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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL
«نسخه برابر اصل»

CASE NO. 89 227
CHAMBER THREE
AWARD NO. 225-89-3

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 22 APR 1986 تاریخ
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No. 89 شماره

McCOLLOUGH & COMPANY INC.,
Claimant,

and

THE MINISTRY OF POST, TELEGRAPH & TELEPHONE, THE NATIONAL IRANIAN OIL COMPANY and BANK MARKAZI,
Respondents.

CONCURRING AND DISSENTING OPINION OF JUDGE BROWER

1. I largely concur in this Award, both because it reaches a broadly just monetary result and because such concurrence is indispensable to the formation of a majority. I am constrained to observe, however, that on every issue of fundamental principle -- i.e., interest, currency of the Award, jurisdiction in respect of tax and social security counterclaims, analysis of forum selection clauses, and, to a certain extent, costs -- the Award stubbornly refuses to follow the clear precedents and established practices of the Tribunal. Instead, it invariably selects a different route, and, moreover, one leading to proliferation of the Tribunal's tasks in each future case rather than their rational diminution. Since this is the first contested Award issued by this Chamber in its present composition, I feel an elaboration of my concerns to be especially appropriate.

I. THE CLAIMS AGAINST PTT

A. The Forum Selection Clause

2. In resolving the forum selection clause issue raised by Claimant's contract with the Ministry of Post, Telegraph and Telephone ("PTT Contract") the Tribunal had a much simpler task before it than it undertook.

3. The Tribunal was presented with equally valid English and Farsi texts of a dispute settlement provision which, standing alone, would each give an entirely different answer to the jurisdictional issue presented. In T.C.S.B., Inc. and Iran, Interlocutory Award No. ITL 5-140-FT (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 261, the Full Tribunal ruled that a dispute settlement provision virtually identical with the English text here would not oust the Tribunal of jurisdiction but that a clause referring disputes ultimately to "competent courts of Iran," as in the present Farsi text, would preclude the Tribunal from exercising jurisdiction due to Article II(1) of the Claims Settlement Declaration.

4. It is true that ordinarily an international tribunal faced with divergent versions of a contractual text in two equally authentic languages would be required to construe, and resolve, the resultant ambiguity in order to give the contract effect. See, e.g., Vienna Convention on the Law of Treaties, Art. 33(4), U.N. Doc. A/Conf.39/27, opened for signature 23 May 1969, entered into force 27 January 1980, reprinted in 8 Int'l Legal Mat'ls 679 ("the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted"); M. Hilf, Die Auslegung Mehrsprachiger Verträge (1973).

5. Here, however, reconciliation inherently is precluded; the very establishment of an ambiguity ends the inquiry, for

the Tribunal has ruled consistently that an ambiguous forum selection clause cannot oust the Tribunal of jurisdiction pursuant to Article II of the Claims Settlement Declaration. See, e.g., International Technical Products Corp. and Iran, Award No. 196-302-3 at 16-17 (28 Oct. 1985) ("A reference [to 'competent Iranian courts'] cannot be implicitly specific . . . ."); Gibbs and Hill, Inc. and Iranian Power Generation and Transmission Co., Interlocutory Award No. ITL 1-6-FT at 4-5 (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 236, 238; Howard Needles Tammen and Bergendoff and Iran, Interlocutory Award No. ITL 3-68-FT at 3-4 (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 248, 250; T.C.S.B., Inc. and Iran, Interlocutory Award No. ITL 5-140-FT at 3 (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 261, 262-63; Zokor Int'l Inc. and Iran, Interlocutory Award No. ITL 7-254-FT at 3 (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 271, 273. The existence of contradictory dispute settlement provisions in the equally valid English and Farsi texts of the Contract on which Claimant relies, which, moreover, under our precedents lead to entirely contrary results, poses not merely an ambiguity, but rather a downright conflict.

6. Thus the Tribunal's attempt "to reconcile the two texts" of the asserted forum selection clause is by definition futile.

B. The "Proces Verbal" of 4 February 1979

7. The Award somewhat underplays, in my view, the significance of the "Proces Verbal" executed between Claimant and Respondent PTT on 4 February 1979. That instrument is a striking document of considerable significance for this proceeding. It commenced by recording that "The Ministry of P.T.T. of the Government of Iran is temporarily without adequate funds to meet its obligations, including substantial sums due and payable to" Claimant, which, it was noted, was "unable to continue financing its

operations without payment from the Ministry." After then expressing mutual concern about the safety of Claimant's personnel, the document recorded the Parties' agreement that "the continuation of services of [Claimant is] of the utmost importance in protecting the interests of the Ministry" and their desire "to reactivate the services at the earliest possible moment." It provided further that the services of Claimant "be suspended . . . until 21 March, 1979," i.e., the Contract termination date; that in the meantime reimbursements would be made by Respondent PTT to Claimant for certain expenses; and "[t]hat the Ministry and [Claimant] shall meet during this period of suspension for the purpose of negotiating an extension of the Contract between the Ministry and [Claimant] as previously amended, said extension to commence on 21 March, 1979." It specifically obligated Claimant to "exert [its] best efforts to resume performance of services," if not on 21 March 1979, then "at such other date as may be agreed upon . . . . "

8. The Award rightly relies on the Proces Verbal as important on several invoice issues (paras. 31, 34). I believe that this Proces Verbal should also have been found conclusive on the issue of Claimant's entitlement to return of the good performance retentions withheld by PTT. I concur in the Tribunal's finding (para. 43) that there is an "absence of supporting evidence" regarding "the alleged inadequate performance of the Claimant," but I think that the proof positive of Claimant's full compliance with the PTT Contract is provided by this statement of the Minister of PTT, which was executed just six weeks prior to the expiry of the Contract and made no mention of any problems of performance.

9. Moreover, this Proces Verbal supports Claimant's demand, rejected by the Tribunal, to be reimbursed for $70,856 (Invoice No. MAC-PTT-1-83) for six months' salaries and expenses to continue staffing its office in Tehran with

three people "from February 1979 to August 1979." These expenditures reasonably were required to meet PTT's request in the Proces Verbal that Claimant use its "best efforts" towards resumption of contractual relations and, in my view, should have been awarded.

II. THE NIOC COUNTERCLAIMS

A. The Alleged Breach of Contract

10. The Tribunal "finds that the Claimant did not adequately discharge its duties as a consultant" to NIOC (para. 81), which duties concededly were to "review and comment on" various matters relating to the construction of a road (para. 75). The Award relies on two grounds as "determinative" (paras. 79, 80):

> . . . Claimant has at no stage even alleged that it expressed the slightest reservation to NIOC as to the choice of the Road site in question.
>
> . . . Claimant has not alleged, nor does the evidence submitted suggest, that . . . special precautionary measures ['in relation to the drainage system and maintenance requirements'] . . . were even suggested by the Claimant.

11. Much could be said about the Tribunal's analysis of this counterclaim, but it is enough to note that these two points simply are refuted by the record. Claimant submitted sworn testimony, uncontradicted by NIOC, that it informed the NIOC project manager, on several occasions, that the mountain on which the repeater station was to be located was not well suited for access by road. According to such testimony, Claimant concluded, however, and so advised NIOC, that a road could be built, if it were both properly designed by the inclusion of suitable culverts and ditches and properly constructed. Claimant also stressed in its testimony that regardless of the design and construction, the road would be usable only if "especially conscientious maintenance" were performed after the construction.

Claimant specifically notified NIOC that failure to maintain the planned drainage system could result in road washout, since a buildup of mud or debris in the drainage systems could cause blockage and overflow. Finally, while there is conflicting evidence on this point, Claimant alleges that it recommended that larger or multiple culverts should have been used instead of the size recommended by the contractor preparing the design. NIOC assertedly backed the contractor's decision to reject Claimant's design modification.

12. The Tribunal's conclusion not to assess damages but instead simply to turn over to NIOC the good performance retentions withheld from Claimant to date reflects, I sense, underlying uncertainty about this counterclaim. The fact that the Tribunal does so while admitting it cannot "with any reasonable degree of certainty" determine "the degree in which [Claimant] may have contributed to" the damage NIOC claims the road has suffered, and despite the fact that under Clause 19 of the General Conditions of its contract with NIOC Claimant is responsible only for "losses or damages. . . directly attributable to [its] negligence," suggests that Claimant arbitrarily is being made to suffer an unsubstantiated penalty. (Emphasis added.)

13. Notwithstanding my disagreement with the Tribunal's decision to award any damages at all, I concur in its refusal to find that all alleged costs of repairs are chargeable to Claimant, since this reduces the error as much as is possible under the circumstances.

B. Social Security Premia and Taxes

14. I regret that this Award does not simply dismiss NIOC's counterclaims for social insurance premia and taxes on the ground that we lack jurisdiction, as all three Chambers of

the Tribunal previously have done. Blount Brothers Corp. and Iran, Award No. 215-52-1 at 30-31 (6 March 1986); International Technical Products Corp. and Iran, Award No. 196-302-3 at 29 (28 Oct. 1985); General Dynamics Telephone Systems Center, Inc. and Iran, Award No. 192-285-2 at 25 (4 Oct. 1985); Questech, Inc. and Ministry of National Defence, Award No. 191-59-1 at 39-40 (25 Sept. 1985); Sylvania Technical Systems, Inc. and Iran, Award No. 180-64-1 at 40-41 (27 June 1985); T.C.S.B., Inc. and Iran, Award No. 114-140-2 at 24 (16 March 1984). The failure to do so inspires false hope in Iranian respondents while unfairly obliging American claimants to foot the expenses of a substantive defense. Parties in both categories deserve finally to be relieved of such unwarranted distress.

III. CURRENCY OF THE AWARD, INTEREST AND COSTS

A. Currency of the Award

15. I agree that the Award here must be paid entirely in United States dollars. I disagree most strenuously, however, with the Award insofar as, contrary to the unbroken line of precedents of this Tribunal since its establishment five years ago,[1] it states certain sums as awarded in Iranian rials.

16. The hitherto consistent practice of the Tribunal to issue all contested awards in dollars,[2] after converting any

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[1]For the latest example see Blount Brothers Corp. and Iran, Award No. 215-52-1 at 31-32 (6 March 1986).

[2]The only Tribunal awards in currencies other than United States dollars were Awards on Agreed Terms. Hafez Glaziery and Glass Cutting Shop and United States of America, Award No. 181-942-2 (8 July 1985); Cross Co. and Iran, Award No. 174-320-1 (18 April 1985); Minnesota Mining and Manufacturing Co. and Iran, Award No. 160-423-SC (22

(Footnote Continued)

sums otherwise contractually due in rials at the rate applicable on the date of breach, conforms both with international precedents and with reason.

17. When payment is required in a currency different than that foreseen by a contract, as indeed it must be here, the only question is of the rate at which the necessary conversion should be made. In determining the appropriate rate, the following principles are applied:

> The objective of civil money judgments is, in general, to place the judgment creditor (i.e., the injured party) in a position as close as possible to that in which he would have been if the obligation had been carried out by the judgment debtor or if the injury had not occurred. When obligations are incurred in currencies other than the currency of the forum [payment], the same objectives govern. Neither party should receive a windfall nor be penalized as a result of currency conversion. . . . Unless the interests of justice require a different result, if the foreign currency has depreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of injury or breach . . . .

Restatement of the Law, Foreign Relations Law of the United States (Revised) (Tentative Final Draft, 15 July 1985) §823, Comment c. Heretofore this rule has been followed by the Tribunal without exception, recognizing further (1) that an American claimant's agreement to accept rials in the first place most likely was a recognition that performance of the contract would entail expenditures in local currency; (2) that after his contract is breached or otherwise ended the claimant ordinarily no longer has any use for rials; (3) that in most cases he himself has been required to exchange

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(Footnote Continued)
Jan. 1985); Stone and Webster Overseas Group Inc. and National Petrochemical Company of Iran, Award No. 92-293-3 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 192.

dollars for rials in order to meet his local expenses in the absence of timely payment by the Iranian party; and therefore (4) that had he in fact been paid in rials at the termination of the contract, he inevitably would have converted them to repatriable dollars.

18. The Award substitutes a convoluted scheme apparently designed to produce substantially the same dollar result as the conventional method while theoretically preserving intact the contract terms. The result, however, is simply to complicate the adjudicatory process, while departing just as surely -- indeed more so -- from the original contract terms. Nowhere do the contracts here in issue themselves foresee a 12.5% increase in the rials payable under them; that supplement results entirely from the application of principles of equity extraneous to the contracts themselves. To expand the number of rials to be paid beyond those called for by the contracts, rather than applying principles of equity to a sum derived directly from the contracts, does more, not less, violence to the contracts. In the end, nothing more than illusion and confusion are achieved by the "Rube Goldberg contraption" of increasing the number of rials payable to a level that, when converted at the present exchange rate, produces substantially the same result as if the contractually prescribed rial payment were converted at the time of breach.

19. An additional vice of this formula is that, as applied, it does not even produce "substantially" the correct result. The contractually required rials are increased only by 12.5% to adjust for rial depreciation of 14.44% (from an average of 70.52/$1 to 80.7/$1). A difference of 1.94% in some cases, however, is the margin between profit and loss.

20. The Tribunal's error is compounded by the failure to grant interest in respect of the "adjustment" amount. Without any analysis of the matter whatsoever, the Award

simply restricts interest to the contractually prescribed rial sum. As approximately seven years' interest is allowed by the Award in general, at 10% per annum, this means that a sum equal to about 70% of the 12.5% adjustment is withheld from Claimant unjustifiably. Indeed, the effect of the scheme adopted here, including the deprivation of interest, is to grant Claimant approximately 6% less than it would receive in respect of rial debts were the traditional formula applied and interest of 10% per annum calculated across the board.[3] There is no reason in justice for such a "windfall" to Respondents and none has been ventured.

21. I dissent from adoption of a wholly novel and unduly cumbersome scheme which precedent does not support, reason does not recommend and justice therefore should not abide.

B. Interest

22. The Award studiously declines to embrace the rule adopted initially by Chamber One in Sylvania Technical Systems, Inc. and Iran, Award No. 180-64-1 at 30-34 (27 June 1985) and to which Chamber Two now has adhered sub silentio in Phelps Dodge Corp. and Iran, Award No. 217-99-2 (19 March 1986) and Phelps Dodge International Corp. and Iran, Award No. 218-135-2 (19 March 1986). I regret that the Tribunal thereby is prevented from acting uniformly in the matter of interest as I would have preferred. See International

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[3]To illustrate this, assume a 1,000,000 rial debt due seven years ago using 10% interest. Under the rulings of the Tribunal heretofore the creditor would receive $24,106.63 (1,000,000 ÷ 70.52 = $14,180.37; .7 X $14,180.37 = $9,926.26; $14,180.37 + $9,926.26 = $24,106.63). Under the formula applied in this Award, however, the result is $22,614.63 (1,000,000 + (.7 X 1,000,000) = 1,700,000; 1,700,000 ÷ 80.7 = $21,065.68; 1,000,000 X .125 = 125,000; 125,000 ÷ 80.7 = $1,548.95; $21,065.68 + $1,548.95 = $22,614.63). The difference of $1,492 represents a 6.189% reduction.

Technical Products Corporation and Iran, Award No. 196-302-3 at 50 n. 25 (28 Oct. 1985); id., Award No. 186-302-3 at 51 n. 15 (19 Aug. 1985); Futura Trading Incorporated and Khuzestan Water and Power Authority, Award No. 187-325-3 at 20 n. 8 (19 Aug. 1985).

23. In order to form a majority on this point now and in the future I am persuaded nonetheless to concur. I do so confident that the result is just, however imperfectly so.

24. Conceptually, interest is an item of damage. Its award is intended as compensation for the temporary withholding of money, and its measure is the cost of such deprivation. In a perfect world such measure would be the actual cost to the injured creditor of replacing it, i.e., the interest paid for borrowing substitute funds, or the earnings lost due to its unavailability, i.e., the return on such sums had they been received and reinvested.

25. Two factors, however, unite against realization of such a perfect world. First, due to circumstances unforeseeable to the debtor, the creditor's cost of borrowing, or even his rate of return on investment, might be unusually high; the ordinary rule shielding a wrongdoer from the assessment of damages not reasonably foreseeable precludes the creditor, as in other situations, from recovering his true loss. Second, the evidentiary complexity of substantiating "interest damages," which by definition is an essentially ancillary process ordinarily directed at establishing but a fraction of the overall loss, may render the effort involved, for litigants and judges alike, disproportionate to the result. In short, the game may not be worth the candle. Thus the struggle for perfection, as so often, must be tempered by competing considerations, both of right and of practicality.

26. A Tribunal such as this one lives with the additional reality of a finite docket of cases, all fixed as of a certain date, with attendant consequences: (1) Each case competes with every other for consideration; and (2) each succeeding award, because decided at a date further removed from the events giving rise to the entire docket, will have a higher percentage component of interest. As a result an enormous emphasis must be placed on the administrative convenience afforded by a rule or formula for interest which provides a result with comparative automaticity.

27. In light of all these considerations it is small wonder that international tribunals, as the Award demonstrates, furnish precedents for almost any decision one might wish to make in regard to interest. Against this background it is difficult to argue that the result reached by the Award is unreasonable. While, as noted, I believe the work of the Tribunal would have been facilitated by this Chamber joining in adherence to the fair standard already established, I recognize that the application of a flat rate of interest of 10%, if not varied, would have the advantage of even more complete automaticity and is not presently unjust.

28. For these reasons I now concur, in the absence of a contractually prescribed interest rate or similarly overriding circumstances, in applying ordinarily a flat interest rate of 10% per annum.

C. Costs

29. Under Articles 38 and 40 of its Rules the Tribunal may assess costs of arbitration against either Party. Sylvania Technical Systems, Inc. and Iran, Award No. 180-64-1 at 35-36 (27 June 1985). While Claimant has made varying calculations of its costs of arbitration at different points throughout the proceedings, in its Memorial it finally demanded sums of $96,151.96 for all costs for preparation

and pursuit of its claims here up to 18 June 1984 and $40,000 for such costs thereafter, or a total of $136,151.96.[4]

30. I would have awarded all of these costs, which appear to be reasonable, against Respondents. Even accepting that the Award's granting, albeit to a limited extent, of one of NIOC's counterclaims might justify not apportioning costs as regards the NIOC claims and counterclaims, I feel strongly that PTT should be required at least to pay all of Claimant's costs related to it.

31. The Tribunal is constrained to observe that a case rarely occurs in which the justice of a claim is so clearly apparent from the beginning as is the case with the claim against PTT. Claimant has prevailed one hundred percent against PTT. By the time of the Hearing even PTT had to concede in full 11 of the 34 invoices underlying the claim (all "half paid" and "revised" invoices). The 4 February 1979 Proces Verbal in which the Minister of PTT admitted PTT's obligations, "including substantial sums due and payable to" Claimant, underscored the utter lack of any defense to the claims asserted here. All of PTT's counterclaims have been categorically and rather summarily rejected.

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[4]This sum excludes the three 18 March 1984 invoices in the rejection of which I have concurred. None of these sums constitutes "costs of arbitration" in this proceeding within the meaning of the Tribunal Rules. "[A]ttempts to negotiate and settle Contract," as noted in Invoices Nos. MAC-PTT-2-83 and MAC-PTT-3-83, clearly are outside this arbitration. The same is true of "efforts to collect amounts due under the . . . Contract," listed in Invoice No. MAC-PTT-5-83.

Claimant's filing of 26 April 1985 listed a higher total of $222,523, without further explanation, however, which was substantially reiterated at the Hearing.

32. Moreover, there is strong reason to believe that Respondent PTT refused to pay its just debts, not because of any asserted legal reason, but in order to coerce Claimant into assisting it in an arbitration involving the GNPS Consortium before the Court of Arbitration of the International Chamber of Commerce, a collaboration that Claimant had no contractual duty to offer. While punitive or exemplary damages, which would be appropriate in a municipal proceeding, see, e.g., 5 A. Corbin, Corbin on Contracts § 1077 (1964), may not so readily be assessed against a State Party, see Separate Opinion of Judge Brower in Sedco, Inc. and NIOC, Interlocutory Award No. ITL 59-129-3 at 25 n. 35 (27 March 1986), it is just that the Tribunal, in considering the assessment of costs of arbitration, take into the account the legitimacy of a respondent's resistance to the claim. I believe that in this case there was no substantial justification to oppose the claims asserted by Claimant against PTT and no merit in PTT's counterclaims.

33. Therefore I would award to Claimant the full costs of arbitration incurred in regard to PTT and not just the $20,000 awarded.

Charles N. Brower