departure from Iran. In view of the fact that a copy of the construction permit was to be maintained at the construction site, it would have been impossible for the Project Manager not to have seen it, had it indeed ever existed. In addition, it was Mr. Honan's duty to keep work on the Project moving in accordance with the contractual agreement. Therefore, in light of the fact that one of the provisions of the Contract required the Claimant to obtain a construction permit, and because Mr. Honan was responsible for complying with the Contract and according to his own affidavit used to report to the company's head office on the progress made in performing thereon, he surely should have known if an important provision of the Contract-- obtaining a construction permit-- had been complied with. Secondly, the proposition that the construction permit might have been left in Iran, and is thus inaccessible, is merely a pretext, one to which the majority ought to have accorded neither weight nor value. It is inconceivable that the Claimant, who had earlier meticulously removed, and has now produced, its financial records and alleged claims, even with respect to minute particulars, would have regarded the construction permit-- which constituted one of its primary and basic obligations and duties-- as being so inconsequential that it did not remove it along with the other documents, but instead discarded it in Tehran or Bushehr like a scrap of brick. The majority's reasoning, wherein it holds that the construction permit had been obtained, amounts to no more than the following:

> "The essential nature of the permit, and the fact that the commencement of building depended on its issuance, both under the Contract itself and as a matter of local law, make it improbable in the extreme that construction could have proceeded on the site in the

> absence of such authorisation. Either the municipality or IHC would certainly have objected, but there is no record of either having done so. Further, in the unlikely event that no permit was obtained, IHC, by allowing the work to proceed and accepting the completed houses, must be taken to have waived any objection it might have been entitled to raise based on the terms of the Contract."

The majority has supposed that there was some sort of physical connection between the construction permit and completion of the construction works, such that it would in practice have been impossible to carry out the construction activities if no permit had been obtained. After commencement of the construction work, the Respondent by its letter dated 15 February 1975 reminded BBC that in compliance with its contractual duty under Article 2 of the Contract, it must obtain a construction permit and send IHC a copy thereof. It must be noted here that there was no need /for IHC/ to protest or to send such a letter, because under Article 2 of the Contract, it was BBC's duty to obtain a construction permit itself, and the Respondent had no duty to acquaint the Claimant with its obligations. Therefore, it cannot be argued that the Respondent has waived its rights in failing to object; and so, even if no such letter existed, we could still not hold that the Respondent had waived performance on this obligation in failing to object. Furthermore, the Claimant has brought some parts of its claims only once, and some others only in its Statement of Claim, and based on the preceding line of reasoning, the majority ought to presume as well that the Claimant has waived them. The fact is that it cannot be shown by the above argument, that the liabilities which someone has accepted pursuant to a contract may somehow be regarded as extinguished. Moreover, it had been provided in this case that the Parties would settle their accounts once the works had been completed. If this settling of accounts had taken place, and this factor were not taken into account and a

certification of good performance were given, then the presumption that the obligation had been waived would apply. Most important of all, it was expressly stated in an official communication from the municipality to the Social Security Organization (Respondent's Memorial No. 83, Exhibit 10), that the buildings had been built without a permit, and that "there are no records with the Bushehr municipality indicating that the construction permit was ever obtained." Nonetheless, the majority has unfortunately resorted to indirect testimony and far-fetched arguments, as against official, written documents. Whereas the majority gives credence to Mr. Honan's assertion that it is "likely" that the construction permit may be among those documents which were left behind in Iran, it expressly dismisses the clear and official declaration by the Bushehr municipality, made in an internal, official communication. On principle, it does not deal with it at all; it is as though there were no such document in the case file. What is astonishing, is how the majority perceives "possibilities," and yet fails to observe documents.

3. In connection with the delays caused by shortages of cement, the majority accepts that:

> "/t/he later cement shortages, which delayed progress in the construction between January 1976 and November 1977 were not, as has been seen, the fault or the contractual responsibility of either /Party/."

Next, however, it opines that:

> "the period of the final contract was extended by the agreement reached at the meeting on 19 April 1978 between BCJ, IHC and Daz Bushehr. The meeting was held in response to a letter from BCJ of 18 April 1978 detailing the various delays and the reasons for them, and requesting, specifically, an extension of time. At that meeting, the revised time schedule proposed by BCJ was accepted.

> "A letter from IHC followed, on 22 May 1978, which requested BCJ to endeavour to complete the houses by September-October of that year 'so that we can take action regarding your request, at the time of completion of the project'-- meaning, presumably, that the financial implications would then be reviewed. There is no suggestion in the Minutes of the meeting, however, that any changes were proposed or adopted to any of the other terms of the Contract, which must therefore be taken to have continued to apply in their entirety. It follows as an automatic consequence of this that the price escalation clause continued to operate as before." (emphasis added)

First, the Minutes of the 19 April meeting do not relate to the letter dated 18 April; nor do those Minutes give any indication that the meeting was held in response to the letter of 18 April. The matters set forth in the Minutes of the meeting include overall Project issues, and they are called the "Minutes of the Coordinating Meeting". In fact, the letter of 22 May is in direct response to the letter of 18 April. The text of the former letter, and the fact that it makes no reference to the Minutes of the 19 April meeting, show that those Minutes are unrelated to the issue at hand. The majority is thus unjustified in relating the Minutes of the 19 April meeting to this issue and adducing them in support of its finding. The text of the May 22 letter is as follows:

> "With reference to letter No. 174 dated 29.1.2537 (18th April, '78) concerning the delays occurred /sic/ in the implementation of Bushehr Workers' Housing Project and the request for extension of the time required for the completion of the work, we would inform you that considering the additional volume of work, the elements causing tardiness and probable pause in the progress, such delays can be examined and assessed, with the Daz Consulting Engineer's confirmation. Therefore you are requested to endeavour to work in accordance with the schedule to complete the houses in Mehr (Sept.-Oct.'78) so that we can take action regarding your request, at the time of completion of the project." (emphasis added)

Although this letter indicates that it was agreed to extend the time required for completion of the Project, it in no way indicates that IHC also accepted the financial implications thereof. On the contrary, rather, it is clear that IHC had taken the financial implications into account and had deferred "examination and assessment." The majority's interpretation here amounts to an ignoring of definite facts, because such a waiver of rights, resulting in giving up millions of rials, must conventionally be stated in clear and explicit terms. Moreover, the clause, "considering the additional volume of the work, the elements causing tardiness and probable pause in the progress, and the date of completion of the Project, such delays can be examined and assessed, with the Daz Engineer's confirmation," /emphasis added/ itself reveals that the /damages resulting/ from those delays had not been waived; rather, the financial accounting relating thereto had been deferred until completion of the works.

Second, it is astonishing that despite accepting that the shortages of cement "were not... the fault or the contractual responsibility of either /Party/," the majority concludes, in interpreting a text which was clear and needed no interpretation, that the Respondent must accept the financial consequences of the delays. Altogether, the letters' contents signify no more than that BCJ has adduced force majeure in excusing its delay, and that IHC, while making no objection to this justification, expresses its hope that the works will proceed expeditiously thereafter and states that the financial accounting /with respect to the delays/ can later "be examined and assessed." And even if there were no such clause in the text of the letter, consent to the extension cannot be regarded as in itself constituting acceptance of the financial obligations thereof, because those obligations are in essence and substance distinct from the agreement to an extension. Moreover, so long as there has been no express statement providing for continuation of the financial obligations,

no one can be bound and obliged to accept them, either. For the reasons set forth above, it is totally inequitable, while being aware that the Respondent was not at fault in connection with the delays due to shortages of cement, to hold him responsible on other grounds unsupported by any rationale whatsoever, by recourse to "presumptions" and unconventional interpretations, and thereby to award against the Respondent for payment of the claims based on adjustment /of the Contract/.

4. The amounts payable under the Contract entered into by IHC and BCJ were stated entirely in rials. Yet, while it calculates the amounts in rials in the text of the Award, the majority ultimately applies a rule for conversion of rials to US dollars, in fixing and stating the amount of the judgement sum in dollars. This approach seems to be neither logical nor methodological, because the Parties to the Contract decided of their own free will what currency to apply for payment of wages and costs; and this option and volition should be accorded respect. The Tribunal is not in any position to award payment in any currency other than that agreed to in the Contract. For this reason, where the Claimant has agreed to accept a particular amount in rials, any award rendered in an adjudication of disputes between the Parties should require payment in the same currency, and not in some currency not agreed to by the Parties. In Sirie v. Godfrey, the New York Court of Appeals held that:

> "At any time before suit was brought, the defendant could have tendered the plaintiff at Paris, France, the... francs in full payment of her claim, and plaintiff would have been compelled to accept same... The purchase price of the goods in question was not payable in American dollars, nor was it payable in German Marks. It was payable in French Francs, and by merely bringing action in this jurisdiction the plaintiff, I apprehend, acquired no right to a more favorable judgement than she could have obtained had action been brought in France."

This decision was also followed in other cases. Therefore, the same currency specified in the Contract should be applied in the Award.

> "It is now clear that English law does not require any foreign money obligation to be converted into Sterling for the purpose of instituting proceedings or of the judgment; on the contrary, where the plaintiff claims a sum of foreign money, he is both entitled and bound to apply for judgment in terms of such foreign money and it is only at the stage of payment or enforcement that conversion into Sterling at the rate of exchange then prevailing takes place. This is so whether the claim is for payment of a specific sum contractually due as for damages for breach of contract or tort or for a just sum due in respect of unjustified enrichment or for restitution. Nor does it matter whether the contract sued upon is governed by English or by foreign law. Nor is it necessary to ask for specific performance rather than payment: in either case the defendant will be ordered to pay foreign money. Moreover an award in an English arbitration may be expressed and enforced in foreign currency and a foreign award or judgment so expressed may be enforced like the English award or judgement." (F.A. Mann: The Legal Aspect of Money, Fourth edition pp. 347-8). (emphasis added)

It is a simple, logical practice that, where a contract is payable in rials, in seeking to settle the dispute the Tribunal should base its decision upon the terms of the contract, inter alia those provisions relating to the currency in which payments are to be made. The Tribunal cannot make an exception and alter the contractual provisions relating to the currency specified, by converting it into a different currency. If the Tribunal believes that, in endeavoring to enforce awards in accordance with the criteria set forth in the Declarations, these monies must be converted into dollars and paid in dollars, then this conversion should be made at the enforcement stage at the rate of exchange then prevailing, and not when issuing the award. The disposition of the matter is also clear at the enforcement stage, because instructions should then be given to De Nederlandsche Bank, which must pay the judgement

amount, to pay the dollar equivalent of the award. As a result of this mechanism, the judgement amount will naturally and inevitably be converted at the rate in effect on the day when payment is effected.

> "The modern practice of the Federal courts which was anticipated in two decisions of judge Augustus N. Hand, and developed in some decisions of the Supreme Court of the United States, rests upon the following distinction. Where the breach or wrong occurred in a foreign country (especially by non-payment of money due there), the damages are measured in the currency of that country and the dollar equivalent calculated at the rate of exchange obtaining at the date of judgment can be recovered; where the breach or wrong occurred in the United States (especially by non-payment of foreign money due there). The damages, being measured in dollars, are to be converted at the rate of exchange of the day of breach or wrong." (F.A. Mann Ibid, p.341)

In the present Award, apart from the fact that the majority therein converts the Contract into dollars even though the latter specifies rials-- ie. permits itself to alter the terms of the Contract-- it also invokes previous Tribunal awards in order to justify its action. Yet, the two awards invoked by the majority are not exhaustive of Tribunal precedent in the matter. Instead, in Award No. 114-140-2 (T.C.S.B. Inc. v. The Islamic Republic of Iran), where the respondent was required by the contract to pay a sum in rials, the Tribunal found as follows:

> "The Claimant assumed under the Contract the risk of exchange rate variations. The fact that by virtue of the Algiers Declarations payment of the present award is to be made in U.S. dollars, should not, by itself, relieve him of that risk."

The Tribunal thereby concluded in the award that the rials should be converted according to the conversion rate in effect on the date the award was rendered. In Award No. 21-132-3 (Rexnord, Inc. v. The Islamic Republic of Iran, et al), the Tribunal also held that "The amounts due shall

be converted to United States dollars at the current rate."

The argument that "the Claimant would, in the normal course of events, have repatriated the funds if they had been received on the due date," and that the date "on which the obligation became due" must be selected as the date of conversion, contains a number of fundamental deficiencies. First, it exchanges the criterion founded upon the Contract for one resting upon mere hypothesis. Second, the very fact that the Parties stipulated rials as the basis for their payments, indicates that their obligations would be satisfied upon payment in rials, without any connection whatever to the dollar; and we cannot now amend the express intent of the Parties. Third, even if the Algiers Declarations do require that payments be made out of the Security Account in U.S. dollars, this does not signify that the terms of contracts stipulating to rials shall be calculated in dollars and that awards are to be rendered in the latter. Rather, this explicitly signifies that the foreign exchange equivalent of the rial amounts are to be paid at the time payment is effected, and the conversion rate in effect on the date of payment should, logically, be taken as the basis of calculations. Otherwise, this logical equivalence and relationship will collapse. Nor will this approach be prejudicial to either of the Parties, for although the conversion rate of the Iranian rial to the US dollar fluctuates, nonetheless, since neither of the Parties included any stabilization clause in the Contract, both Parties have freely accepted any risks owing to alterations in the exchange rate; and if either of the Parties is injured in the process, this is a risk which is accepted in advance. It it, therefore, inequitable for the Chamber to set an exchange rate, or date for determining the rate of conversion, which is in conflict with the terms and tenor of the Contract.

"The true equity and the real reason should be that it is not the function of legal proceedings to interfere with substantive rights. It is their function to enforce rights. The idea that default or breach creates entitlement to a currency which previously was not the money of account, whether actual or potential, lacks both justification and attraction."

(F.A. Mann, The Legal Aspect of Money 4th edition pages 346-7)

Sayyid Mohsen Mostafavi