IRAN-UNITED STATES CLAIMS TRIBUNAL

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Case No. 54 Date of filing: 21 Dec 83

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** DISSENTING OPINION of mr R. M. Mosk
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R/12

DAMES & MOORE,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN, THE ATOMIC ENERGY ORGANIZATION OF IRAN, THE NATIONAL IRANIAN STEEL COMPANY, THE IRANIAN MEDICAL CENTER and THE NATIONAL IRANIAN GAS COMPANY,

Respondents.

CASE NO. 54

CHAMBER THREE

AWARD NO. 97-54-3

DISSENTING OPINION OF RICHARD M. MOSK TO DISMISSAL OF CLAIMS ON JURISDICTIONAL GROUNDS

I dissent to that portion of the Tribunal Award dismissing the claims against the Respondent Atomic Energy Organization of Iran ("AEOI") on jurisdictional grounds. I concur in the remainder of the Award.

Under Article II, paragraph 1, of the Claims Settlement Declaration,[1] the Tribunal's subject matter jurisdiction extends to claims which "arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding . . . claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts...."

[1] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, dated 19 January 1981.

Respondent AEOI has objected to the Tribunal's jurisdiction over the claims against it on the ground that the contract between AEOI and Claimant's foreign-owned entity, Dames & Moore International, S.R.L., included a provision which falls within the above-quoted (or final) exclusion clause of Article II, paragraph 1. That contract provision reads as follows:

> 10.16 Settlement of Disputes
>
> Any dispute or disagreement arising under this Contract shall first be discussed amicably by both parties. Failing agreement, such dispute or disagreement shall be submitted to conciliation. Each party shall have the right to appoint one conciliator and a third conciliator shall be appointed by the Plan and Budget Organization of the Government of Iran. In the event that either party is unwilling to accept the decision of the conciliation board, the matter shall be decided finally by resort to the courts of Iran.

The Full Tribunal held that it lacks jurisdiction in another case by virtue of a similar contract clause.[2] T.C.S.B., Inc., v. Iran, Interlocutory Award No. ITL 5-140-FT (5 November 1982), 1 Iran-U.S. C.T.R. 261, 264-67. While stating its disagreement with the decision in that case, Claimant has conceded that the Iran forum selection clause at issue in T.C.S.B. cannot be distinguished from Article 10.16 of the contract involved in the instant case. Although I adhere to my view that such contract clauses should not divest the Tribunal of jurisdiction over claims (see Dissenting and Concurring Opinion of Richard M. Mosk on the Issues of Jurisdiction, Case Nos. 6, 51, 68, 121, 140,

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[2] Such a clause shall hereinafter be referred to as an "Iran forum selection clause."

159, 254, 293 and 466 (5 November 1982), 1 Iran-U.S. C.T.R. 305), I recognize the binding authority of the Full Tribunal's decision.

Claimant argues, however, that despite the unavailability of jurisdiction over its breach of contract claim in this Tribunal, it may nevertheless maintain in the Tribunal its claims against AEOI on the theories of quantum meruit and account stated -- theories which it pleaded in the alternative to the breach of contract claim in its Statement of Claim filed with the Tribunal.

The Tribunal has, without any significant legal analysis or discussion, rejected Claimant's contention, holding, in effect, that as the Iran forum selection clause in the contract between the parties precludes Tribunal jurisdiction over the contract claim, the Tribunal does not have jurisdiction over the alternative quantum meruit or account stated claims based on performance of that contract.[3]

The Claims Settlement Declaration only purports to exclude from Tribunal jurisdiction "claims arising under a

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[3] The Tribunal's decision with regard to the account stated claim is confusing. It appears that the Tribunal accepts that there can be an alternative claim for an account stated, which is a separate contract. The Tribunal seems to discuss the merits of the claim, but concludes that there is no jurisdiction over it.

binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts...." Article II, paragraph 1. (Emphasis added). As one court has noted, "[t]he term 'arising under' is relatively narrow as arbitration clauses go." Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, 253 F.Supp. 359, 364 (S.D.N.Y. 1966). For example, the term "arising under" is a much narrower expression than the term "arising out of or relating to," which is a frequently used arbitration clause. See Model Arbitration Clause provided for in the UNCITRAL Arbitration Rules. Thus, a claim may relate to a contract but may not arise under it. A claim arising under a contract is one to enforce contractual obligations or to recover damages for the breach of such obligations. See Management Investors v. United Mine Workers of America, 610 F. 2d 384, 390 (6th Cir. 1979).

One having a claim arising under a contract and a related (and even inconsistent) noncontractual claim may assert both of those claims in the alternative, as Claimant has done in the instant case. There is nothing in the Tribunal rules which precludes the pleading of claims in the alternative. Indeed, alternative pleading is widely recognized. See, e.g., 36 Halsbury's Laws of England §44 at 35 (4th ed. 1981); Lena Goldfields Arbitration §23 (1930) reprinted in 36 Cornell L.Q. 42, 50-51 (1950); A. von Mehren and J. Gordley, The Civil Law System 165 (2d ed. 1977).

The jurisdictional issue in the instant case is whether or not the quantum meruit claim or the account stated claim arises under the contract containing the Iran forum selection clause. If those claims do not, then the Tribunal has jurisdiction over them.

Claims based upon quasi-contract theories, such as quantum meruit, restitution and unjust enrichment, have long been recognized under international law as well as under the laws of the United States and Iran. See 3 Whiteman, Damages in International Law 1732-61 (1943); 12 Williston on Contracts §§1459-1459A at 68-108 (3rd ed. 1970); Restatement of the Law, Restitution §§1, 108 (1936); Civil Code of Iran, Arts. 301-306, 336; Haidariyan, Fundamentals of Law: A Comparative Study 240 (1971)(in Farsi)

The principle of quantum meruit is based upon a recognition that there is a legal duty to pay for services which one has received. An entitlement based upon quantum meruit arises out of a debt created by the application of principles of unjust enrichment. The Tribunal has jurisdiction over claims arising out of "debts". Claims Settlement Declaration, Article II, paragraph 1. An obligation imposed by the principle of quantum meruit, and thus by law, is a "debt" within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. Moreover, the Tribunal has previously held that it has jurisdiction over claims based upon unjust enrichment. See Benjamin R. Isaiah v. Bank

Mellat, Award No. 35-219-2, (30 March 1983); ___ Iran-U.S. C.T.____ . Therefore, the Tribunal has jurisdiction over claims for quantum meruit.

Although a claim for quantum meruit may relate to a contract claim, it is, as stated by AEOI itself, "based on a completely different and separate bases [sic] and, in principle, definitions of claims arising out of the doctrine of unjust enrichment appearing in the laws of various countries give rise to the clear inference that such claims have a basis other than a contract." Rejoinder of AEOI at 7 (filed 13 January 1983). A quantum meruit claim is separate and independent from a breach of contract claim. As one authority has written, unjust enrichment claims "constitute an independent category of actions based on obligations which must be distinguished from claims arising in contract or in tort." Zweigert and Müller-Gindullis, "Quasi-Contract", Ch. 30 in III International Encyclopedia of Comparative Law 4 (undated).

A quantum meruit remedy is limited to the reasonable value of the claimant's services; a breach of contract remedy, on the other hand, entitles one to damages that would put him in the same position he would have been in had the contract been fulfilled. See Treitel, "Remedies for Breach of Contract", Ch. 16 in VII International Encyclopedia of Comparative Law 27 (1976). To establish a breach of contract, a party must prove the existence of a valid contract, its own performance and the breach itself. The

party normally need not show the value of the services performed. Unlike a breach of contract claim, a claim based on quantum meruit places on the claimant the burden of establishing the actual value of the services rendered. Thus, a quantum meruit claim deals with facts and legal issues different from those presented in a contract claim.

A quantum meruit claim, therefore, is independent of any contract claim which may exist and gives rise to a remedy different from that arising under a contract claim. Such a quantum meruit claim cannot be said to arise under a contract and, therefore, is not excluded from the Tribunal's jurisdiction by the exclusion clause at the end of Article II, paragraph 1, of the Claims Settlement Declaration.

A similar analysis applies to the account stated claim. An account stated is an agreement between a creditor and a debtor as to an amount due. Such an agreement may be implied from the conduct of the parties, as when a creditor renders a statement of account to a debtor and the debtor retains such a statement without objection for an unreasonably long period, thereby resulting in an inference that the debtor has assented to the statement. See Restatement (Second) of The Law of Contracts §282(1)(1981);[4] 15

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[4] "An account stated is a manifestation of an assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor. A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent."

Williston, supra §§ 1862-64 at 564-581; cf. Civil Code of Iran, Art. 292(1).

An account stated claim is based upon a new, separate and independent agreement, thus precluding certain defenses, such as a statute of limitation or improper venue, which would have been applicable to a claim based upon the original contract. See 6 Corbin on Contracts § 1309 at 247-49 (1962); 15 Williston, supra §1862, note 11 at 566-67; see generally I. Jacob, Bullin and Leake and Jacob's Precedents of Pleadings 187-190 (12th ed. 1975).

The final exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration would be applicable to an account stated only if, as an independent contract, it included an applicable Iran forum selection clause, a circumstance which does not exist in the instant case.

It would not be incongruous to preclude Claimant from presenting its contract claim to this Tribunal and yet permit Claimant to invoke the jurisdiction of this Tribunal with respect to alternative and related claims. As noted above, the alternative claims involve different remedies -- remedies that generally provide less compensation than those available under the excluded claim. Moreover, it is not unusual for claimants to plead in such a way as to come within the jurisdiction of a particular forum. For example, in the United States, a claimant may forego a claim lying exclusively in a federal court in order to maintain a state claim in a state court. Similarly, a claimant may give up a

portion of a claim in order to bring an action in a court in which jurisdiction is limited to an amount less than that to which the claimant believes it is entitled. A claimant may, in some instances, frame a claim in such a way so as to avoid the jurisdiction of an administrative tribunal and thereby maintain the claim in a court. It is also quite common for a claimant to plead alternative claims in order to insure that it can continue to pursue one remedy if another one appears unobtainable.

Claimant is presently seeking to proceed before the Tribunal on its quantum meruit and account stated claims in lieu of litigating its breach of contract claim in another forum.[5] Claimant has therefore elected to seek certain remedies and assume additional evidentiary burdens in order to maintain a claim before this Tribunal. Accordingly, by retaining jurisdiction over the alternative claims, the Tribunal would not, as the Award states, render "ineffective" or circumvent the exclusion language of the Claims Settlement Declaration or the decisions of the Full Tribunal.

Thus, I believe that the Tribunal should have ruled that it has jurisdiction over the claims for quantum meruit

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[5] In view of the Tribunal's decision in this case, the Claimant may, of course, seek to litigate the breach of contract claim in another forum.
It has been held that the resolution of a breach of contract claim is not necessarily res judicata as to a subsequently asserted quantum meruit claim and vice versa. See Annot, 35 ALR 3d 874 (1971 and Supp. 1978). This indicates the essential differences between those claims.

and account stated. Such a ruling would not have been a determination of whether the claims are legally cognizable in this circumstance. In order to make such a determination, the Tribunal would have to decide whether the Claimant has stated facts sufficient to constitute a legal claim for quantum meruit or for an account stated in light of the fact that there exists a valid contract covering the services which are the subject of these alternative claims. Such a question would seem to be one of substantive law, although it has procedural aspects; it is not a question of jurisdiction.

There are a number of different choice of law doctrines that could be utilized in determining which law to apply to this legal question. See Zweigert and Müller-Gindullis, "Quasi-Contract," supra. The Tribunal has no evidence of how Iranian law would bear on the substantive issue; also, the Tribunal has little evidence or indication of how other municipal systems would deal with the subject.

I recognize that, even within the United States, there is a division of authority as to whether a party may assert a quantum meruit claim arising out of services performed under a valid contract. Compare Falls Sand and Gravel Co. v. Western Concrete, Inc., 270 F. Supp. 495, 505 (D. Mont. 1967) with Cole v. Benavides, 481 F. 2d 559, 561 (5th Cir. 1973).

Under these circumstances, I believe that the Tribunal can and should determine this legal question on the basis of what it believes to be the most appropriate and sensible rule. See Claims Settlement Declaration, Article V.

One well known treatise on contract remedies has thoroughly discussed the subject, and it is worthwhile to quote that discussion at length:

> If ... the plaintiff has only partly performed and has been excused from further performance by prevention or by the repudiation or abandonment of the contract by the defendant, he may recover the value of the services rendered:
>
> "Where one party to an express contract is wrongfully prevented by the other party from completing, he may sue upon the contract for a breach thereof, in which case the measure of his damages will be the value of the part performed as measured by the contract price plus the profits which would have accrued to him had he completed the contract according to its terms; or he may ignore the contract, and declare on a quantum meruit or quantum valebat, in which case his measure of damages will be the fair and reasonable value of what he has done."
>
> Actually, however, such a remedy is no more necessary than where he has fully performed, since in both cases alike the plaintiff has an effectual remedy in an action on the contract for damages. As the court pointed out:
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> "A plaintiff situated as this one is may declare for a quantum meruit or he may declare specially on the contract, or he may join such counts in his complaint. The choice of one of these remedies does not in law amount to the rejection of the other." And, as signalized by a federal court in a case of novel impression:
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> "The doctrine of election of remedies thus invoked seeks to prevent a party from shifting his position inconsistently. Since it is rooted in estoppel, the doctrine is not available as a defense unless the defendant has materially changed his position as a consequence of plaintiff's previous conduct.... The applicability of the doctrine to the situation here presented appears not to have been decided previously in this jurisdiction; but we think the better rule is

> that no election is required between contract and quasi-contract. The two remedies may be joined and pursued in the same action."
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> In some jurisdictions, if a price or rate of compensation is fixed by the contract, that is made the conclusive test of the value of the services rendered. More frequently, however, the plaintiff is allowed to recover the real value of the services even though this may be substantially in excess of the contract price. The reason for this is found in the following judicial utterance wherein the pertinent rule is stated:
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> "It being settled as the general rule that upon prevention of performance the injured plaintiff may treat the contract as rescinded and recover upon a quantum meruit without regard to the contract price, why should he be limited to the contract price in case payments for portions of the entire contract have been made or liquidated? Those payments were received in full only on condition that the entire contract be performed. But, if the contract is rescinded, the prices fixed by the contract are also rescinded. As aptly said ... 'Where the defendant undertakes to limit the plaintiff's recovery by treating the contract price as a limitation upon such recovery, he is asserting a right under the very contract which he himself has discharged.'"
>
> The latter rule seems more in accordance with the theory on which the right of action must be based - that the contract is treated as rescinded, and the plaintiff restored to his original position as nearly as possible.

12 Williston, supra § 1459 at 77-91 (citations omitted).

In the instant case, AEOI's termination of the contract, although not a breach of contract, prevented Dames & Moore International S.R.L. from completing its remaining obligations under the contract. It is clear that AEOI had breached the contract by not making required payments.

As the contract in the instant case and performance thereunder were not completed, Claimant should have the choice of a breach of contract remedy and a quantum meruit remedy. Moreover, in ascertaining Claimant's remedy for past services rendered, there is no compelling reason to distinguish a contract terminated according to its terms from one terminated by a breach, or to distinguish a contract fully performed from one partially performed. In any of these situations, when the respondent has breached its obligations, the claimant is entitled to compensation, and the damages to the claimant, either as measured by the contract or by the value of the services rendered, are entirely foreseeable. There does not seem to be any reason why the injured party should not be able to choose its remedy - at least when none of the remedies would result in the recovery of more than the party would have received if the contract had been fully performed.[6]

It should be noted that in a leading international case, in which a claim was pleaded alternatively for damages for breach of contract and for quantum meruit, the arbitral tribunal held that the claim should be allowed for quantum meruit despite the existence of the pleaded, fully enforceable contract claim. Lena Goldfields Arbitration §§ 23, 25 (1930) reprinted in 36 Cornell L. Q. 42, 50-51 (1950).

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[6] Some have said that the quantum meruit recovery is limited by the contract price; others have said there is no such limitation. See 12 Williston, supra §1459 at 84-86; §1478 at 270-71.

Accordingly, I believe that Claimant has stated a cognizable claim in quantum meruit for services rendered, notwithstanding the fact that those services were performed under a valid contract.

Claimant has also stated a legally sufficient claim for an account stated. As discussed above, because an account stated claim is based on an agreement separate and independent from any contract giving rise to the services covered by the account stated, such a claim may be maintained regardless of the existence of a valid contract.

In view of the decision of the Tribunal, I need not discuss in any detail whether Claimant has submitted sufficient evidence to sustain its claims based on quantum meruit or on an account stated. The evidence before the Tribunal demonstrates that Dames & Moore International, S.R.L. performed valuable services for AEOI and that Claimant is entitled to compensation therefor. In view of this conclusion, it is not necessary to determine whether the invoices to which AEOI failed to respond constitute an account stated.[7]

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[7] It is ironic that it was Claimant Dames & Moore that unsuccessfully challenged, before the Supreme Court of the United States, the power of the President of United States by the Algiers Declarations, to cause the suspension of United States legal proceedings by U.S. Claimants against Iran, in favor of this Tribunal. Now Dames & Moore is denied access, in large part, to this Tribunal. Dames & Moore v. Regan, 453 U.S. 654 (1981).

For the foregoing reasons, I dissent to the dismissal of the claims against AEOI on jurisdictional grounds. I concur on the remainder of the Award in which Claimant is awarded $ 208,435 plus interest at the rate of 10%.

Dated, The Hague
20 December 1983

Richard M. Mosk