IRAN-UNITED STATES CLAIMS TRIBUNAL

ایالات متحده -

807-42
۸۰۷-۴۲

ORIGINAL DOCUMENTS IN SAFE

Case No. 277 807 Date of filing: 10 OCT 83

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

** DECISION - Date of Decision _____
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** CONCURRING OPINION of Mr M. HOLTZMAN
- Date 10 OCT 83
9 pages in English — pages in Farsi

** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
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** OTHER; Nature of document: _____
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- Date _____
_____ pages in English _____ pages in Farsi

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CHAMBER ONE

807 -42
۸۰۷ -۴۲

I.

A.B.S. WORLDWIDE TECHNICAL SERVICES, INC.,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN, et al.,
Respondents.

CASE NO. 279
AWARD NO. 63-279-1

II.

THE GOODYEAR TIRE AND RUBBER COMPANY, GOODYEAR INTERNATIONAL CORPORATION,
Claimant

and

TASMEH MELLI CO. (formerly GOOD BELT IRAN)(PRIVATE JOINT STOCK COMPANY),
Respondents.

CASE NO. 427
AWARD NO. 65-427-1

III.

THE PROCTOR & GAMBLE COMPANY,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN et al.,
Respondents.

CASE NO. 807
AWARD NO. 64-807-1

CONCURRING OPINIONS OF HOWARD M. HOLTZMANN TO AWARDS ON AGREED TERMS IN CASE NOS. 279, 427 AND 807.

INTRODUCTION

I join in these Awards because I do not wish in the circumstances of these cases to hinder the desirable

termination of litigation. I write separately, however, to call attention to inappropriate provisions relating to Bank Markazi which are incorporated in the Awards on Agreed Terms in these three cases. In my view, these provisions are unacceptable because they are outside the framework provided by the Algiers Declarations.[1] It is difficult to predict what, if any, complications or confusions might arise in the future from these inappropriate and unnecessary provisions. The language is superfluous and of no effect; it would be more prudent for the Tribunal to refuse to place its imprimatur on needless clauses. Indeed, the Tribunal Rules give the Tribunal discretion as to what it will or will not record as an Award on Agreed Terms, and thereby invite and authorize the exercise of such prudence.[2]

I also take the occasion of these concurring opinions to comment on the ill-advised statement which Mr. Kashani has inserted above his signature on each of these Awards.

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[1] For a description of the framework established by the Algiers Declarations, See Decision, Case No. A/1 (17 May 1982).

[2] For a brief analysis of Article 34 of the Tribunal Rules and of the Full Tribunal's decision in Case A-1 concerning the criteria to be applied in accepting or rejecting settlements for which the parties jointly request the issuance of an Award on Agreed Terms, see Opinions of Howard M. Holtzmann re Three Awards on Agreed Terms; Concurring as to Case Nos. 19 and 387, Dissenting as to Case No. 15 (Introduction).

I. THE A.B.S. WORLDWIDE TECHNICAL SERVICES CASE (CASE NO. 279)

As in most cases settled by Awards on Agreed Terms, in Case No. 279 the amount to be received by the Claimant (the "Settlement Amount") is to be paid out of the account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981 (the "Security Account"). The Settlement Agreement of the parties which is accepted by the Tribunal and annexed to the Award on Agreed Terms requires one of the Respondents, Iran International Engineering Company (IRITEC), to pay an amount equal to the Settlement Amount to the Bank Markazi, the Central Bank of Iran, at some indeterminate time in the future. Specifically, Article 5 of the Settlement Agreement states:

> The Settlement Amount paid out of Security Account shall be paid by IRITEC to the Central Bank of Iran, whenever it is requested to do so.

It is to be noted that the Central Bank of Iran is not a party in this case. It therefore seems hardly appropriate for this Tribunal to record as an Award a requirement for payment by an Iranian Respondent to its own Central Bank. That is entirely an internal matter within Iran and is not within the framework of the Algiers Declaration.

II. THE GOODYEAR CASE (CASE NO. 427)

The Award on Agreed Terms in Case No. 427 also provides for payment of the Settlement Amount out of the Security

Account. The Settlement Agreement which is accepted by the Tribunal and annexed to the Award on Agreed Terms includes the following provision as paragraph 2(iii):

> Respondent shall pay to Bank Markazi Iran the Rial equivalent of the Settlement Amount and shall obtain Bank Markazi's approval for the payment thereof to be made to the Claimants out of the Security Account. The fact that the Agent of the Islamic Republic of Iran to the Iran-United States Claims Tribunal approves this Settlement Agreement is sufficient evidence that such approval of Bank Markazi has been obtained. Nothing in this section (iii) shall be interpreted so as to limit in any way the rights of the Claimants by virtue of this Settlement Agreement.

The requirement that Respondent shall pay the Rial equivalent of the Settlement Amount to Bank Markazi, which is not a party in this case, is subject to the same comments as set forth above with respect to Case No. 279.

In addition, I must point out that the requirement that "Respondent shall . . . obtain Bank Markazi's approval for the payment [of the Settlement Amount] to be made to the Claimants out of the Security Account" is also entirely an internal Iranian matter. Nothing in the Algiers Declaration or in the related inter-governmental agreements concerning the establishment of the Security Account requires the approval of Bank Markazi for payments out of the Security Account. Consequently, the inclusion of this provision in a document annexed to an Award on Agreed Terms is not appropriate within the framework of the Algiers Declarations.

III. THE PROCTOR & GAMBLE CASE (CASE NO. 807)

The Settlement Agreement which is accepted by the Tribunal and annexed to the Award on Agreed Terms in Case 807 contains a provision which is identical in effect to the one described above in the discussion of the Goodyear Case, although having somewhat different words. Article Three states, in pertinent part:

> It is agreed that such payment shall be made out of the Security Account. . . . The Pars International Manufacturing Co., (PIMCO) will pay to the Central Bank of Iran the Rials equivalent of the dollars to be paid under settlement agreement and will obtain the Central Bank's approval for payment of the settlement amount to be made out of the Security Account mentioned above.
>
> Submission of this Settlement Agreement by the Agent of the Government of the Islamic Republic of Iran to the Iran-United States Claims Tribunal, means that such approval has been obtained.

The same comments as are made above with respect to the Goodyear Case are equally applicable to this case and need not be repeated.

IV. MR. KASHANI'S STATEMENT

Mr. Kashani has inserted the following statement above his signature to the Award on Agreed Terms in each of these three cases:

> I agree with the Chairman in accepting and recording of the Settlement Agreement as an award on agreed terms but I dissent as to the remaining part of this Award not only because that part unilaterally condemns one of the parties to the performance of its obligations and ignores the reciprocal obligations of the other party but also because it provides for an enforcement procedure, which a judge is barred from after deciding the dispute or accepting and recording the settlement, according to Article 34 of the UNCITRAL Rules and the functus officio rule (dessaisissement du juge) with respect to that case.

There are two comments to be made concerning Mr. Kashani's statement:

First, Mr. Kashani is incorrect in stating that the Award "unilaterally condemns one of the parties [i.e., the Respondent] to the performance of its obligations and ignores the reciprocal obligations of the other party [i.e., the Claimant]." Quite to the contrary, each of the Awards explicitly refers to the existence of reciprocal obligations by both parties. For example, the Award in the Goodyear Case states:

> The Settlement Agreement provides for certain reciprocal obligations by the Parties, including the payment to the Claimant of the sum of Four Hundred Thousand United States Dollars.

Similar provisions are found in the Awards in the A.B.S. Worldwide Technical Services Case and the Proctor & Gamble Case. Following those statements, the conclusions of the Awards in all three cases clearly state that "The Settlement Agreement is hereby recorded as an Award on agreed terms, binding upon the Parties," and then go on to specify the particular amount which the Respondents must pay in accordance with the Settlement Agreement. By recording the entire Settlement as an Award on Agreed Terms, the conclusion of each Award gives effect to all of the reciprocal obligations of all parties contained therein; by specifying the amounts which the Respondents are obligated by their agreement to pay, the conclusion of each Award provides the necessary authorization as to the amount to be paid out of the Security Account. The conclusion is thus explicit and comprehensive. It is to be noted in this connection that

the reciprocal obligations, in addition to the amount to be paid, are typically set out in quite detailed provisions of the Settlement Agreement. Accordingly, the most effective way for the conclusion to cover all of these provisions is to incorporate the entire Settlement Agreement by reference and to state that it is "binding upon the parties."

Secondly, I must comment upon Mr. Kashani's remarks objecting to what he calls "an enforcement procedure, which a judge is barred from after deciding the dispute or accepting and recording the settlement, according to Article 34 of the UNCITRAL Rules and the functus officio rule (dessaisissement du juge) with respect to that case." I understand that this statement is a criticism of the provision which appears in the Conclusion of each Award that

> The Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Mr. Kashani's objection to this sentence is surprising because the same words have regularly appeared in more than 50 earlier Awards, including Awards on Agreed Terms. The sentence precisely reflects the mechanism established by the Algiers Declaration and related inter-governmental agreements for effecting payments from the Security Account. The sentence accurately and quickly identifies Awards which are to be notified to the Escrow Agent and thus insures against possible mistakes in withdrawing funds from the Security Account. Thus it provides valuable guidance, support and

protection for both the President of the Tribunal and the Escrow Agent. It is hard to know why it should so suddenly become objectionable.[3]

Mr. Kashani invokes Article 34 of the UNCITRAL Rules and the concept of functus officio in support of his objection. Article 34 of the UNCITRAL Rules, which is adopted without any change in the Tribunal Rules, contains nothing which supports this new theory. As for functus officio in arbitration, that concept has been concisely described by a leading authority as follows:

> The Latin phrase "functus officio," literally translated, means "a task performed." It is a term applied to an officer who has fulfilled the function or purpose of his office or whose term of office has expired, and who therefore has no further official authority. The doctrine is applied in arbitration to prevent arbitrators from exercising a fresh judgment on the case and altering their award.

M.Domke, The Law and Practice of Commercial Arbitration 215 (1968) (footnote omitted).

The functus officio rule is simply not relevant to the circumstances of these cases. The terms of office of the Members of the Tribunal have not expired and their functions have not been terminated; they continue to have authority to

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[3] I must assume that Mr. Kashani's objection bears no relation to certain well-publicized instances in which the Escrow Agent, Banque Centrale d'Algerie, has delayed sending instructions to the Depositary Bank for the payment of Awards, and that it is not an effort to provide an excuse -- however weak -- for any such delays.

perform their tasks in accordance with the Algiers Declaration. In particular, the President continues to have the authority and the duty to notify the Escrow Agent concerning payment of Awards from the Security Account. Moreover, submitting an Award to the President for notification to the Escrow Agent does not constitute a new judgment or the alteration of the Award, acts which the rule of functus officio in arbitration was designed to avoid; rather, it merely assists in effectuating the Award in the manner agreed to by the two Governments. See, e.g., Technical Agreement among Banque Central d'Algerie, as Escrow Agent, Bank Markazi Iran, The Federal Reserve Bank of New York, as Fiscal Agent of the United States and N.V. Settlement Bank of the Netherlands, par. 1(e)(i).

CONCLUSION

Notwithstanding the foregoing comments, I concur in the Awards on Agreed Terms issued in Cases Nos. 279, 427, and 807.

Dated, The Hague
10 October 1983

Howard M. Holtzmann