IRAN-UNITED STATES CLAIMS TRIBUNAL

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ORIGINAL DOCUMENTS IN CASE

Case No. 64 Date of Filing: 27 June 85

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE No. 64

CHAMBER ONE

AWARD NO. 180-64-1

SYLVANIA TECHNICAL SYSTEMS, INC.,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

SEPARATE OPINION OF HOWARD M. HOLTZMANN
ON AWARDING COSTS OF ARBITRATION

I welcome that the Award in this case has dealt at some length with questions relating to awarding costs of the arbitration to the successful party. It is the most detailed analysis of this matter thus far by the Tribunal. I write separately to expand somewhat more on the subject.

I. The Right of a Successful Party to be Awarded its Costs of Arbitration is a Treaty Right

It is well to emphasize at the outset that the right of a successful party to be awarded its costs of arbitration, including the fees of its lawyers, is a right that arises from the Algiers Accords, as do the limitations on that right. I stress this because the almost casual, and certainly inconsistent, way in which costs have been awarded,

and not awarded, in so many of the Tribunal's past cases tends to obscure the fact that basic rights are involved.[1]

The right of the successful party to costs stems from the provision in the Claims Settlement Declaration that "the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal."[2] The UNCITRAL Arbitration Rules contain specific and detailed provisions that mandate that the arbitral tribunal "shall fix the costs of arbitration in its award", that define those costs and that require that they be borne by the unsuccessful party, subject to certain conditions discussed below. Art. 38; Art. 40, paras. 1 and 2. These provisions have been carried

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[1] The Award in this case correctly summarizes this Tribunal's widely inconsistent past practice as follows: "Chamber Two has never awarded any costs, Chamber One has awarded relatively small amounts of costs in only a few cases, and Chamber Three has in general awarded costs to the successful party in an amount well below the one claimed, using a range between $5,000 and $25,000 with costs of $70,000 awarded in one case. No distinction has been made between costs for legal representation and assistance and other costs, where costs were awarded." Award at 36-37. See also Concurring Opinion of Richard M. Mosk filed 19 March 1984 in William L. Pereira Associates, Iran and Islamic Republic of Iran, Award No. 116-1-3, at 1-2 (Tribunal should have awarded full costs); Dissenting and Concurring Opinion of Howard M. Holtzmann filed 1 Nov. 84 in Sea-Land Service, Inc. and The Government of the Islamic Republic of Iran, et al., Award No. 135-33-1, at 72 (dissenting from unexplained denial of costs).

[2] 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, signed 19 January 1981, Art. II, para. 2.

forward into the Tribunal Rules without change, except for certain modifications that are not relevant to this discussion.[3]

Article 38, paragraph 1 of the Tribunal Rules reads as follows:

> 1. The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:
>
> (a) The costs of expert advice and of other special assistance required for a particular case by the arbitral tribunal;
>
> (b) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (c) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.

It will be noted that sub-paragraphs (a) and (b) of Article 38 relate to costs of arbitration other than lawyer's fees, while sub-paragraph (c) deals with the successful party's costs for legal representation and

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[3] The differences between Articles 38 and 40 in the UNCITRAL Arbitration Rules and the Articles with the same numbers in the Tribunal Rules relate only to expenses of the Tribunal itself, which in accordance with Article VI, paragraph 3 of the Claims Settlement Declaration are borne equally by the two Governments, not by the parties.

assistance.[4] Article 40 then contains directions for implementing the awarding of these costs. It establishes a regime for awarding costs other than legal fees in paragraph 1 that is different from the provisions concerning legal fees found in paragraph 2. Following that structure of the Tribunal Rules, I will discuss those two types of costs separately.

II. Costs Other Than Lawyers' Fees

As noted, there are two types of "costs of arbitration", other than lawyers' fees, that the arbitral tribunal must fix in its Award. Tribunal Rules, Art. 38, para. 1.

First, the Tribunal must determine the costs of any expert advice and also "other special assistance required for a particular case". Para. 1(a). The phrase "other special assistance" is comprehensive and includes, inter alia, the assistance of those who make the translations required by the Tribunal.

Second, the Tribunal must determine the "travel and other expenses of witnesses" to the extent it approves such expenses. Para. 1(b). This provision is largely self-explanatory, and includes not only expenses of those who appear in person before the Tribunal but also costs in connection with witnesses whose testimony is presented in the form of affidavits.

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[4] The concept of legal "representation and assistance" is mentioned in Article 4 of the Tribunal Rules authorizing Parties "to be represented or assisted by persons of their choice", and in Article 38, para. 1(c) dealing with the costs of "legal representation and assistance". The meaning of the terms "representation" and "assistance" are explained in the Notes to Article 4 of the Tribunal Rules. Note 2 explains that "[a]n appointed representative shall be deemed to be authorized to act before the arbitral tribunal on behalf of the appointing party for all purposes of the case and the acts of the representative shall be binding upon the appointing party." On the other hand, according to Note 3, "Persons chosen to assist . . . are not deemed to be authorized to . . . bind the appointing party or to receive notice, communications or documents on behalf of the appointing party."

Article 40, paragraph 1 of the Tribunal Rules states explicitly that "the costs of arbitration referred to in paragraphs 1(a) and 1(b) of Article 38 shall in principle be borne by the unsuccessful party." The Tribunal may, however, "apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case". For example, apportionment would be reasonable where one party is successful as to a claim and the other party prevails on a counterclaim.

A party claiming these costs must, of course, show that they were actually incurred.

III. Costs for Fees of Lawyers

Article 38, paragraph 1(c), quoted above, establishes two standards to be applied by the Tribunal with respect to the successful party's costs for legal representation and assistance. First, such costs must have been claimed during the arbitral proceedings. That, of course, means that the claim must have been timely made. Second, such costs are to be fixed "only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable".

While Article 38, paragraph 1(c) thus points in the direction that the claimed, reasonable costs of the successful party for lawyers' fees will be borne by the losing party, Article 40, paragraph 2 introduces an element of discretion by providing that "the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable". Professor Sanders in his authoritative commentary on the UNICTRAL Rules contrasts this with the provisions governing other costs of arbitration and notes that "not only the reasonableness of the amount claimed is subject to the supervision and

decision of the arbitrators, but also whether costs for legal representation or assistance will be awarded at all". P. Sanders, Commentary on UNCITRAL Arbitration Rules, Yearbook Commercial Arbitration, Vol. II, at 172, 216 (1977). In this respect, he observes that the rule as to lawyers' fees "deviat[es] from the general rule expressed in para. 1" of Article 40, which provides that the costs of arbitration shall in principle be borne by the losing party. Id. at 217. Professor Sanders explains that this discretion was provided for in the UNCITRAL Rules because the drafters were preparing rules that could be used in a wide variety of disputes, including not only complex cases but also those involving very simple issues where no legal representation would be necessary. Thus, the circumstances in which that discretion was intended to be exercised are limited. Professor Sanders concludes that the question of whether the unsuccessful party should bear the winner's legal costs "depends on the decision of the arbitrators whether they deem legal assistance necessary under the circumstances of the case". Id. In this connection, he notes that services of lawyers are likely to be needed in complex international cases. Id.

In summary, the Tribunal Rules establish four tests to be applied by the Tribunal in determining the amount of costs for lawyers' fees and who should bear them:

1. Were such costs claimed in the arbitration?
2. Was employing lawyers necessary in this case?
3. Are the amounts of such costs reasonable?
4. Are there circumstances in this case that make it reasonable to apportion such costs?

Application of the first two tests is relatively simple. Whether costs were claimed, and, if so, which costs, can be readily determined from the record in each case. As to the second test, given the types of legal and factual issues that arise in the cases before this Tribunal, generally involving issues of both public and private

international law, the necessity of employing lawyers is largely a foregone conclusion.

The third test -- whether the amount of costs claimed is "reasonable" -- imposes a more difficult task upon the Tribunal. A test of reasonableness is not, however, an invitation to mere subjectivity. Objective tests of reasonableness of lawyers' fees are well known. Such tests typically assign weight primarily to the time spent and complexity of the case. In modern practice, the amount of time required to be spent is often a gauge of the extent of the complexities involved. Where the Tribunal is presented with copies of bills for services, or other appropriate evidence, indicating the time spent, the hourly billing rate, and a general description of the professional services rendered, its task need be neither onerous nor mysterious. The range of typical hourly billing rates is generally known and, as evidence before the Tribunal in various cases including this one indicates, it does not greatly differ between the United States and countries of Western Europe, where both Claimants and Respondents before the Tribunal typically hire their outside counsel. Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and presentation. While legal fees are not to be calculated on the basis of the pounds of paper involved, the Tribunal by the end of a case is able to have a fair idea, on the basis of the submissions made by both sides, of the approximate extent of the effort that was reasonably required.

Nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man

spending his own money, or the money of the corporation he serves. That is a classic test of reasonableness.[5]

The fourth test to be considered in awarding costs is whether circumstances exist that might make it appropriate to apportion costs. This test should be applied in a straightforward manner. As noted above, when one party wins a claim and another wins a counterclaim, apportionment is warranted. Similarly, some cases involve quite separate and independent causes of action, such as where a contractor claims under two separate contracts involving different building projects. If such a claimant were to be successful as to one project but lose as to the other, an apportionment of its total legal fees would be appropriate. Where no such circumstances exist the concept of apportionment is not applicable.

IV. Application of the Rules in this Case

(a) Costs Other Than Lawyers' Fees

Although the Statement of Claim seeks "Sylvania's ... costs of arbitration before the Tribunal and legal fees", the Claimant has not chosen to specify or present evidence as to any costs other than for its fees to lawyers and incidental disbursements by the law firms involved. In particular, no claim is made or supported in this case with respect to translation costs or expenses of witnesses.

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[5] This discussion is directed primarily toward bills for professional services rendered by outside law firms and individual practitioners and the disbursements incident to such services. The Award does not deal with measuring or awarding costs related to in-house counsel or government employees, and I do not reach those questions here.

(b) Costs of Lawyers' Fees

As to its legal fees, the Claimant has submitted copies of invoices of the law firms that represented it. These invoices total $830,093 and cover professional services, as well as disbursements by the law firms for such usual expenses as duplicating services, postage and air express charges, etc. The invoices cover the period from the first calendar quarter of 1979 through the third calendar quarter of 1984. No claim is made for costs attributed to the services of in-house counsel who participated in the case.

The Claimant explains that the invoices on which the claim for legal fees is based include Sylvania's costs "incurred in presenting its claim before this Tribunal and before courts in the United States" (emphasis added).

As noted above, the initial test to be applied by the Tribunal with respect to legal costs of the successful party is whether they were for costs of the arbitration for which a timely claim was made. The invoices submitted indicate that approximately $565,000 of the total legal fees claimed related to litigation in the United States. In my view, Claimants' costs of litigation in the United States should not be granted in this case for several reasons. First, such costs are not costs of this arbitral proceeding and are therefore not covered by Articles 38 and 40 of the Tribunal Rules.[6] Second, the Statement of Claim, which was not amended, sought only "costs of arbitration before the Tribunal and legal fees" and did not refer to consequential

[6] Just as costs of litigation in United States courts are not part of the arbitration proceedings and therefore cannot be considered in awarding costs pursuant to Articles 38 and 40 of the Tribunal Rules so, too, it would be inappropriate to take into account whether or not there might be costs of enforcing the award outside the arbitral proceedings. For that reason, I disagree with the statement in the Award that the existence of the Security Account established by the Algiers Accords is relevant to the determination of reasonable costs of arbitration under the Tribunal Rules. See Award at 37 & n. 19.

damages for costs of litigation in the United States resulting from the Respondent's calls on letters of credit. The United States litigation costs were mentioned for the first time in Claimant's Memorandum on Proof of Damages, filed 15 December 1983, which was its last comprehensive pleading, and then were merely listed without any further explanation or legal argument as to why such costs are an appropriate basis for damages. Accordingly, in view of the procedural posture and record in this case, the Tribunal has not reached the question of whether costs that are outside the scope of Articles 38 and 40 might nevertheless be a basis for damages in a case where properly pleaded and proved.

The second test to be applied by the Tribunal is to determine whether it was necessary for the Claimant to employ legal counsel. It cannot be doubted that this claim involves complex issues of fact and law. In addition, Claimant was required to defend against counterclaims for approximately $48 million, an amount far exceeding the claim. In these circumstances, employment of counsel was an obvious necessity. The Claimant retained two United States law firms and a Dutch firm. Forming a team of lawyers is not unreasonable or unusual in international cases involving substantial interests, as demonstrated by the practice before many international tribunals and in a number of cases before this Tribunal. While most Claimants before the Tribunal have not employed Dutch counsel, such retaining of local counsel cannot be seen as unreasonable, considering, among other things, the filing of ten Iranian challenges in courts of the Netherlands against Awards of the Tribunal.[7]

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[7] These challenges were later voluntarily withdrawn but the underlying question of the application of Dutch law to Tribunal proceedings remains undecided. See W.T. Lake & J.T. Dana, "Judicial Review of Awards of the Iran-United States Claims Tribunal: Are the Tribunal's Awards Dutch?", Law and Policy in International Business, Vol. 16, at 755 (1984). The Claimant appears to have first engaged Dutch counsel within a few days of the filing on 8 April 1983 of Iran's first suit in the District Court of The Hague.

The third test that the Tribunal Rules impose is whether the amount of the lawyers' fees claimed is reasonable. Here invoices have been presented showing hours spent and billing rates, and generally indicating the services rendered. From these invoices it appears that approximately $265,000 was charged for services related to this arbitration. Two of the three law firms described their activities in greater detail than did the third, and their specificity was helpful to the Tribunal. The hourly rates indicated on the invoices are within customary ranges. The number of hours billed appears reasonable in the light of the number and nature of the issues involved, and the very extensive submissions and voluminous evidence that were presented on behalf of the Claimant, as well as the extent of the Respondent's submissions requiring analysis. The disbursements billed were typical in nature and small in amount. The fact that the Claimant appears to have paid the invoices from its own pocket, not knowing whether it would be reimbursed for such fees by the Tribunal's Award, corroborates that the amounts were reasonable.

Finally, there are no circumstances in this case of the type described above that would warrant apportioning the legal costs between the parties.

In conclusion, and for the reasons noted above, I would have awarded the Claimant $265,000 for the costs of legal representation and assistance. I have joined in granting only $50,000 for such costs, however, in order to form a majority for the Award.

Howard M. Holtzmann

The Hague
27 June 1985