IRAN-UNIT[redacted]RIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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DUPLICATE ORIGINAL
«نسخه برابر اصل»

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

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری ایران - ایالات متحده
FILED - ثبت شد
Date 1 MAY 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.

CORRECTION TO THE ENGLISH VERSION
OF THE
CONCURRING AND DISSENTING
OPINION OF JUDGE BROWER

The following correction should be made in the English version of my Concurring and Dissenting Opinion filed in this Case on 22 April 1986.

1. At paragraph 31, line 1, the words "The Tribunal is" should be deleted and the words "I am" inserted.

2. At paragraph 11, line 4, the word "uncontradicted" should be deleted and the words "substantially unrebutted" should be inserted.

3. The word "Proces" should be spelled "Procès" at the following places: page 3, line 25, heading "B."; paragraph 7, line 2; paragraph 8, lines 1 and 3; paragraph 9, lines 1 and 7; and paragraph 31, line 8.

4. At paragraph 29, line 7, the amount "$96,151.96" should be deleted and the amount "$96,000" should be inserted.

5. At paragraph 29, line 10, the amount "$136,151.96" should be deleted and the amount "$136,000" should be inserted.

A copy of the corrected pages is attached.

Charles N. Brower

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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 "Procès Verbal" of 4 February 1979

7. The Award somewhat underplays, in my view, the significance of the "Procès 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 Procès Verbal as important on several invoice issues (paras. 31, 34). I believe that this Procès 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 Procès 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 Procès 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, substantially unrebutted 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.

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 $96,000 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 $136,000.[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. I am 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 Procès 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.