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

In the Name of God

Persian version filed on 20 Nov'.1990

CASE NO. 60
CHAMBER THREE
AWARD NO. 485-60-3

DEVELOPMENT AND RESOURCES CORPORATION,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
THE KHUZESTAN WATER AND POWER AUTHORITY,
THE STATE ORGANIZATION FOR ADMINISTRATION AND EMPLOYMENT,
THE MINISTRY OF ENERGY,
THE MINISTRY OF AGRICULTURE,
THE NATIONAL IRANIAN OIL COMPANY,
THE MINISTRY OF ECONOMY, and
BANK MARKAZI,

Respondents.

DISSENTING AND CONCURRING OPINION OF JUDGE PARVIZ ANSARI

INTRODUCTION

I see no need for me to elaborate on or reiterate those parts of the present Award in which I concur, and I shall thus refrain from commenting on them. I shall, however, set forth below my views on the most important areas in which I dissent to this Award. I first point to those defects that apply to the manner in which the Claimant's claims against each and every one of the Respondents have been adjudicated. These defects include the way in which the arguments and evidence presented by the Parties have been analyzed and dealt with, the way in which the Contract has been interpreted, and the way in which the rules of evidence have been applied. In general, it would appear that the presumption of nonresponsibility and nonliability, which is the starting point and a principle of judicial examination, has been inverted, and that instead, in adjudicating the claims, it has been presumed that they are valid and that an obligation to make compensation exists, unless proof is made to the contrary. In numerous instances, it is observed that the majority has reached its decisions on the basis of suppositions and conjectures, rather than on that of evidence and judicial logic. Even the most fundamental rule, namely that proof must be presented by that party which alleges some right or asserts that some event has occurred, has not been scrupulously respected in important and decisive places. As a result, instead of the Claimant being required to prove his case, his claim has been indulgently accepted, whereas the Respondent has been asked to rebut the Claimant's claim by submitting credible evidence, without being allowed, in presenting his rebuttal evidence, that same indulgence that has been deemed permissible in accepting the Claimant's evidence.

CLAIMS AGAINST THE KHUZESTAN WATER AND POWER AUTHORITY:

With respect to the claims of Claimant Development and Resources Corporation ("D&R") against the Khuzestan Water and Power Authority ("KWPA"), it is necessary first to note several points concerning the adjudicative proceedings. In the first place, the majority declined to accept KWPA's submission dated 21 February 1986, on the grounds that it had been filed late. It should be explained that KWPA filed the said memorial subsequent to its request that the Tribunal permit it to submit evidence to which it had recently gained access. In view of the fact that KWPA's region of operations and activity is the province of Khuzestan, and that the said province was severely ravaged as a result of the protracted years of the imposed war -- and also that KWPA naturally did not remain immune to the circumstances and ravages of the war -- in my opinion KWPA's arguments and explanations for its delay in obtaining the evidence in question were justified, and fairness would have required that the Tribunal accept KWPA's submission, as well as its request for permission to submit further evidence that would have helped in discovering the facts and clarifying the ambiguities. A further point is that right from the time this claim was raised before the Tribunal, KWPA repeatedly requested that D&R be asked to produce the evidence and ledgers relating to the period of performance on the Contract, and also that the Tribunal appoint an expert to examine D&R's records and ledgers for the relevant years. This action was particularly necessary for the reason that the examination of certain claims, inter alia the claim relating to the adjustments to the estimated construction [costs] for projects "b," "c," and "d," and also KWPA's counterclaims, required access to D&R's expense records, and D&R was the only source that could have produced those records.

CLAIMS RELATING TO THE PERIOD AFTER AUGUST 1978:

For the most part, KWPA's defences to the claims relating to the period following August 1978 relate to the non-existence or insufficiency of probative evidence, as has also been noted in the Award; and in certain instances, they also relate to the nonpayability of the claimed amounts by reason of their non-conformity to the Contract's provisions. Aside from the general rule of the burden of proof, which rests upon the Claimant, Article 4 of the Contract at issue in this claim also emphasizes the need to present "detailed monthly invoices, together with ... supporting documentation." For this reason, KWPA's objection is justified both within the framework of the general rules of judicial examination, and in terms of the Parties' contractual obligations. In view of the Contract's provisions, D&R was required to send KWPA monthly invoices, together with supporting evidence documenting its expenses incurred in rendering the services provided for under the Contract, in order to be recompensed therefor, to establish that they had been incurred, and to justify the amount thereof. Absent such documentation, KWPA had no obligation to examine and confirm D&R's expenses, the necessity thereof, or their conformity to the Contract; nor, in principle, would it be able to do so. Regrettably, based solely on its assumption that the claim is valid, the majority has in some instances agreed that D&R incurred expenses and that KWPA has a responsibility to recompense it for same, even though there is insufficient evidence of the alleged expenses.

In places, conjecture, supposition and assumptions of validity have been relied on to such an extreme degree, in place of evidence and judicial reasoning, that some imputed event in the past dealings of the Parties to the claim has been presumed to be proved, even though no record thereof exists in the Case file. By way of example, it is stated

in paragraph 68 of the Award, where KWPA's general objections to D&R's claims are taken up, that:

> "The documentation accompanying D&R's invoice claims consists mostly of the routine backup materials upon which KWPA previously disbursed amounts payable for such invoices."

This statement apparently signifies that because the backup materials submitted by D&R in support of its claims relating to the invoices were similar to the materials that had previously been submitted to and accepted by KWPA, they were therefore also sufficient for proof of the claims brought in this Case. At any event, whatever its intent, the above statement is not supported by any evidence. The records of the Parties' prior dealings, and evidence showing that KWPA had previously made payments to D&R on the basis of backup materials similar to those which D&R has now presented, have not been submitted. It is astonishing how the majority was able to reach the conclusion set forth in paragraph 68 of the Award, without having access to the records of the Parties' past dealings. In many other instances, recourse has been had to arguments similar to the above, in accepting D&R's claims without there being in the Case file any record of the Parties' prior practice or any supporting evidence of the sort that D&R formerly submitted to KWPA in order to document its expenses. In this manner, even where the majority has in principle accepted the necessity of presenting backup materials, it has still not been prepared to regard a lack thereof as grounds for dismissing the claim, and has instead advanced excuses in order to justify that claim. In paragraph 72 of the Award, where it addresses KWPA's general objections under the heading of "Insufficient Backup Documentation," the majority concludes as follows:

> "Under the circumstances, the missing countersignatures and missing time cards are most probably due to the force majeure conditions. D&R has submitted as much documentation as was reasonably possible.

> KWPA has provided no credible evidence that the employees were not on the work site during these periods, and the Contract does not make provision of time cards an absolute prerequisite to payment. No contemporaneous objection was ever made."

As can be observed, the majority thereby accepts an unsubstantiated claim, based on its guess that the time cards and countersignatures might be missing owing to force majeure. This conclusion also demonstrates a flimsy logic. For how can force majeure have prevented only the signing of the time cards, and yet not have prevented D&R's employees from being present and continuing with their work? With that facileness which has been noted above, the majority has, on the basis of guesswork and conjecture, treated D&R's failure to present signed time cards as being justified; and yet, several lines further down in the same paragraph of the Award, it expects KWPA to present credible evidence proving that D&R's employees were not on the work site -- whereas both the terms and provisions of the Contract, and the rule of onus probandi, require that as the Claimant, D&R submit the necessary evidence in order to prove that its employees were present and performed the services in question. Continuing with its argument in paragraph 72 of the Award, the majority holds that submission of time cards was not an absolute prerequisite to payment. However, firstly, pursuant to Article 4, Section A, paragraph 3 of the Contract, D&R was required to "submit to [KWPA] detailed monthly invoices, together with appropriate supporting documentation..." This means that the incurring of any expense, and the payment of any monies, had to be substantiated by documentary proof of the expenditure. Secondly, the record and the Parties' practice demonstrate that time cards were to be submitted as a part of the backup documentation in proof of expenses.

Moreover, in certain instances, D&R has also been excused from producing documentation which the Contract re-

quired it to submit. Although Article 6 of the Contract expressly required D&R to submit monthly and quarterly reports and a work completion report for each project or for each specific phase of its services, the majority nonetheless holds that the failure to submit the reports, which in actuality amounts to a breach of contract, is immaterial and irrelevant, inasmuch as such submission was not made a precondition for payment on the invoices (paragraph 77 of the Award). Yet, it is categorically certain that the Parties to the Contract would not have made provision for submission of the said reports, had they not been necessary. Furthermore, without being provided with those reports and the other supporting documentation that D&R was required to submit along with its invoices, KWPA naturally could not examine whether the expenses had been incurred or the services performed; nor could it determine whether or not compensation was justified. Awarding for payment of the invoices, where the other Party to the Contract has failed to comply with its obligations to submit the reports or the necessary supporting documentation, is tantamount to our holding that KWPA is required to pay the invoices submitted by D&R, without conducting the necessary examination.

A further example of such disregard of the contractual requirements and the rule of onus probandi can be found in the finding made with respect to the claim for housing and maintenance expenses for D&R's employees. In paragraph 101 of the Award, the majority responds as follows to KWPA's defence that backup documentation needed to be submitted in proof of the alleged expenses:

> "In particular, [KWPA] alleges that copies of rental agreements, deeds and other documents are not provided, that a resolution of the Board of Directors of KWPA authorizing use of housing is not submitted, that the names of the employees using the houses are not provided and that insufficient evidence has been provided to establish that the alleged payments were actually made. The Contract does not require such backup documents."

Paragraph 102 of the Award, relating to KWPA's objection that its consent to the payments had not been obtained, makes an interpretation of the Parties' contractual relations that is blatantly contrary to the terms of the Contract. In pertinent part, paragraph 102 states that:

> "Where the reimbursement sought seems reasonable and no contemporaneous objection was made, agreement by KWPA may be inferred."

Contrary to the above statement, the Contract expressly requires that KWPA's consent be obtained for the outlay of any expenses by D&R for housing needs. Annex "F", paragraph 4 to the Contract provides that:

> "If or to the extent that the Authority does not furnish any facility or service which is provided for herein and which is required for purposes of ⌜D&R's⌝ services under this Contract, ⌜D&R⌝ may, by agreement with the Authority and to the extent reasonably possible, directly secure, maintain, or operate such facility or service and be paid by the Authority the costs thereby incurred..."

Logically, such consent had to be obtained before the expenses were incurred; and at any event, no payment whatsoever could be made without KWPA's consent. In light of the Contract's express terms, even if an expense was reasonable, KWPA had no obligation to reimburse it unless its consent had been obtained. In addition to the necessity of obtaining KWPA's consent, which has been explicitly referred to in the Contract, it was also necessary, logically enough, to present documentation of the expenses incurred. Clearly, in order to prove that D&R had incurred some expense that was reimbursable under the Contract, it was first and foremost necessary to establish that the expense had been incurred; and the most obvious evidence thereof would be the documents relating to payment of the alleged monies.

In connection with the claim relating to the costs associated with travel by technical staff and the shipping

of their personal effects, KWPA has objected that owing to a failure to submit sufficient documentation, the invoices cannot be paid. Among the documents that KWPA asked to be submitted was the payment receipt. There can be no more reasonable expectation than that the evidence of payment and of having incurred expenses be presented as proof of such costs. In paragraph 110 of the Award, the majority not only questions whether such documentation was necessary, but apparently alludes to KWPA's prior practice as well, and states that:

> "There is no allegation that such backup was ever required prior to the time the invoice was submitted. There is no suggestion that the total amounts invoiced are extraordinarily high."

In addition to being incorrect -- because no evidence has been presented of the Parties' prior practice showing that KWPA normally paid such invoices without the receipts of payment having been submitted -- this statement is also unacceptable, in that it presents an interpretation of KWPA's statements that is contrary to fact. KWPA has always maintained the position that before it could make payment on invoices, backup documentation demonstrating that the expenses had been incurred and that the amounts indicated in the invoices had been paid, had to be submitted.

In its discussion of D&R's claim for the 120 percent override on its employees' termination salaries, the majority resorts to arguments that have no basis in the Contract, and that do not constitute a reasonable inference from the circumstances of the matter or from the conduct of the Parties to the Contract, in concluding that the 120 percent override on the termination salaries is payable to D&R (paragraph 128 of the Award). Under Article 2, Section A, paragraph 4.c of the Contract, the 120 percent override would be allowed only with respect to the amount under subsection (a) to that same paragraph of the Contract, namely

"The amount of salaries paid to field technical staff on the basis of the amount set forth in each staff member's employment agreement with [D&R]." As can be observed, the Contract refers only to the salaries paid, and makes no mention of the amounts that would be paid to the employees upon termination of their services. On the other hand, given that the majority holds that payment of the amounts claimed for the costs related to termination of the Contract is justified on the basis of Article 8, Section A of the Contract (paragraph 66 of the Award), we must also refer to that provision. Article 8, Section A, paragraph 1 of the Contract describes as follows the costs that are payable in the event of termination:

> "... the Authority shall pay to the Consultant the cost of all work performed to the date of termination of the Contract in accordance with the payment provisions of Articles 2, 3 and 4 above, including earned fee, salary termination costs of field technical staff and necessary costs of terminating work and returning field technical staff and their dependents to their homes or points of origin."

To explain, those employee salaries to which the 120 percent override applied are covered by Article 2 of the Contract. As can be seen, the employee salary termination costs are mentioned in Article 8 of the Contract as an item that is independent of and separate from the employee salaries covered by Article 2. The obvious conclusion is that in Article 8 of the Contract, which the majority deems to govern the settlement of accounts between the Parties in the event of termination of contract, mention in made only of the salary termination costs -- and not of the 120 percent override thereon -- in computing those costs that are payable to D&R. If, as argued in the Award, pursuant to the Contract the salary termination costs were also considered to be a part of the employees' regular salaries that were payable pursuant to Article 2 of the Contract, there would have been no need for the Contract to mention them once more under the heading of "salary termination costs of field technical staff."

Adjustments to estimated construction costs on project "d":

There appears to be no dispute or question over the fact that pursuant to the provisions of Article 2, Section B, paragraph 3.d of Contract 401, D&R was required to credit KWPA for the final amounts which it had received, based on the terms of the previous contract, on the invoices for the year 1346 [1967-68] for design services. D&R was required to take the amounts of the said invoices into account in its calculations, and to subtract them from its fee for design services which was to be calculated according to the terms of Contract 401. To this extent the Contract is clear, and each Party's position and D&R's obligation are specifically set forth. The dispute that arose after Contract 401 had been performed on was over D&R's refusal to credit KWPA for the final invoices for the year 1346. D&R has also alleged that certain of the design services which it had performed in 1346 [1967-68] under the terms of the previous contract -- the fees for which it had also already received in full -- were largely unusable owing to subsequent changes, and had to be performed once more. On this basis, D&R alleged that in its calculations, it did not have to credit KWPA for the full amount of the final invoices relating to 1346. Aside from the terms and interpretation of the Contract, which do not permit D&R to take such action, there can be no doubt that D&R's statement is no more than an assertion. Therefore, assuming that we accept its interpretation of the Contract and that we consider it as authorized, in computing its claims, to reflect those amounts which it had received for the portion of design services that needed to be revised, this still does not relieve D&R of its obligation to present evidence and to prove its claim. Therefore, the claim that certain of the services performed in 1346 needed to be carried out once more, must be supported by evidence. On this issue, the majority seemingly takes the position that D&R has proved its claim merely by virtue of having stated it and

by specifying the amount thereof and presenting a series of computations, and it furthermore holds that KWPA must present specific evidence of its own in order to prove that the claim is unfounded. In this regard, the majority has acted precisely contrary to the rule of onus probandi. The Contract's requirement that all final invoices for the year 1346 must be subtracted from the amounts D&R is entitled to claim for design services fees on projects "b," "c" and "d," which were to be calculated in accordance with the terms of Contract 401, is clear and absolute. As a result, it was D&R's duty, in raising the claim and by virtue of being the Claimant in this Case, to prove all elements of its claim. D&R was required to prove, through the submission of evidence, the reason why, and specifically which part and amount of, the services performed in 1346 were subsequently unusable. All that D&R has presented as evidence is certain figures and calculations relating to costs, which D&R has arbitrarily categorized and apportioned. D&R has not submitted the documents underlying its computations. No evidence whatsoever has been provided specifically demonstrating that services relating to a particular project had been carried out a second time or, in principle, that such action had been necessary. What has been presented as evidence constitutes, in fact, merely an elaboration and explanation of the claim, and not evidence in support thereof. In accepting D&R's unsupported claim, which rests on the statements of one of its prior employees, the majority evinces no doubt at all; and yet, at the same time, it regards as inadequate the defences of KWPA, which rest upon the same sort of calculations as those provided by D&R, and thus holds that sufficient evidence must be submitted. The majority refers to D&R's detailed breakdown of calculations for the final estimated construction costs and for the amounts that should be credited to KWPA for the 1346 invoices, and it compares it to the report submitted by KWPA, which contains the same sort of data and calculations. Yet, at the end,

the majority accepts D&R's position, and concludes its arguments with the following sentence:

> "KWPA has failed to submit sufficient evidence to show that it would be entitled to credit for payments in year 1346 of $324,900 (1) instead of the $128,426.22 that D&R has conceded." (Paragraph 178 of the Award)

The majority forgets that it is D&R who is the Claimant in this Case, and that it is thus D&R who must prove that circumstances arose which entitled it to recompute its demands, contrary to the Contract's provisions and stipulations. On the other hand, it was D&R that performed the work, and so any evidence relating to modifications of the projects and to the necessity of repeating the services performed in 1346 and carrying out renewed services should be in D&R's possession; and in bringing the claim, D&R was required to produce such evidence. The failure to produce evidence relating to the alleged costs not only renders D&R's claim invalid by reason of lack of proof, but it also confirms the counterclaim brought by KWPA on this same issue, i.e., the adjustment to the estimated construction costs. Nonetheless, the majority deals with KWPA's statements and defences in an inflexible manner, and it demands credible evidence in proof of each point. By way of example, in paragraph 176 of the Award the majority even casts doubt on points that D&R has not denied. The majority questions whether the $329,900 which KWPA states was paid to D&R for its services rendered on project "d" in the year 1346 was actually paid, and writes that "[h]owever, neither the KWPA report nor any other document on the record contains any evidence of the alleged payments..." Yet, the fact is that D&R did not deny having received the monies stated by KWPA. Their dispute was over what amount of the monies paid for services rendered in 1346 should have been credited to KWPA.

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(1) The figure quoted by KWPA was $ 329,900.

A further point that should be mentioned in connection with the claim relating to project "d" is, that D&R brought that claim in an extremely untimely manner. That is -- supposing in arguendo that the majority's arguments be accepted -- the final contract let out to a subcontractor on project "d" was dated September 1973. According to the majority's argument, by that date at least, D&R could have computed the adjustments to the estimated construction costs for the project, and submitted them to KWPA. By its own admission, D&R submitted the revised construction costs on project "d" to KWPA in February of 1977. On page 13 of its explanation of the claim dated 10 February 1977, which it had prepared in order to justify its demand for additional monies, D&R states that:

> "To this date, D&R has not submitted revised construction cost calculations for project d due to its failure to reach agreement with KWPA representatives on the revised ECC's and associated compensation due D&R for projects b and c, and also due to delays and problems encountered during the design and construction of the project d irrigation facilities."

The failure to reach agreement over the costs for projects "b" and "c" cannot, logically, be deemed an excuse for this delay in submitting the claim relating to project "d," which was an independent project. Nor were problems in the planning and construction phases of certain project "d" facilities the cause of the delay, because by D&R's own assertion, which has also been accepted by the majority, the last contract relating to project "d" was let out to the subcontractor in September 1973. If D&R really had a valid and justified claim in connection with the adjustments to the estimated construction costs on project "d," it should have submitted it to KWPA at that same time, in accordance with the terms and provisions of Contract 401. The nearly four-year delay in submitting the claim, especially during the term of the Contract and in a situation where the Parties were continually working together in car-

rying out the various projects under the Contract, cannot be regarded as normal or conscionable. At the very least, this conduct signifies that by its untimeliness in submitting its claim, D&R actually waived any right that it might have had with respect thereto. See: Oil Field of Texas, Inc. and The Government of the Islamic Republic of Iran, National Iranian Oil Company, Award No. 258-43-1 (8 Oct. 1986), pp. 14-16 [of the Persian text] (reprinted in 12 Iran-U.S. C.T.R. 316-317).

Claim against the State Organization for Administration and Employment:

The contract at issue in this claim is a Memorandum of Understanding ("MoU") that was concluded on 22 April 1978, in implementation of the previous MoUs. D&R alleges that it performed certain services for the State Organization for Administration and Employment (SOAE") in the third quarter of Phase III of the Contract (21 September through 20 December 1979) pursuant to the said Contract, and that in consideration therefor, it is entitled to receive the contractually stipulated monies. D&R has not presented any acceptable evidence in order to prove that it performed the services under the Contract, or that it complied with its contractual obligations. In its submissions, SOAE has repeatedly objected to this lack of proof, and has requested that D&R produce evidence showing that it performed the work under the Contract in a satisfactory manner, and that it submitted the necessary reports to the SOAE. In its memorial dated 15 November 1984, D&R has submitted to the Tribunal three reports amounting to a total of ten pages, as constituting the results of its work during the period from 21 September through 20 December 1979. The SOAE denies that it was ever sent those reports. The reports lack any cover letter or statement evidencing that they had been sent to the SOAE. Nor has D&R submitted any other evidence to establish that the reports were submitted dur-

ing the term of the Contract. In view of the foregoing, there is in fact no evidence in this Case that D&R performed any work under the Contract during the third quarter of Phase III of that Contract, such as would entitle it to receive the contractually stipulated monies.

A further point is that the contents of the reports in question do not indicate that any useful work was performed; nor do they reflect any recommendations or guidelines relating to the subjects provided for in the Contract. The report relating to the period from 21 September through 20 October 1979 is merely 5 pages long. According to D&R's allegation, it had eleven experts working under the Contract during that period. The report relating to the period from 21 October through 20 November 1979 does not exceed five pages, either. The number of D&R's experts over this period was only 6 persons. The report relating to the period from 21 November through 20 December 1979 is only a half page long. That report does not refer to any work performed under the Contract; nor does it indicate how many experts had been engaged in such work over that period. Not only do the reports in question fail to prove that any services under the Contract were performed, but on the contrary, they clearly show that D&R was in breach of its contractual obligations. Here, I shall mention only one of the most flagrant of these violations, namely concerning the number of experts engaged in performing the services under the Contract, about which there is not any doubt or dispute whatsoever. Pursuant to the MoU dated 22 April 1978, D&R undertook:

> "To make available for these services in Iran the more than thirty experts previously assigned during Phases I and II with additional new experts of equal qualifications if the consulting tasks require them."

In contrast to this obligation, in fact D&R had only eleven experts available for the month of September, and six in November, as was stated above; and although the number of

experts is not mentioned in the report for December, the indirect evidence indicates that there could not have been more than one person involved. The number of experts is illuminating for the reason that it is numbers that are at issue, and it is difficult to employ sophistry in connection with numbers. Perhaps the majority might be willing to regard the few pages which D&R has annexed to its 1984 memorial, to indicate that it had performed on its contractual obligations, as constituting acceptable evidence thereof; and it might not fathom the baselessness of such a decision without having an adequate knowledge of the contents of the Case. With respect to numbers, however, I do not think it would be necessary to know the entire body of the Case record, in order to perceive the baselessness and unfairness of the findings set forth in the Award.

The majority itself has noted this problem as well, but it has apparently deemed it immaterial; in paragraph 313 of the Award, it holds that:

> "The Tribunal notes that according to D&R's Report of Phase III only 13 people worked on the project, instead of 'more than thirty' as required by Article 2 of the MOU. However, this reduction may be due, as the Report states it was, to conditions prevailing in Iran."

This reasoning is totally incorrect. By this statement, the majority expressly concedes that D&R has violated its contractual obligations. It should, naturally, have been concluded, following this introduction, that D&R was in breach of the Contract and is not entitled to demand any monies. Or at least, D&R should have presented evidence to prove that owing to the special conditions prevailing in Iran, it was unable, due to <u>force majeure</u> and notwithstanding its best efforts, to carry out its contractual obligations. D&R has not proved any such thing; nor has the majority, apparently, deemed it necessary for it to do so. Merely on the guess that "this reduction [in the number of experts] may be due... to <u>conditions prevailing in Iran</u>,"

D&R is held to be excused from any need to perform on its contractual obligations, and it has been awarded the amounts claimed, i.e., the contractual monies that were to be payable to D&R only if it completely carried out its contractual obligations. It has not been made clear in the Award just what is meant by the "conditions prevailing in Iran," or just what legal effect this bears. Is it definite that special conditions existed, or not; and were they sufficiently severe to constitute force majeure, or not? Even if it be presumed that the prevailing conditions constituted force majeure, and that D&R was unable, owing to force majeure, to assign a sufficient number of experts for the work, yet the question that remains is, why should the SOAE be held liable for payment of the contractual monies for services that D&R failed to perform owing to force majeure conditions? A further question is, how is it that D&R succeeded, under the conditions prevailing in Iran, in completing the services under the Contract despite having only 13 experts at its disposal? And another question is, just what were those conditions prevailing in Iran, which permitted 13 experts to be engaged in work and yet made it impossible for 30 persons to work? These issues, which would be the first to spring to the mind of any ordinary person taking up D&R's claim, have not been addressed in the Award.

Another objection to the majority's decision is that contrary to the express admission of D&R and its witness Mr. Macy, to the effect that D&R performed on Phase III of the Contract for only eight months, the majority has nonetheless stated the period of performance as being nine months. On page 20 of its Statement of Claim, D&R writes that:

> "During the eight months of rendering consulting services under Phase III, D&R submitted thirty-three advisory papers to Dr. Alimard..." (Doc. No. 291)

Mr. Macy allegedly signed the Contract at issue in the claim in person, in his capacity as President of D&R, and there can obviously be no doubt that he was aware of how long D&R was engaged in working on Phase III of the Contract. This point is important for the reason that D&R had, as it itself confirms, already received the contractual payments relating to the first and second quarters of Phase III of the Contract (six months). Therefore, in light of D&R's admission that the total duration of its performance on Phase III of the Contract was eight months, it could at most have brought claim before the Tribunal for recovery of the contractual payment relating to two months out of the third quarter of Phase III of the Contract. Nonetheless, the aforementioned admissions of D&R, as set forth in the Statement of Claim and in Mr. Macy's statement, have been disregarded, and in paragraph 316 of the Award, it is stated that:

> "The Tribunal notes that, while D&R in its Statement of Claim states that only eight months of work had been performed, contemporaneous evidence shows that nine months of work had been done."

In connection with the evidence pertaining to the duration of performance of work, it must be noted that the evidence relating to the one month in question (21 November through 20 December 1979) consists of a single page containing about ten lines, in which it is not even asserted that D&R had performed any work, and wherein, contrary to normal practice, the number of experts who had been engaged in work over the said month is not mentioned either; and this is in itself strong evidence that in fact, none of the experts had carried out any contractual services over that one-month period. The discrepancy between the statements of D&R and its witness on the one hand -- who have explicitly declared that work was carried out on Phase III of the Contract for a period of eight months -- and on the other hand the invoice issued by it, which states that work was performed for nine months, can only be resolved to the det-

riment of D&R, by any normal presumption and by every rule of adjudication.

Claim against the Ministry of Energy:

D&R's claims against the Ministry of Energy fall under two headings: (a) return of the good performance retentions, and (b) recovery on the unpaid invoices.

As to claim (a): Owing to D&R's breaches of the Contract, the good performance retentions are not repayable. The most obvious example of D&R's breach of the Contract is, its delay in submitting to the Ministry of Energy the reports that were the subject of that Contract. That is to say, the Contract between D&R and the Ministry of Energy was concluded on 22 September 1973. As stated in Article 3 of the Contract, the term thereof -- i.e., the date of delivery of the reports that were the subject of Phase II -- was specified as being 50 months from the date on which it was concluded. Consequently, the Contract was initially to expire in November 1977. Following a subsequent request by D&R, to which the Ministry of Energy agreed, the Contract's term was extended by four months. That extension meant that the revised date for expiration of the Contract, and as a result for delivery of the final report that was the subject of the Contract, was to be 20 March 1978.

By its own assertion, D&R sent the Ministry of Energy eight of the ten volumes of the report that was the subject of the Contract in September 1978, and the remaining two volumes in May 1979. The obvious conclusion to be reached from these preliminary facts is that D&R failed to meet the deadline set forth in Article 3 of the Contract, in connection with delivery of the reports. That breach is in itself sufficient justification for denying D&R any right to recover the good performance retentions. The majority is not justified in invoking Article 17 of the Contract, and it thereby disregards the other express terms of the

Contract. That Article, which refers to a delay "for a period exceeding one fourth (¼) of the anticipated execution period" for the work on each Phase of the Contract, relates to the terms for terminating the Contract, and as a result, it makes provision for those circumstances under which the Ministry of Energy was entitled to terminate the Contract. Pursuant to the Article in question, if the delay in completing the work on any Phase of the Contract exceeded one-fourth of the anticipated execution period provided therefor, the Ministry of Energy would be entitled to terminate the Contract. As stated in the said Article, termination entailed, inter alia, forfeiture of the good performance retentions. Article 15 of the Contract is that Article which relates to the good performance guarantee retentions, and it categorically entitles the Ministry of Energy to confiscate the good performance retentions to its own benefit, in the event that D&R failed to perform on its obligations. Article 15, paragraph 1 provides that:

> "The above guarantee will be forfeited to the benefit of the Employer [the Ministry of Energy] in case the Consulting Engineer [D&R] fails to fulfil his obligations and/or if the Contract is terminated due to the fault of the Consulting Engineer in performance of his services and/or if the Consulting Engineer fails to carry out the Contract."

As can be seen, the Contract makes provision for several situations whereby the good performance retentions would be forfeited: one of those conditions was, where "the Contract is terminated due to the fault of [D&R]." Another condition was absolute, and it did not depend upon termination of the Contract in order to become operative; as a result, it is not limited by the requirements for termination set forth in Article 17 of the Contract. The remaining condition states that failure of D&R "to fulfil his obligations" would unconditionally authorize the Ministry of Energy to confiscate the good performance guarantee retentions. There can be no doubt whatsoever that the 14-month delay in submitting the work that was the subject of the

Contract constitutes a blatant breach by D&R of the provisions of Article 3 of the Contract. Similarly, there is no doubt that such a delay in completing the work under the Contract cannot be regarded as "good performance" of that work. Therefore, the point that according to the language of Article 17 of the Contract, a delay of less than 14 months does not constitute grounds for terminating the Contract, is not inconsistent with the fact that D&R failed to complete the work under the Contract on time, and thus that pursuant to Article 15 of the Contract, it is not entitled to recover the good performance retentions -- recovery of which required that it perform the work properly and in a timely manner -- unless the Contract was terminated.

Contrary to the majority's opinion, the time of performance of the work constitutes an important and fundamental aspect of the Contract. I must refer to Article 3 of the Contract in order to confirm this point, and also to confirm the fact that the delay in submitting the reports constituted a breach of contract and at the very least entitled the Ministry of Energy to regard the work that had been performed as deficient, even if only by virtue of having been submitted late, and thus not to return the good performance guarantee retentions. In Article 3 of the Contract, the extension therein anticipated depends upon specific conditions, as well as upon confirmation by the Ministry of Energy. Article 3, paragraph 2 provides that:

> "If for reasons beyond the control of the Consulting Engineer, it becomes desirable to extend one or more of the above time limits, the Consulting Engineer shall present the necessary justification for an extension to the Employer who shall review the matter and approve new time limits as appropriate."

Unquestionaly, D&R could not delay delivery of the work by 14 months, without taking the aforementioned Article into account and without informing the Ministry of Energy -- and yet, despite all this, still assert that it had made "good performance on the work."

As to claim (b): for a number of reasons, D&R's claim relating to invoices should also be dismissed. Firstly, that claim has no contractual basis. As I stated above, the Contract expired on 20 March 1978, even taking into account the four-month extension thereof. As a result, the invoices in question, which were for work allegedly performed after that date, namely between 20 March and August of 1978, relate to a period when there was no longer any contract obligating the Ministry of Energy to pay. The unquestionable consequence of this fact is that if, in arguendo, D&R performed work after the Contract expired, i.e., after 20 March 1978, such performance on its part related to the carrying out of obligations that it was supposed to have completed while the Contract was still in force. Pursuant to Article 3 of the Contract, as revised, D&R was required to complete the work under the Contract and deliver it to the Ministry of Energy by 20 March 1978, at latest. The fact that D&R failed to complete this work, and allegedly had to continue working after the Contract expired in order to fulfil its obligations, is no justification for payment of additional monies to D&R. Clearly, if D&R had carried out its work in a timely manner and had delivered the reports that were the subject of the Contract to the Ministry of Energy on the date the Contract expired, i.e., 20 March 1978, there would have been no cause for it to demand those monies to which it is now bringing claim for the works performed after that date. Therefore, the award for payment to D&R of the invoices relating to the period following the expiration of the Contract is -- aside from the fact that it lacks any contractual basis whatsoever -- in actuality tantamount to a reward to D&R for having been late in completing its contractual obligations. In other words, the Ministry of Energy has been held liable for payment of additional monies to D&R, simply because the latter failed to complete its work on time.

A further defect in the majority's decision is its disregard for the objections by the Ministry of Energy at the numerous deficiencies in the reports submitted. Submitting affidavits from specialists in the field, the Ministry has enumerated in detail the deficiencies and defects in the reports, most of which objections have gone unanswered by D&R. At the same time, these objections also constitute the basis of the Ministry of Energy's counterclaim. Unfortunately, by relying on Article 5 of the Contract, which specified that the deadline for any objection to the reports was 60 days after their submission, and also on the excuse that there was no such objection, the majority holds that it is relieved of the need to address the merits of the objections brought by the Ministry of Energy. In view of the circumstances, such an argument is unjust and prejudicial to the rights of the Ministry of Energy; moreover, it is erroneous. For on the one hand, in confirming that the invoices claimed by D&R are payable, the majority has totally disregarded the express provisions of the Contract, inter alia the deadline for completing the works and delivering the reports, as set forth in Article 3 of the Contract, and has also interpreted the Contract so broadly that it considers D&R to be entitled to recover the amount of the invoices for work allegedly carried out after the Contract expired -- yet, on the other hand, in examining the objections and counterclaim of the Ministry of Energy, the majority holds that the Ministry was required to comply punctiliously with its secondary obligations (to object within 60 days after the date of delivery of the reports), even 14 months after the Contract had already expired.

Another point not taken into account is that pursuant to Article 11 of the Contract, the credit ceiling allowed under the Contract was only 165 million rials. The Ministry of Energy had no obligation to pay any amount in excess of this figure. According to evidence submitted by the Ministry of Energy and unchallenged by D&R, the

payments made to D&R by the date the Contract expired had already exceeded the aforementioned credit ceiling, and thus the Ministry was under no contractual obligation to pay any further amounts, even presuming that such payments were otherwise valid and owing under the terms of the other provisions of the Contract.

With regard to costs of arbitration and interest, I have previously stated my opinion thereon in other cases, and shall therefore refrain from reiterating those comments in dissenting here to the award in this connection. See: H.A. Spalding, Inc. and The Ministry of Roads and Transport of the Islamic Republic of Iran, Award No. 212-437-3 (24 Feb. 1986), Concurring Opinion of Judge Parviz Ansari, reprinted in 10 Iran-U.S. C.T.R. 35-36; also McCollough & Company, Inc. and The Ministry of Post, Telegraph and Telephone, et al, Award No. 225-89-3 (22 Apr. 1986), Separate Opinion of Judge Parviz Ansari, reprinted in 11 Iran-U.S. C.T.R. 45-52.

Dated The Hague,

.18....January.... 1991/..28...Day..... 1369

Parviz Ansari