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IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

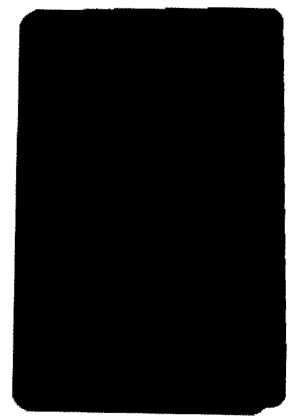
Case No. 84 Date of filing 4 March 1983

_____ AWARD. Date of Award _____

_____ pages in English. _____ pages in Farsi.

_____ DECISION. Date of Decision _____

_____ pages in English. _____ pages in Farsi.



_____ ORDER. Date of Order _____

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✓ CONCURRING OPINION of Judge Mosk

Date 4 March 18 pages in English. — pages in Farsi.

_____ DISSENTING OPINION of _____

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_____ OTHER; Nature of document: _____

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IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

4 March 1983

[redacted]

ULTRASYSTEMS INCORPORATED,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
INFORMATION SYSTEMS OF IRAN,

Respondents.

CASE NO. 84
CHAMBER THREE
PARTIAL AWARD NO. 27-84-3

Concurring Opinion
of Richard M. Mosk

I concur in the Tribunal's Partial Award. I do so in order to form a majority so that an award can be rendered.[1] Although, as I discuss below, my analysis varies from that set forth in the Reasons For Award, I recognize that in view of the circumstances of this case, other points of view on the merits are not unreasonable. As I explain below, however, I believe that the decision to leave some issues presently unresolved was inappropriate.

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[1] As Professor Pieter Sanders has written, arbitrators are "forced to continue their deliberations until a majority, and probably a compromise solution, has been reached". Sanders, Commentary on UNCITRAL Arbitration Rules, 1977 II Yearbook Commercial Arbitration 172, 208. If no majority can be reached, no award can be rendered, thus creating a great injustice to the parties.

The parties and the Tribunal operated under difficult circumstances. Of two key witnesses, one is deceased and the other is incarcerated in Iran. Other witnesses were unavailable. Claimant did not have access to certain documents and witnesses. There were various discrepancies among those documents produced. Restrictions on travel between Iran and the United States, the lack of relations between the two countries, the age of the claim and language differences exacerbated proof problems. Of course, it is not unusual for Tribunals such as this one to be "compelled to act upon the basis of meager, incomplete, and unsatisfactory evidence". Sandifer, Evidence Before International Tribunals 22 (1975). Moreover, the Tribunal, is not specifically authorized to conduct its own investigation of the facts. See id. at 154-60.[2]

When a party, such as Isiran, has access to relevant evidence, the Tribunal is authorized to draw adverse inferences from the failure of that party to produce such evidence. Id. at 147; see Articles 300-02, Civil Procedure Code of Iran (Sabi trans. 1972).

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[2] Of course, the Tribunal may "require the parties to produce documents, exhibits or other evidence..." Article 24(3) of Provisionally Adopted Tribunal Rules. In the instant case, Claimant's request for such production went unheeded by Respondent and the Tribunal. Also the Tribunal can take judicial notice of facts. Sandifer, supra at 382-397.

Isiran agreed to a termination based upon the payment to Ultrasystems of the "final billing".

Ultrasystems could have asserted a claim for all of its consequential damages arising out of a breach of contract. Such a remedy would have been independent of its rights to termination under Article 15 of the contract. Moreover, Ultrasystems could have invoked Article 15[4] of the contract. Isiran was in breach of the contract by, inter alia, not paying amounts due to Ultrasystems; the conditions in Iran appeared to fulfill the requirements necessary to constitute force majeure under Article XI of the contract;

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[4] 15.1 In the event the Consultant or ISIRAN is in material breach or default of this contract, or any material provision thereof, and does not remedy such breach or default within sixty (60) days after written notice of breach or default is given by the other party, this contract may at any time thereafter be suspended or terminated by the other party by its giving to the party guilty of such breach or default a written notice of termination or suspension. Any waiver of a breach or default shall not constitute a waiver of any other breach or default.

* * *

15.3 Upon termination of the Contract for convenience of ISIRAN, or Force Majeure, or breach or default by ISIRAN, ISIRAN shall pay the Consultant for:

a. Satisfactory work performed by the Consultant to date of termination, and all fully supported actual costs incurred in connection with the termination and demobilization by the Consultant.

b. Any amount to be mutually agreed upon by Isiran and the Consultant to compensate for other costs resulting directly from such termination. Failure of the parties to agree on the amount of such costs shall be a dispute which shall be settled by arbitration under Article XIX.

and a contract termination would have been for the benefit of Isiran.[5]

Having such claims and rights, Ultrasystems proposed that the contract be terminated on the condition that Ultrasystems and Isiran agree upon the obligation of Isiran to Ultrasystems. Isiran agreed to this proposal. Ultrasystems and Isiran then agreed upon the categories of payment that should be made by Isiran to Ultrasystems and the actual amount of the obligations.

Thus, in effect, and as reflected in a series of writings, Ultrasystems and Isiran entered into a new contract whereby the old contract was terminated.[6] Ultrasystems thereby gave up its right to assert a claim under the contract either for a breach thereof or for losses under Article 15 thereof, and Isiran promised that it would make certain types and amounts of payments to Ultrasystems and release the outstanding letter of credit. Parties to a contract may agree to terminate that contract on certain terms and conditions and by such agreement create an enforceable contract superseding the terminated contract. See, e.g., Article 292(1) of the Civil Code of Iran (Sabi trans. 1973).

Thus, the so called "final billing" in essence reflects a portion of the new contract setting forth Isiran's obligations to Ultrasystems in connection with the termination of the old contract.

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[5] That such a termination might also benefit Ultrasystems does not render this portion of Article 15 inapplicable.

[6] An agreement need not be a formal written contract in order to be enforceable. See Sabi, The Commercial Laws of Iran 11(1973), reprinted in IV Nelson, Digest of Commercial Laws of the World (1982).

The fact that the amount set forth in the "final billing" contained some errors does not necessarily vitiate the new agreement. The parties agreed on the categories of obligations; that is, they agreed on the components of the debt. This agreement, in effect, dictated how to arrive at the amount owing. The errors reflected mutual mistakes in connection with the figures utilized to arrive at the final sum, but not an absence of agreement.

Isiran does not dispute that the mistakes were made. In light of the express agreement on the categories of payment, it seems highly unlikely that the erroneous figures induced the agreement or that the agreement was reached on the basis of the mistaken figures. Since Isiran agreed to a higher amount, it cannot be said it would not have entered into an agreement for a lower amount. Accordingly, the Tribunal should be able to reform[7] the agreement to reflect the parties' actual intentions.

That this was an agreed-upon "final billing" is supported by the fact that the parties treated the contract as terminated. The termination was conditioned upon the payment of a final billing. The new termination agreement, having been performed in part (i.e., the mutual termination of the contract), should not be ignored, simply by virtue of errors which are immaterial to Isiran. The "final billing", as amended to correct the admitted errors, should have been enforced by the Tribunal. Thus, the Tribunal did not have

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[7] Reformation, is a judicial remedy which is referred to as "rectification" in England. It might also be argued that the agreement could be enforced, with the Claimant simply waiving the amount attributable to the errors.

to determine whether various categories referred to in the "final billing" were appropriate items for reimbursement.

Even though the Tribunal determined that there was no enforceable agreement upon termination of the contract, the actual termination of the contract must be accompanied by compensation under Article 15 of the contract or under the Tribunal's theory that the contract provides "the appropriate standard for compensation . . . in a case of mutual termination."

The evidence established that the parties, by agreeing to a mutual termination, did so on the basis that there would be compensation. If there were no enforceable promise regarding the compensation, it would be more reasonable to assume that the contract had been terminated under Article 15 of the contract. The "final billing" itself contains Ultrasystems' contention that Isiran had breached the contract. Moreover, it recites that the termination "was adjudged to be a prudent move for Isiran as well as Ultrasystems, Inc.", thereby pointing out that the termination was in essence "for the convenience of Isiran" under Article 15.

Whether the contract was terminated under Article 15 or, as the Tribunal finds, was mutually terminated with the contract setting "the appropriate standard for compensation," one must ascertain the amount of the payment due to Ultrasystems by interpreting the contract terms, "actual costs incurred in connection with the termination and demobilization" and "other costs resulting directly from such termination."

One traditional method of interpreting a contract is to observe how the parties themselves interpreted the contract by their conduct. See 3 Corbin on Contracts § 558 at 249 (1960). In the instant case, the "final billing" reflects the understanding of the parties that compensable costs include unamortized costs, other costs related to performance and certain amounts reflecting profits that would have been received had the contract been performed. As to this latter item, it should be noted that according to the evidence before the Tribunal, Ultrasystems' profit was deferred until later performance, and thus, although earned, had not been recovered under the billed invoices. That the parties themselves treated these items as costs is persuasive evidence of the proper interpretation of the contract.

Moreover, the Tribunal, in its decision seems to award only "actual costs incurred in connection with termination and demobilization" under Article 15(a) (emphasis added). In reality, the Tribunal fails to take into account required compensation for "other costs" (emphasis added) resulting from the termination provided for under Article 15.3(b). Surely the phrase "other costs" must be construed so as to distinguish such costs from "actual costs incurred in connection with termination and demobilization." Costs, other than the "actual costs" should be interpreted to include the claimant's losses which were specified in the "final billing". See Webster's Third New International Dictionary 515 (1976) (a definition of "cost" is "loss, deprivation ... as the necessary price of something gained or as the unavoidable result or penalty of an action").

Based on the foregoing factors, I would have included in the costs to be paid Claimant all of the items referred to as "costs" in the "final billing" agreed to by the parties.

The Tribunal gives no effect to the "final billing" on the basis of "circumstances surrounding the signing of the letter." Any argument concerning the authenticity of Isiran's agreement to pay the amount set forth in the "final billing" should, on the basis of the evidence, be rejected. Isiran claims that the managing director's signature on a document agreeing to the "final billing" was forged. It also contends he lacked authorization.

Iranian law provides that "any contract entered into is understood to be genuine unless its false nature is proved." Article 223 of the Civil Code of Iran (Sabi trans. 1973).

Isiran produced a written statement from the managing director, who is incarcerated in Iran, stating that the signature on the agreement was not authentic. Yet, the letter agreement was on Isiran stationery; Claimant produced a sworn statement from an expert handwriting analyst to the effect that the signature was that of the managing director; one of Isiran's own witnesses testified that the signature in question resembled the managing director's actual signature; a former Isiran employee also testifed that the signature appeared to be authentic; and there was evidence that an Ultrasystems employee reported the agreement at the time it was made, although that employee is now deceased.

The initials on the letter of a non-present Isiran employee were explainable because his initials had routinely been typed on such letters in the past. That some stated they did not recognize the managing director's stamp or that the identifying number on the letter was out of sequence does not affect the authenticity of the signature. Isiran did not carry its burden of proving that the signature which purported to be that of the managing director was not authentic.

Moreover, in response to the belated assertion that the managing director lacked authority to enter into the agreement, Ultrasystems produced evidence from former Isiran employees that the managing director had such authority and had exercised it in connection with other transactions.

The Tribunal asserts that "a number of circumstances surrounding the signing of the letter cast serious doubt on whether the letter can be considered as an approval of the final billing binding on Isiran." The Tribunal fails to describe these "circumstances." That there may be "doubt" does not mean that one must ignore the overwhelming evidence of the authenticity of the letter. The burden was on the Respondent to demonstrate that the document was not authentic. The Tribunal does not indicate how that burden was met. Indeed, in light of the evidence, it would appear that any "doubt" was largely dispelled.[8]

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[8] In addition, in connection with the relative credibility of the parties, Claimant volunteered information on errors with respect to its computations, thereby reducing the amount of its claim; on the other hand, Isiran's pre-hearing representations concerning the jurisdictional issue of government control over Isiran were at variance with the actual facts and positions taken by Isiran in other proceedings.

In light of all of these facts, I would enforce the agreement between the parties as reflected in the "final billing" as corrected. Moreover, even if that agreement is not enforced, I believe the Claimant is entitled to the proper amounts owing under each of the categories agreed to in the "final billing".

In certain respects I do not agree with the Tribunal's resolution of the specific items,[9] but in light of my view that the entire amount of the "final billing" less erroneous amounts therein, is owing, I need not discuss all of the specific items.

The Tribunal left unresolved Isiran's contention that it made payment to Ultrasystems of certain amounts. In this connection, Isiran submitted copies of two purported checks, made payable to Ultrasystems (written and purportedly endorsed in Persian), which documents Isiran asserted constituted evidence of payment of certain amounts claimed by Ultrasystems. Isiran also pointed to alleged internal memoranda authorizing the payments. By the close of the hearing, Isiran introduced no significant evidence as to

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[9] The Tribunal does not reach the issue of whether a claim for medical expenses for injuries to an Ultrasystems employee falls outside the jurisdiction of the Tribunal as damages that are a "result of popular movements in the course of the Islamic Revolution in Iran" which was not an act of the Government of Iran. Algiers Declaration, paragraph 11; Claims Settlement Declaration, Article II(1). If this claim is based on an agreement to pay the amount and is not a direct claim for the injury, such a claim is within the jurisdiction of the Tribunal. As to my views on interest and costs see Concurring Opinion of Richard M. Mosk in Award No. 18-30-3 (Granite State Machine Co., Inc.)

the authenticity of the checks. Ultrasystems submitted evidence that it had no record of having received the checks, nor the amounts thereof, and did not receive the checks.

As to one of the checks (no. 184101) Ultrasystems tendered evidence that it received another check a day later which was duly received and recorded; thus it would be curious if a check given a day earlier was not similarly received and recorded. Although there purports to be an endorsement on the back of the check, it cannot be determined who endorsed the check on behalf of Ultrasystems.

As to the other check (no. 854454), there is an affidavit from an Ultrasystems employee that she did not know of this payment and that it was her understanding that at the time of the check, Isiran was not paying any of its foreign contractors. Another witness, who had been employed by Isiran from 1976 until February 8, 1979, testified that Isiran made no payments to anyone after September, 1978 and that a payment to a subcontractor such as Ultrasystems would have been "impossible" because of conditions in Iran and the lack of funds. Again the check, purportedly endorsed in Persian, does not indicate the identity of the person actually endorsing the check.

Isiran provided neither its normal bank statements nor any other bank records concerning either of the checks. There is no independent evidence that the either of the checks cleared so that the proceeds would actually have been credited to Ultrasystems' account.

Thus, the unauthenticated checks did not constitute adequate evidence of payment. The fact that Isiran had evidence available to it which would show if the checks were authentic and resulted in actual payment to Ultrasystems, but failed to produce such evidence, should result in an inference that such records do not exist and that therefore the amounts of the purported checks were neither credited to Ultrasystems' account nor otherwise received by Ultrasystems. See Sandifer, supra at pp. 147-154.

Moreover, in view of the fact that Ultrasystems voluntarily produced evidence showing that it was not owed certain monies, thereby reducing its own claim, it seems unlikely that it would knowingly conceal the receipt of the amounts represented by the purported checks.

Despite the weight of the evidence, it is, of course, possible that the checks were paid and the amount received by Ultrasystems. Because of the chaotic events during the period in question, one cannot discount the possibility of errors in Ultrasystems' records. Neither this Tribunal, nor any other body, can generally establish facts to an absolute certainty. The Tribunal can make decisions only on the evidence before it and based upon various legal principles and probabilities. Thus the Tribunal, based on the record, would have been justified in concluding that Isiran had not met its burden to establish payment of the amounts in question. See Article 24(1) of the Provisionally Adopted Tribunal Rules ("Each party shall have the burden of proving the facts relied on to support his claim or defence")(emphasis added).

Long after the close of the hearing, and shortly after what were supposed to be final deliberations, the Tribunal received two telexes which purported to be from Iranian banks. One of them was from the "Int'l disputes dept" of the bank and stated that one of the disputed checks "has been passed for remittance" to Ultrasystems' account and that the "given information is based upon content of said letter received from Isiran company." The other telex relates to the alleged crediting of a check and Ultrasystems' account balances. Immediately after deliberations concerning these telexes, a third telex was received which was purportedly from one of the banks and which discussed alleged withdrawals from an Ultrasystems account. The telexes were admittedly submitted in connection with the deliberations in response to a unilateral, ex parte communication by one of the Arbitrators, (acting through his legal assistant). As to the propriety of the foregoing, see Article 31, note 2 of the Provisionally Adopted Tribunal Rules; Naomi Russell (Mexico/U.S.A.) 4 R. Int. Arb. Awards 805, 884 (1931)(Nielsen dissenting); Mustill and Boyd, The Law and Practice of Commercial Arbitration in England 271 (1982); Sandifer, supra at 1-14, 154-160. Amer.Arb.Assoc. and Amer.B.Assoc. Code of Ethics for Arbitrators in Commercial Disputes, Canons III,VII (1977). It should be noted that the Tribunal found against the Claimant on a number of factual issues without according Claimant the benefit of such ex parte communications with any of the Arbitrators concerning the possibility of submitting necessary evidence.

The Tribunal should have refused to accept the telexes or consider them for any purpose. These telexes were

not even submitted by a party. See Article 24(3); Article 25, Note 2; Article 29 of the Provisionally Adopted Tribunal Rules.[10]

Article 29 of the Provisionally Adopted Tribunal Rules provides as follows:

> 1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.
>
> 2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

In the instant case, the hearings were declared closed. None of the parties applied to the Tribunal to re-open the hearings and no "exceptional circumstances" were manifest suggesting that the hearings be reopened. These telexes were received three months after the hearing, without any explanation. It should be noted that the Claim was filed on November 17, 1981. There was a prehearing on March 31, 1982. Submissions were ordered to be filed on July 29, 1982. The hearing was postponed at the request of Respondent and took place on November 13, 1982. Respondent had every opportunity to present evidence on every issue. It was represented by able counsel at the hearing. Accordingly, for all of the foregoing reasons the Tribunal should not have considered the telexes.

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[10] The Tribunal may of course obtain evidence from such sources as its own retained experts and from those invited to participate under Article 15, note 5 of its rules and by way of judicial notice. But, to consider material only submitted in this case by a total stranger to the case, without Tribunal authorization, is another matter.

Even if the Tribunal could consider the telexes, they cannot be deemed to be competent evidence. See Article 25(6) of the Provisionally Adopted Tribunal Rules (Tribunal determines the "admissibility ... of the evidence offered"). There is nothing to substantiate that the telexes were actually sent by a bank official. There is nothing to suggest that the person who sent the telexes, even if he were with a bank, was in a position to know the information transmitted. The telexes do not purport to be an evidentiary statement of any kind. They are certainly not sworn statements. The telexes are ambiguous, hearsay assertions of what purports to be contained in records. No reason is given as to why the actual bank documents were not produced.

In short, there is an insufficient showing of the reliability of the telexes and their content. Although the Tribunal has been quite liberal in its receipt of evidence, to admit these telexes when Respondent has access to competent evidence would not be reasonable. Accordingly, even if the telexes had been properly filed with the Tribunal, the Tribunal would be justified in not receiving them as evidence or otherwise considering them.

Finally, even if the telexes were to be received in evidence, they should be accorded little weight because of their nature and content. There is no showing that the sums represented by the checks actually went into Ultrasystems' account or that the proceeds of the checks were the source of Ultrasystems' alleged withdrawals.

The case had been pending for well over a year. As noted above, Respondent has been accorded ample time and opportunity to prepare its case and submit its evidence. It has had a fair hearing at which it could and did present evidence and question Claimant's witnesses. The case has been under submission for over three months. At some point the Tribunal must close the case and issue an award.

Although there are appropriate times for flexibility in connection with the operation of procedural or evidentiary rules, neither a liberal application of rules nor the search for truth justify any action based on the receipt of telexes under the circumstances outlined above. Indeed, even the ultimate substantiation of Isiran's position on the unresolved issues would not provide such justification.

A Tribunal having thousands of cases is far different than an international arbitration involving only one case. The claimants and respondents before this Tribunal are entitled to have cases heard and decided in a prompt, efficient and fair manner, in accordance with Tribunal rules and the law. Long delayed and expensive proceedings in which parties are not accorded equal treatment create much greater injustice than the failure to permit unlimited means and time to establish every fact in any particular case.

As I noted at the outset, despite my view that I would have preferred different reasoning on the merits and despite my dismay over certain procedures and events associated with this case, I do join in the result of the Partial Award, which I deem tenable, in order to form a majority for it. Thus, I concur in the Tribunal's Partial Award providing that Respondent, Information Systems Iran, shall pay to the Claimant, Ultrasystems Incorporated, the sum of $361,136.92.

Dated: The Hague,
4 March 1983

Richard M. Mosk