814-122

ES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

122

ORIGINAL DOCUMENTS IN SAFE

Case No. 814 Date of filing: 28 July 89

** AWARD - Type of Award _____

- Date of Award _____

_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____

_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of Mr Noori

- Date 28 July 89

10 pages in English 10 pages in Farsi

** DISSENTING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

_____

- Date _____

_____ pages in English _____ pages in Farsi

R/12

In the Name of God

CASE NO. 814
CHAMBER ONE
AWARD NO. 430 -814-1

ELECTRONIC SYSTEMS INTERNATIONAL, INC.,
Claimant,

and

THE MINISTRY OF DEFENCE OF THE
ISLAMIC REPUBLIC OF IRAN,
MILITARY INDUSTRIES ORGANIZATION,
Respondents.

DISSENTING OPINION OF ASSADOLLAH NOORI
IN CONNECTION WITH THE FIRST CLAIM

---

1. I hereby dissent to the Tribunal's Award in connection with the First Claim, whereby the Respondent Military Industries Organization ("MIO") has been required to pay the Claimant, Electronic Systems International, Inc., the sum of US$ 30,525, plus interest running from 20 June 1979.

I. A REVIEW OF CERTAIN FACTS

2. As is clear from the Award, in the First Claim in the present Case the Claimant alleged that it delivered to the freight forwarder 2500 pieces of M57 firing devices comprising the last consignment under MIO's Purchase Order No. 334 /1401-11175-12 dated 19 June 1978, and it therefore demanded the sales price thereof.

3. It is also clear from Part I of the Award ("Facts and Contentions") that on 22 May 1979, before arrangements had been made for shipment of the firing devices, the Respondent requested, through Bank Markazi and Manufacturers Hanover Trust Company ("MHTC") -- which were, respectively, the issuing bank and advising bank with regard to the Letter of Credit -- that the Purchase Order and Letter of Credit be cancelled with respect to the balance of the Order (2500 pieces of M57 firing devices), subject to the Claimant's consent.

4. Instead of announcing its agreement or disagreement with the Respondent's request, or shipping the goods and drawing upon the Letter of Credit (which was valid up to 30 June 1979), the Claimant initially sent a letter on 15 June 1979 demanding payment of a cancellation fee of US$ 27,483, and enclosed certain papers purported to be shipping documents. Following that, the Claimant declared in its letter of 21 June 1979 that it would be prepared to ship the goods in the future, provided that it received the sum of US$ 27,483 and that the Purchaser cancelled the good performance bond.

5. As is also stated in the Award, MHTC declined to accept this proposal, on the grounds that it had no authority to negotiate or to accept the cancellation fee,

but it did relay the information to Bank Markazi.[1]

6. The record in this Case contains no indication of any further action from that date on -- i.e., from 1st July 1979, the date of MHTC's letter to the Claimant, which was sent one day after the Letter of Credit had expired.

II. REASONS FOR THE DISSENT TO THE AWARD

A. Dissent to payment of the principal amount of the relief sought in the First Claim

7. I dissent to the majority's finding in connection with the First Claim in this Case, for the majority has unfortunately not taken into consideration the very elementary and simple fact that in this part of the Claim, it could have based its decision only on a liability on the part of the Respondent falling outside the scope of the Letter of Credit. Under such circumstances, any hypothetical claim against MIO could only have been based on the ground that the goods having allegedly been shipped, the Respondent was hence required to pay the contractual consideration, whether or not a valid Letter of Credit existed at the time of shipment. Thus, in such a hypothetical situation, the Tribunal would have been required to establish, before all else, that the goods at issue were actually loaded on board a vessel, for "C & F" delivery, rather than proceeding to assume a role whereby it could seemingly pay the contractual consideration to

---

[1] MHTC states in its letter of 1st July 1979 that it had sent the Claimant a copy of its telex to Bank Markazi in that connection. Unfortunately, however, the Claimant did not submit the telex to the Tribunal, and the Respondent also stated in the course of the proceedings that it had been unable to find such a telex in its own files, or in those of Bank Markazi, either.

the Claimant on behalf of the Respondent, by mere virtue of having seen shipping documents which the bank was not prepared to accept.

8. In connection with this part of the Claim, it is clear from the available evidence on file that after the Respondent's proposal of cancellation, the term of the Letter of Credit expired; and thereupon, the manner of payment agreed upon by the Parties to the Purchase Order and by the banks involved became inoperative, with no conceivable fault on the part of the Respondent, owing to the Claimant's own actions in counter-offering a cancellation fee and failing to present in a timely manner the proper documents which would have made it possible to draw upon the Letter of Credit. If, as is stated in para. 56 of the Award, the Claimant would have been entitled to demand the sales price upon having delivered the goods to the freight forwarder (and not, as the Respondent believes, upon having loaded them on board a ship in accordance with the terms of the Purchase Order) and upon having submitted the documents as prepared, [2] then in that event the claim ought to have been brought against the banks (or at least against Bank Markazi), not against MIO, for the latter had, in accordance with the contract,

---

2 Invoking the terms of the Purchase Order and the relevant Letter of Credit, as well as the INCOTERMS provisions relating to C&F shipping and those of the Uniform Customs and Practice for Documentary Credits (UCPDC), the Respondent maintained that the Claimant's obligation was not completed upon delivery of the goods to the freight forwarder, but rather its entitlement to the price of the transaction would mature only when the goods were placed on board a ship.

In this connection, the Respondent noted the phrase in the relevant Letter of Credit, which made payment contingent upon sending a draft in a timely manner, together with a FULL SET OF CLEAN ON BOARD BILLS OF LADING and the other necessary documents, in accordance with the contract.
(Footnote continued)

maintained the Letter of Credit's validity up to 30 June 1979. The Respondent had not instructed either Bank Markazi or MHTC to cancel the Letter of Credit, and its proposal of cancellation was made expressly subject to the Claimant's consent.[3]

The Tribunal has totally ignored the fact that the papers prepared by the Claimant, dated 15 June 1979, were not the actual shipping documents, but had been prepared, as a counter to the Respondent's offer made subject to the Claimant's consent, solely for the purpose of bargaining and obtaining the cancellation fee. Otherwise, how can it be accepted that the shipping papers were really prepared on 15 June 1979 and that the goods were actually loaded on board a ship or even delivered to the freight forwarder, in circumstances wherein the Seller speaks one week later (on 21 June 1979), of a proposal to ship the goods at some future time, conditional upon acceptance of certain actions by the Buyer, employing such an expression as "will ship" or declaring its preparedness "to ship the balance of the goods in spite of the cancellation [of the Letter of Credit]?" (See also paragraphs 8-9 and 11 of the majority's Award.)

(Footnote continued)
The Respondents also maintained that the risk of loss or destruction of the goods would pass to the Customer at that same time.

Therefore, although the finding in the final sentence of para. 55 of the Award remains indefensible in light of these facts and the banks' rejection of these documents, and of even those related to Part One of the Second Claim which confirmed that the goods had been loaded on board the freight forwarder's lash barge, as "shipment" within the terms of the Purchase Order and the Letter of Credit, the brief discussion presented hereinabove relieves me of any need to embark upon an analysis of such a finding which in effect considers the Respondent as having a liability outside the scope of the Letter of Credit, despite its making several perfunctory references thereto.

[3] Bank Markazi of the Islamic Republic has not been named as a Respondent in this Case.

9. Without attributing some fault to the Respondent with respect to its obligation to open a Letter of Credit and to maintain its validity over the prescribed period of time, the Tribunal cannot hold the Respondent liable outside the scope of the Letter of Credit because of the alleged delivery of goods to the freight forwarder, and thereby re-invoke the terms of the Letter of Credit in order to find it obligated to pay the sales price out of funds other than the Letter of Credit despite the specific agreement between the Parties as to the manner of payment, and in the absence of any act by the Respondent in breach of the said specific payment procedure. It is under such circumstances that, in my view, the Tribunal should have required more compelling evidence in proof that the alleged shipment took place.

Against the Respondent's repeated objections that it had not been informed of any steps by Claimant to deliver the goods for shipment, and its denial that they were ever shipped or received, there is no evidence on file which would establish that the goods at issue in the First Claim were really shipped, as were the goods sent with the s/s "Sam Houston," of whose fate -- and of the approach taken by Claimant and Respondent in that connection -- the Tribunal is aware in this Case. There has been no assertion, either orally or in writing, that the goods at issue here were actually loaded on board a vessel to be shipped to an Iranian destination, let alone any proof that the goods were shipped to Iran and off-loaded at a port in that country.

10. In view of the fact that the term of the Letter of Credit relating to this element of the claim had expired, and taking into account the Parties' prior practice in connection with the goods sent with the s/s Sam Houston, the Tribunal should have been more meticulous in finding out that the goods had been loaded on board a ship

and sent to their intended destination in Iran.

If the goods at issue in the First Claim had actually been shipped to Iran, the Respondent would certainly not have refused to pay the paltry sum of $30,525, just as it paid the sum of $676,192, on 21 August 1979, for delivery of the goods sent on board the s/s Sam Houston even though the relevant Letter of Credit had already expired.

11. Even if the Tribunal were to hold the Respondent liable under the Purchase Order and the expired Letter of Credit, before all else it ought to have taken the terms of those documents into consideration.

Note 1 to para. (b) of Article 10 of the Purchase Order provides that the Seller shall advise the

> "complete name and address of the representative of the Forwarders and/or Transporters in Iran ... after dispatch of goods."4

The Claimant has not alleged, and no evidence is available on file to prove, that it ever sent the Purchaser copies of the shipping documents, or that in keeping with its obligations, it ever communicated a telex or sent a notice to the Respondent indicating that the goods had been loaded or shipped. The importance of this

---

4 Please see also Articles 7(b) and 11 of the Purchase Order (quoted in footnotes 1 and 2 of the Award, respectively). Pursuant to the provisions of the INCOTERMS which governed the relations between the Parties, the Seller also bore a similar obligation:

"A= The Seller shall:

4. At his own expense, load the goods on board the vessel at the port of departure... and inform the purchaser, without delay, that the goods have been loaded on board the vessel."

point and its impact on the Parties' performance of their obligations become clear when we note that the Claimant did give the Respondent the necessary information in connection with the goods sent on board the s/s Sam Houston, and that upon receipt of the goods, the Respondent paid the price of the transaction, even though the related Letter of Credit had expired.

A further point worth noting is that the Claimant had the original copies of the alleged shipping documents with it at the Hearing conference, whereas those documents should in principle have been in the possession of MHTC or Bank Markazi, if the Claimant's allegations were true. (See para. 56 of the Award).

12. The Tribunal has also failed to give its findings in this Award the necessary coordination and coherence. In other words, it has not acted consistently, in the sense that although in dismissing Part One of the Second Claim it has expressly based its finding on three highly important documents -- viz. (1) the Claimant's telex of 24 July 1979 to the Respondent, (2) the Claimant's letter of 30 July 1979 to the then Chargé-d'affairs of the Embassy of the Islamic Republic of Iran in Washington, D.C., and lastly, (3) the Embassy's response to the Claimant's letter dated 22 October 1979 -- it has forgotten the impact of these same documents, which are also entirely relevant to the First Claim in this Case, on this part of the Claims.

13. The Claimant's telex dated 24 July 1979 to the highest authority of the time with the Respondent organization indicates that the Claimant was laying claim to only one debt, namely the price of the consignments shipped under Part One of the Second Claim, which debt was settled in August as stated in the Award and as briefly

mentioned hereinabove.

The letter of 30 July 1979, also written by Electronic Systems International, Inc.'s Managing Director and principal shareholder, was to the then Chargé-d'affairs of the Embassy of the Islamic Republic of Iran in Washington, D.C.; it mentions only the existence of a single dispute and one shipped consignment worth $ 676,192.

Finally, the letter of 22 October 1979 by the Legal Department of the Embassy of the Islamic Republic of Iran in Washington, D.C. is a document which should, when joined to the other two, have a conclusive effect in putting an end to all disputes. This letter confirmed that the Respondent had made arrangements to pay the amount claimed through Bank Markazi, and it requested the Managing Director of the Claimant company as follows:

> "If there is anything further with which we may assist you, please do not hesitate to contact us."

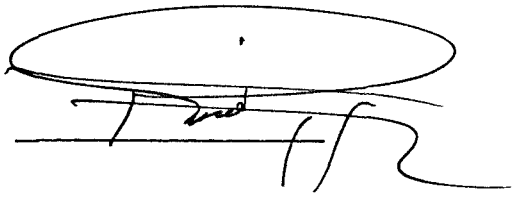
Following receipt of this letter and payment of its demand for $676,192, the Claimant did not bring any claim on any grounds whatsoever, until the time that the Statement of Claim was filed. Under such circumstances, it is incomprehensible how my colleagues could, as stated in the Award, have convinced themselves to require the Respondent to pay $30,525 for goods whose shipment and delivery have not been proved.

B. Dissent to the payment of interest, and to the starting date for calculation thereof

14. I also dissent to the payment of interest in favor of the Claimant. I have previously succinctly stated the reasons for my objection in paras. 45-46 of my Dissenting Opinion in Agrostruct International, Inc., Award No. 358-195-1, and thus do not intend to reiterate them here.

In addition to my objection, in principle, to the payment of interest regardless of the rate and the running date thereof, I have been unable to find any justification for fixing 20 June 1979 as the date for the commencement of computation of interest. An award for payment of interest as from 20 June 1979 is in no sense justifiable, in a Case where no demand was made upon the Respondent for the principal of the debt until the day the Statement of Claim was filed, and where a fundamental doubt as to the Claimant's entitlement existed right up to the day the Award was issued, and also where the Claimant's alleged right had not until that date ripened into an indisputable claim. In similar instances, the Tribunal has awarded interest as running from the date of the Award, and in my opinion the same approach should have been followed in the present Case. Alternatively, the Tribunal could have awarded the interest as running from the date the Statement of Claim was filed, in view of the fact that the principal amount of the claim was only demanded for the first time therein, and that the Respondent had no knowledge of the alleged shipment or delivery of the goods until it was filed. (Reliance Group, Inc. and National Iranian Oil Company, Award No. 315-115-3, para 68; Howard Needles Tammen & Bergendoff and Islamic Republic of Iran, et al., Award No. 244-68-2, para. 149 (11 Iran-U.S. C.T.R. p. 302); The United States on behalf of Linen Fortinberry and Associates, Inc. and The Islamic Republic of Iran, et al., Award No. 372-10513-2; and The United States on behalf of Mrs. Opal H. Sether and Tavana Company, et al., Award No. 363-11377-2, para.5).

Dated, The Hague
28 July 1989



Assadollah Noori