IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

CASE NO. 93
CHAMBER ONE
AWARD NO. 289-93-1

FORD AEROSPACE & COMMUNICATIONS CORPORATION,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
BANK MARKAZI IRAN,

Respondents.

DISSENTING OPINION OF MOHSEN MOSTAFAVI

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1. When I wrote my Dissenting Opinion with respect to Award No. 180-64-1 (Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran (Air Force)), I did not know the circumstances of the other cases relating to the IBEX project, since that was the first award issued by this Chamber following my appointment as the Iranian arbitrator thereon. Therefore, in interpreting and drawing conclusions from the Respondent's letter of 16 July 1979, I dealt only with the substance of its terms and language, in an effort to ascertain, from them, the writer's intention.

However, now that a number of the IBEX project cases have been adjudicated and the overall circumstances thereof ascertained, it is clearer to me than ever that my understanding of the letter of 16 July conforms much better to the facts of the case than does the majority opinion, because no contradictions arise as a result of its application to the circumstances relating to the other cases. Now, however, because the majority has provided a sweeping interpretation based solely upon the special circumstances involved in Sylvania, without at least taking into account the particular features of each case, the majority feels obliged to place the present case within the context of that same interpretation-- which did not, incidentally, conform to the circumstances of the earlier case, either-- even though the present case contains special features not to be found in Sylvania.

Thus, invoking precedent (viz. Sylvania and Questech), and noting that letters to the same effect were sent to all the IBEX contractors, the majority in the instant Award has construed the sending of the letter as constituting notice of termination of contract. It also regards this action as conforming to the provisions of Article 4.2, relating to the option to terminate the Contract. That Article provides that

> "The Buyer is entitled at any time to terminate this contract partly or wholly for its own convenience by a 30 days prior notice."

However, because the contents of the letter of 16 July do not conform in the slightest to the provisions of the said Article, the majority justifies its /application thereof/ by stating that "These provisions are therefore applied by analogy to the present Case." The majority regards the statement made in the letter of 16 July, that

> "...the accomplishment of all the works and expenditures under the Contracts... has been considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran,"

as constituting a notice of termination of contract, whereas the terms of the letter make it clear that its purpose was to express dissatisfaction with the prevailing state of affairs; as a result, the letter also requested that a fully-authorized representative of the Contractor come to Tehran for "contractual negotiations." Surely, the Employer would have used other terms and expressions corresponding to the provisions of Article 4.2 of the Contract, had it really intended to terminate the Contract in reliance on that Article-- particularly in view of Article 4.3, which bears upon Article 4.2 and provides that

> "Buyer's decision about termination of this Contract in whole or in part is conclusive and there is no need for mentioning the reason or discussion and negotiation." (emphasis added)

Therefore, the invitation to engage in negotiations which was extended in the letter of 16 July ipso facto constitutes a clear indication that the Employer desired to prevent a prolongation of the stoppage of work. Moreover, not only does the overall tenor of the letter not signify that the Contract had been terminated, but it also sets forth the Respondent's efforts to end the prevailing stoppage of work. The available evidence in the case-- as well as the letter to the Communication & Electronic Organization of Iran sent by Mr. McCrary, Claimant's Programs Manager and Representative, following the meeting of 18 September-- clearly shows that the Respondent did not intend, in sending the letter of 16 July, to give notice of termination of contract. In his letter, Mr. McCrary states that

> "At said meeting you advised us that all work under the said Contracts was considered stopped but that the said Contracts were not terminated..." /emphasis added/

It is therefore manifest that Iran took the position at the meeting of 18 September that "the Contracts were not terminated," and that instead, "all work under the said Contracts

was considered stopped." Although the letter goes on to state that Iran's position was not acceptable, it also makes it clearer yet that the letter of 16 July constituted, not a notice of termination of contract, but a sort of protest at the stoppage of the works. The letter proceeds as follows:

> "...We cannot accept the Government's position in this regard. Absent contractual direction we continued performance of work, terminating or reducing effort only where work became impossible to perform due to lack of authorized direction of Government of Iran, lack of design approval and/or failure of the Government to provide Buyer Furnished Equipment required under the Contract."

It is therefore clear that the issues under discussion related to the reason for the stoppage of work, with Iran representing the Claimant as being responsible therefor, while the Claimant held that the Respondent was responsible. There was, however, absolutely no discussion of any termination of contract. The sentence following the matters cited above provides further confirmation that the Contract was not terminated by the letter of 16 July:

> "...Costs have continued to be incurred by the Contractor and certain costs will continue <u>until the Contracts are terminated</u>..." (emphasis added)

Therefore, notwithstanding the majority's opinion, the conclusion reached by the Claimant from the letter of 16 July, as well as from the negotiations at the 18 September meeting (including the statements made thereat by the Respondent), was that the Contract had not been terminated. This inference is explicitly set forth once more, near the end of the said letter:

> "... we must take action to further minimize liability with respect to those subcontracts and must also take action to reduce our claim <u>if termination of the Contracts is undertaken</u>..." (emphasis added)

In addition to the foregoing, Mr. R.W. Maag, Senior Attorney to Ford Aerospace, states in his report dated 24 September 1979, in connection with the "Customer Meetings" on 18 September, that

> "We asked whether or not the contract has been terminated or merely stopped and the Colonel (Eskandarzadeh) indicated that it has only been stopped..." (emphasis added)

It is thus clear how incorrect and baseless, and how inconsistent with the manifest facts of the case, are the majority's assumption that Iran terminated the Contract, and its conclusions in paragraph 53 of the Award, where we read that

> "... the Tribunal concludes that by its letter of 16 July 1979, at a time when neither Party was in breach of the Contracts, Iran decided to bring them to an end. It confirmed this termination at the meeting of September 1979 by requesting Final Status Reports and by not responding to the Claimant's notice that it would have to terminate the remaining subcontracts and sell equipment unless it received other instructions."

A comparison of these statements and assertions with the above-cited excerpts from Mr. McCrary's letter clearly reveals that the majority invoked irrelevancies and disregarded the manifest facts in the case, in seeking to support and corroborate its decision.

The deficiencies in the majority's Award do not end here. Rather, it sets forth this conclusion after having dismissed the Respondent's defence, to the effect that the Contract came to an end owing to the Claimant's inability to obtain an /export/ license. The majority sees no connection between the obligation to obtain an export license, and continuation of the Contract. Pursuant to the Contract, the Claimant was obligated to obtain an export license for certain goods. There is no dispute between the Parties over

the fact that the Claimant was unable, from early 1979 onwards, to obtain an export license. In this connection, the Respondent holds that one of the reasons why the Claimant abandoned the Contract, was that it did not succeed in obtaining an export license, and was thus necessarily unable to carry on with the works; the Respondent holds, therefore, that the Contract came to an end by virtue of the Claimant's default thereon. The Claimant states that on the contrary, the lack of an export license played no role in Iran's deliberate policy decision to terminate the Contract. The majority accepts the latter position, arguing that

> "... The fact that this license expired did not block the Claimant's performance, which took place in the United States, because there was no obligation to deliver before the Contracts ended in 1979. The 16 July 1979 letter was not motivated by the lack of a valid export license. It did not even mention it. Nor did the export license play a prominent role in the discussions between the Parties at the meeting in September 1979 in Tehran, as it was only one of several matters the Claimant undertook to deal with in the future and was not invoked by either party as a reason for not continuing the Contracts. The discussions never reached the stage where the issue of the export license may have acquired crucial significance."

The majority's grounds for concluding that the Claimant's inability to obtain an export license did not play a decisive part in Iran's decision to terminate the Contract are, in short, as follows: (1) the letter of 16 July was not motivated by the lack of an export license; the letter did not even mention the export license; (2) the export license did not play a prominent role in the September meeting; and (3) expiration of the export license did not prevent performance of the works in the United States.

Firstly, the argument that the letter of 16 July made no mention of the export license, and that the export license played no role in the negotiations in September, derives from the incorrect assumption that the letter of 16 July constituted a notice of termination of contract, and that the nego-

tiations in September were for the same purpose; and that since neither the letter nor the said negotiations invoked the lack of an export license as the cause of termination of contract, the termination of the Contract was therefore not due to the /Claimant's/ inability to obtain an export license. The fact is, however, that neither the letter of 16 July, nor the September negotiations, were for the purpose of giving notice of termination of contract; as a result, the majority's conclusions are incorrect.

Secondly, the phrase "stoppage of work" which occurs in the letter of 16 July, the negotiations in September held for the purpose of "contractual negotiations," and the express statement made during those negotiations that the Contracts had not been terminated but "only stopped," all point to this inability to obtain an export license, because performance on works of any sort would inevitably have ceased upon expiration of the export license on March 14, 1979.

Thirdly, the majority's view that "the export license was not necessary for performance of works within the United States" is incorrect; the majority's argument is, as a result, based upon a faulty premise. This is because the export license was necessary for both manufacture and delivery, so that the goods could not have been manufactured in the United States without an export license. Ford Aerospace's letter of 8 March 1979 to the arms licensing Bureau of the United States State Department, whereby it sought an extension of the export license, expressly states that

> "Ford Aerospace and Communications Corporation (FACC) hereby submits an extention /sic/ application for approval of its contract for an additional twelve (12) months on its contract for manufacture and delivery of the Ground Collection Segment with Iranian Air Force." (emphasis added)

It is thus clear that the majority's argument rests upon an incorrect premise; and therefore, the conclusion which it

derives therefrom is similarly incorrect. It should be noted as well, that the United States State Department gave a negative response to this request on 1st May, 1979, by stating as follows: "A license cannot be issued until the situation in Iran has been clarified."

It thus subsequently became clear that performance on the Contract was impossible. In addition, according to the report of 24 September dealing with the negotiations held in Tehran on 18 September,

> "Mr. McCrary also noted that in March we requested the United States Government to extend our export license and they indicated they would not and that we requested an advisory opinion in August and were advised that we must totally resubmit the applications. McCrary stated that we are presenting no plans for the future of the program since we have no knowledge of what is desired by the Government." (emphasis added)

Following upon those remarks, Colonel Eskandarzadeh stated that "we /FACC/ should have been aware that the work has been stopped since the revolution," because in actual fact it was due to the Revolution that the United States Government was unwilling for such a sensitive program to be made accessible to the Revolutionary Government of Iran (See: pages 3-5 of my Dissenting Opinion to Award No. 180-64-1). This interpretation is fully supported by the terms used by the United States Department of State in its response to the application for an extension of the export license. Therefore, in using the phrase "stoppage of works," the letter by Iran describes a state of affairs which had been caused, just as stated by Mr. McCrary, by the United States Government's refusal to issue an export license, whereupon the Contractor was also prevented from presenting any "plans for the future of the program." Thus the majority's conclusion that

> "The discussions never reached the stage where the issue of the export license may have acquired crucial significance,"

is totally inconsistent with the facts as reflected in this case. The majority could at least have argued, in order to preserve the standing of its own precedent, that the Contract had ended prior to the letter of 16 July, by virtue of the Claimant's inability to obtain the export license. In this way, it would have neither engendered so many contradictions, nor been compelled to resort to matters which were contrary to fact. Unfortunately, the majority did not even take note of the fact that there was no need whatsoever for the Respondent to terminate the Contract unilaterally and thereby expose itself to liability for payment of millions of dollars in damages due to breach of contract, since the Respondent was aware of the Claimant's inability to obtain an export license, knew that this inability constituted a default on the Contract, and could thus have invoked this fact in order to safeguard itself from charges of breach of contract. On the contrary, rather, the Respondent's reference to "stoppage of works" in its letter of 16 July, and its repetition of this point in the negotiations on 18 September, indicate precisely that the Respondent brought up this fact since it was aware that the Claimant was unable to continue with the works owing to its inability to obtain an export license; and these matters also indicate that the Respondent was totally unwilling to assume liability for termination of the Contract.

2. Having held the Respondent liable for termination of contract as set forth above, and having specified that the /resulting/ damages were to be paid on the basis of Article 8.3 of the Contract, in applying that Article's terms and provisions the majority clearly alters the express tenor thereof, in favor of the Claimant and to the detriment of the Respondent. This Article, which is quoted in the Award itself, expressly provides that the Respondent shall

> "../take/ over the responsibility of paying the price of all equipment and materials shipped and works performed for the Buyer. Besides, he is responsible to pay the price of the equipments and

> materials which are shipped to the Buyer." (emphasis added)

Unfortunately, however, the majority has proceeded to interpret this clear and straightforward text, which contains no ambiguity requiring interpretation. In so doing, it argues as follows:

> "...In applying these provisions to the invoice claims, the Tribunal notes that it is irrelevant that in this Case no equipment and materials were actually shipped to Iran..." (emphasis added)

These provisions relate specifically to the present case, and it is therefore unclear why the majority holds that they are irrelevant to this same case. Before elaborating on the matter, however, it will be better to hear the majority's reasoning:

> "... Firstly, the wording of Articles 8.4 clearly implies that works performed for the Buyer must be paid irrespective of whether equipment or materials were shipped or not. Secondly, under the Contracts there was no obligation on the Claimant to deliver anything in 1979 to Iran. At the time when the Respondent terminated the Contracts the Claimant's performance was in the phase of the "Critical Design Review" which as noted above, was not implemented at least in part because the Respondent failed to appoint a Program Director for the IBEX project..."

I take no issue with the first part of this statement, because the said Article expressly provides that "works performed" shall be paid for. It cannot, however, be concluded from this that if the works performed must be paid for, the price of goods which have not been delivered must be paid as well. There is no logical relationship between these two points, such as might dictate that as a result of the obligation to pay for "works performed," the price of goods which have not been delivered must be paid as well, notwithstanding the express provisions to the contrary. Despite this explicitness-- and even though there is no term or condition providing for payment for goods which have not been

delivered-- the majority regrettably imposes the following limitation: "... under the Contracts there was no obligation on the Claimant to deliver anything in 1979 to Iran," so that the Respondent must also pay the price of goods which have not been delivered.

Aside from the express language of this Article in connection with the obligation to pay for shipped goods, it must also be noted that the purpose of the said Article is to specify the arrangements for settling accounts following interruption of the Contract, whereupon the disposition of everything must be known-- and not to effect a provisional settling of accounts where performance of certain obligations, inter alia delivery of goods, is postponed until a later time; and where the course of the Contract and the obligations does not come to an end. In addition, the express terms of this provision-- ie. the obligation to pay the price of delivered goods only-- arises out of the Claimant's obligation to obtain an export license. When the Claimant cannot, owing to its inability to carry out this obligation, deliver the goods and materials to the Respondent, it is only necessary and logical that it cannot recover the cost of those goods either. The manner in which the majority interprets the express terms of this Article-- which does not even need interpretation-- also leads it to the illogical conclusion whereby it requires that the Respondent pay for goods which it will never obtain. In other words, the majority has enriched the Claimant to the detriment of the Respondent.

In supporting its position, the majority concludes its argument with the following sentence:

> "The Claimant was only obliged to ship completed equipment, and that stage of the Contracts was never reached."

Once again, the majority thereby disregards the express and unambiguous terms of the provisions of Article 8.3, and it also acts ex proprio motu in adding nonexistent terms and con-

ditions thereto. In so doing, it fails to note that the condition that the Claimant is entitled to receive payment for the goods comes into play, logically, only when the work has been completed and the materials delivered-- or, if the work is not completed, to note that the Claimant is entitled to receive payment /only/ for goods delivered by it to the Respondent. Just as the Claimant is entitled to payment only for works actually performed-- and no more-- it cannot demand payment for goods which it has not delivered, either.

In Award No. 206-34-1 (First Travel Corporation, and The Government of the Islamic Republic of Iran & Iran National Airlines Corporation), the majority applied the rule of interpretation holding that where a contract has been drafted by one party thereto, the court shall adopt that interpretation which is more favorable to the other party to the contract. Therefore, the majority should not take an approach which is contrary to this precedent or to this accepted rule in the instant case, where the Contract was drafted and presented by the Claimant; for the majority would thereby be adopting the interpretation which is more favorable to the party that drafted the Contract. Although I believe that the express language /of the Contract/ makes the issue clear, and that there is thus no need for interpretation in this instance, I do deem it necessary to note that my colleagues have regrettably disregarded both precedent and this rule of interpretation in making their interpretation.

3. Pursuant to the Contract, the Claimant had two types of goods at its disposal: one, goods which it was to furnish itself, and the other, those goods which the Respondent furnished and made available to the Claimant. Based on a motion by the Respondent, the Tribunal reserved jurisdiction over the disposition of the second type of goods, a decision to which I have no objection. As for the second type of goods, however, the majority did not even address the fact that they

are in the Claimant's possession; nor has it taken their value into account in this final settlement of accounts. In two places in its memorials, the Claimant confirms that it retains possession of these goods. According to Document No. 223, entitled "Materials Available for Sale," the Claimant calculates the total value of these goods at $14,378,500.00, and it offered for sale a portion thereof, worth $7,515,267. It also retained the remainder of the goods, worth $6,728,969, since they were classified materials. Of those goods, worth $7,515,267, which it had offered for sale, it sold a part (worth $4,670,186) for $2,595,786, and credited the Respondent with this last-named sum. According to the aforementioned document, this figure constitutes the net amount remaining after deduction of $134,264, representing costs of transport, xeroxing, and maintenance. Similarly, in the footnote to page 12 of its Document No. 227, the Claimant implicitly confirms that only a part of these goods have been sold, and that it retains possession of the remainder. Thus, on the basis of the calculations submitted by the Claimant in Document No. 223, the Claimant retains possession of a part of the goods, labelled "classified materials," which are worth $6,728,969, as well as goods, worth $2,845,081, left over from those goods allegedly offered for sale-- for a total value of $9,574,050. Yet, although it has required the Respondent to pay for these goods, the majority not only fails to require in the Award that they be restored to the Respondent, their rightful owner, but does not even so much as mention the said goods in its Award.

Counsel for the Respondent explicitly stated, in concluding his presentation at the Hearing conference, that even if the Tribunal does not award the full amount of the relief sought in the Counterclaim, it should order delivery of the goods belonging to the Respondent and being held by the Claimant; or, alternatively, it should require restitution based on the amount of their value (quantum valebant)-- the very least that ought to be expected of a Tribunal with a duty to administer justice. Nevertheless, unfortunately, the majority has

nowhere addressed in its Award the fact that such goods are in the possession of the Claimant, let alone making any effort to decide as to their disposition. As a result, on the one hand the majority's Award requires the Respondent to pay for goods which have not been delivered, while it does credit the Respondent with the amount realized from sale of a portion of those goods-- ie, it at least recognizes its entitlement to the price of those goods-- and yet, on the other hand, the Award makes no mention whatsoever of the remainder of those goods still in the Claimant's possession, or of the value thereof.

The objection cannot be maintained, that the Respondent's general pleadings do not give rise to any duty on the part of the Tribunal, since the Respondent has not specifically sought disposition of the Seller Furnished Materials. This is so for the following reasons:

First, the Respondent requested that the Tribunal retain its jurisdiction over the Buyer Furnished Materials. It is thus clear that its request relating to delivery of goods or, failing this, payment of an amount equal to their value, related to the Seller Furnished Materials.

Second, given that the Tribunal has credited the Respondent with the sum realized from sale of a portion of the goods, it is obvious that the Respondent is entitled to the remainder of the goods as well. Thus, the Tribunal's silence as to disposition of those goods is both detrimental to the Respondent, and an inequitable measure taken in favor of the Claimant.

Third, this Chamber has previously ruled that where a claim has not been specifically asserted and yet can be found to be based upon a general pleading, such a claim may be taken into account (See: Award No. 264-264-1, Henry F. Teichmann, Inc., Carnegie Foundry, and Hamadan Glass Company, page 25, paragraph 64).

Fourth, this Tribunal has the duty, within the limits of its jurisdiction, to settle the disputes between the Parties; moreover, it lies within the Tribunal's jurisdiction to make a disposition of the goods in question. Therefore, in carrying out its duty to defend truth and justice, it was incumbent upon the Tribunal, when determining the amount of the Parties' claims and liabilities, to determine in this respect what amount is owing to the Respondent, as well as the amount of its liabilities (just as it deducted the sum of $2,595,786, representing the proceeds from sale of a part of the goods, from the Respondent's debts). It ought then to have set off its claims and liabilities, instead of merely determining the amount of the Respondent's liabilities while disregarding a part of those amounts to which the Respondent was entitled.

4. I have already commented in connection with taxes, social security premiums, and the issue of interest, in my Separate Opinion in Sylvania; there is thus no need to reiterate those views here.

Dated The Hague,

9 Bahman 1365/29 January 1987

Mohsen Mostafavi