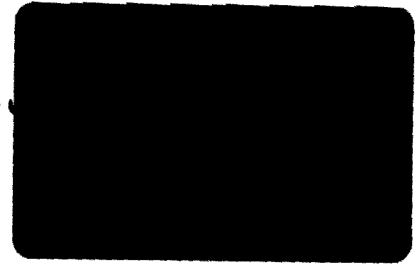


84-127

ایالات متحدہ



ORIGINAL DOCUMENTS IN SAFE

Case No. 84

Date of filing: 7 DEC 1983

\*\* AWARD - Type of Award \_\_\_\_\_  
- Date of Award \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

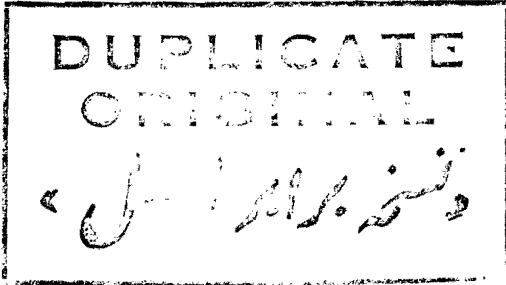
\*\* DECISION - Date of Decision \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* CONCURRING OPINION of \_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* SEPARATE OPINION of \_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* DISSENTING OPINION of RICHARD M. MOSK  
- Date 7 DEC 1983  
5 pages in English \_\_\_\_\_ pages in Farsi

\*\* OTHER; Nature of document: \_\_\_\_\_  
\_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi



Case No. 84

Chamber Three

Award No. 89 -84-3

ULTRASYSTEMS INCORPORATED,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,  
INFORMATION SYSTEMS OF IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعوی ایران - ایالات متحده
ثبت شد - FILED	
Date	۱۳۶۲ / ۹ / ۱۶
7 DEC 1983	
No. 84	شماره ۸۴

CH3

Dissenting Opinion  
of Richard M. Mosk to Final Award

I have already pointed out in my Concurring Opinion to the Partial Award and in my Dissent to Order, both of which are annexed hereto, why I believe that the procedures utilized or accepted in this case were inappropriate.

After the Hearing and over my objection, the Tribunal granted Respondent Isiran an opportunity to submit evidence to support the genuineness of certain checks it had previously submitted as proof of payment and allegations that it had made certain other payments to Ultrasystems. In response to this opportunity, Isiran filed only a number of unauthenticated documents and statements, including alleged copies of cashed checks or withdrawal records for only a portion of disputed amounts and a document purporting to be a statement of bank transactions which indicates that after



September 9, 1978, each successive payment from Isiran's bank account resulted in an increasing deficit therein.

It is possible that Isiran's checks were honored and that Ultrasonics was paid. The negative balance in Isiran's bank account may not be inconsistent with checks being honored if Isiran had a line of credit with the bank. But there is no direct, competent evidence to support such a supposition.

The Tribunal gave Isiran an opportunity to supply competent evidence with regard to the authenticity of the two checks in question and with regard to the content of some telexes received from Iranian banks after the Hearing. Although the Tribunal does not adhere to strict rules of evidence, once an issue is raised as to the validity of documents submitted by a party and that party is given an opportunity to authenticate those documents, its failure to do so should affect the weight accorded such submissions. Moreover, the burden was on Isiran to establish its defence that payment was made with the checks. Article 24, paragraph 1, of the Tribunal Rules. Especially in view of the question concerning the authenticity of the checks, the Tribunal's placement on Ultrasonics of the burden of establishing non-payment of the checks is questionable.

Even if there is support for the conclusion that the checks in question were paid, this would not reflect upon Claimant's credibility. Claimant based its position that

the checks were not paid on the facts that Isiran had no money to pay the checks and that there was no record of receipt of the checks. The records concerning Isiran's bank account support the allegation that Isiran had no money to cover the checks. Under the circumstances, Ultrasystems could not have known that the bank honored the checks despite Isiran's insufficient funds, if in fact such checks were honored. The employee of Ultrasystems who had the responsibility to process any such payments is deceased. Moreover, Ultrasystems had no access to its records in Iran, and it has no other record of receipt of such sums. Indeed, Isiran's failure to supply all of the records which it has in its possession or under its control concerning the issues should result in the Tribunal drawing inferences adverse to Isiran.

Whatever the decision on the remaining disputed funds, there is absolutely no legal or factual justification for the award of costs in the Final Award. The expenses associated with the disposition of issues remaining after the Partial Award were due to what I believe were incorrect procedures utilized by this Tribunal in connection with Isiran's delayed presentation of its evidence. Ultrasystems complied with every order of this Tribunal. Isiran, by delaying its submissions until well after the Hearing, without any order of the Tribunal authorizing such delay, caused Ultrasystems to incur unnecessary, additional expenses. Thus Isiran failed to supply relevant documents at the appropriate stages of the proceedings. Indeed,

Ultrasystems has, in effect, been precluded from recovering its own documents in Iran, a factor which increased its costs and resulted in difficulties in obtaining evidence. The Tribunal did not compel the production of evidence located in Iran. Unauthenticated material was supplied by non-parties on behalf of Isiran after the Hearing and during deliberations because of an ex parte communication with one of the members of the Tribunal. Awarding Isiran costs under these circumstances is indefensible.

By its decision, the Tribunal acquiesces in, and even encourages, a flagrant violation of Tribunal rules and accepted practices.

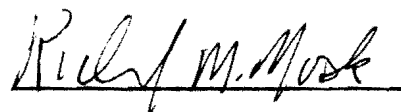
Moreover, Isiran submitted absolutely no evidence of its costs in connection with the remaining issues resolved by the Final Award. It is inconceivable that Isiran's costs associated with compiling and sending the Tribunal a few telexes and mailing to the Tribunal certain unauthenticated records amounted to \$15,000. Thus, even if the Tribunal reserved its decision on costs in connection with the unresolved issues -- a conclusion unsupported by the language in the Partial Award -- there is absolutely no basis for the determination of costs in the Final Award.

Since there is no justification for the award of costs to Isiran and since there is absolutely no basis for the majority's determination of these costs, it is apparent that in its award of costs, the Tribunal is adjusting the costs already awarded Claimant in the Partial Award. This it

cannot do. There is no provision in Tribunal Rules or elsewhere for a modification of an award, except in the case of "any clerical or typographical errors, or errors of similar nature." Article 36, paragraph 1, of the Tribunal Rules. There is no such error in the instant case.

I am also disturbed by the potential consequences of unnecessarily separating a case into segments and then deciding it piecemeal at different times and with different majorities. The procedure gives the Chairman the ability to divide a case into a number of issues and thereby to dictate the final result without there being any majority for the award. Such a practice, especially if misused, conflicts with the spirit, if not the letter, of the rule requiring an award to be made by a majority of the arbitrators. Tribunal Rule 31, paragraph 1. In the instant case, the Chairman, having obtained my reluctant compromise vote in order to form a majority for the Partial Award (See my Concurring Opinion to Partial Award No. 27-84-3), has now taken a portion of that award away with a different majority. Such actions are not conducive to the formation of majorities.

In view of the foregoing, I consider the award relating to costs in the Final Award to be erroneous and inappropriate.

A handwritten signature in cursive script, reading "Richard M. Mosk", written over a horizontal line.

Richard M. Mosk

Dated, The Hague  
7 December 1983