IR [redacted] TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

311

Case No._____ Date of filing: _____

** 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 Mr Bahrami

- Date 21. Aug 86
18 pages in English 13 pages in Farsi

** OTHER; Nature of document: _____

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- Date _____
_____ pages in English _____ pages in Farsi

R/12

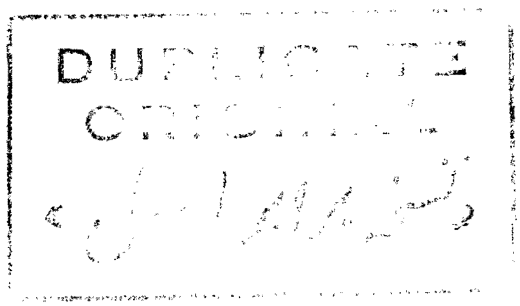
IRAN-UNITED STATES CLAIMS TRIBUNAL

[redacted]

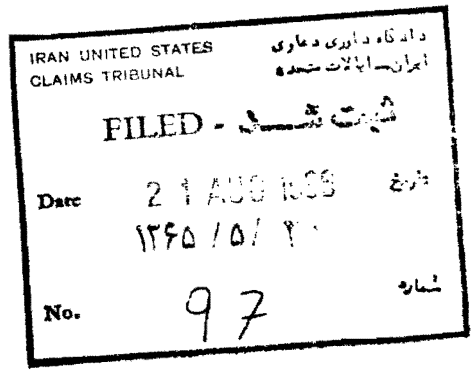
دیوان داوری دعاوی ا

311

In the Name of God



CASE NO. 97
CHAMBER TWO
AWARD NO. 232-97-2



RICHARD D. HARZA,
JOHN A. SCOVILLE,
GEORGE E. PABICH,
as trustees,

Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN,
KHUZESTAN WATER AND POWER AUTHORITY,
SEA-MAN-PACK COMPANY, LTD.,
S.G. SERVICES COMPANY,

Respondents.

DISSENTING OPINION OF HAMID BAHRAMI

Primarily due to the unjustified dismissal of the Respondents' counterclaims, contrary to the opinion of the experts appointed by the Tribunal, as noted in the present Opinion, and also due to certain other legal considerations and issues referred to below, I am unable to join in the majority decision with respect to the matters discussed herein below:

I. With respect to the Tribunal's assertion of jurisdiction, I believe that since some of Harza's shares were transferred to a number of other United States nationals, the said transfer of shares is without effect on the finding in favor of the Tribunal's jurisdiction. However, as I stated at some length in my Dissenting Opinion in Case No. 99, I believe that where a claim is transferred to non-United States nationals, this Tribunal is divested of its inherent jurisdiction thereover, even if such transfer occurred after 19 January 1981. I also believe that the contra-positive of Article VII, paragraph 2 of the Claims Settlement Declaration, which sets forth provisions dealing with continuous ownership of a claimant over his claim up to 19 January 1981, cannot be used to impute to the two Governments signatory to the Declarations any intention that the Tribunal may also hear claims brought by non-United States nationals, merely by virtue of the fact that those claims were initially owned by United States nationals. Therefore, although I concur in the majority's finding with respect to jurisdiction, the majority's argument in support of jurisdiction is not convincing (especially since it might affect the Tribunal's jurisdiction over other cases as well).

II. In awarding in favor of shareholders in a non-United States company (an indirect claim) the majority has noted certain legal problems involved. It has then gone on to conclude, in this claim, that because it cannot compel the Claimants to share awarded amounts with the corporation or the other shareholders, it will award them an amount in proportion to the percentage of their shares in the corporation. Of course, in this particular claim such hypothetical legal problems are in practice of a merely theoretical nature, since the Claimants hold 97.24% of the Liberian corporation's shares anyway.

However, it appears to be highly unjustifiable to rely upon this Award as a precedent in other cases, where the percentage of shares owned by United States nationals might be lower, and where the corporation, its non-United States shareholders, or its creditors, might proceed to bring suit against the Respondent on their own. In Blount Brothers (Award No. 215-52-1), the Tribunal ascertained on principle that the claimant corporation had no outstanding debts to any parties; and it concluded, on the assumption that the corporation was inactive, that the shareholders were entitled to receive 90% of the judgment sum. In the present case, first, the Claimants have not stated that Harza International is now defunct; and second, the Tribunal has not established that Harza International at least has no outstanding debts to third persons, as well as to the Respondent itself, with respect to the contracts concluded between itself and the Respondent. Although the Tribunal has held that it need not take up this legal issue since it has awarded against the Respondent with respect to its counterclaims, the Respondent might nevertheless be faced with Harza International's claim before other courts, apart from having had its counterclaims dismissed by the Tribunal. In my opinion, the Tribunal should have resolved the legal problems and ambiguities in the Claims Settlement Declaration in the course of implementing its provisions, rather than setting down case-by-case solutions wherever the Declaration was silent, and rather than having these case-by-case expedients stand as precedent for the Tribunal's decisions in more important cases.

As the International Court of Justice held in Barcelona Traction,[1] where international law fails to

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[1] Barcelona Traction, Light & Power Co., Ltd. I.C.J. Rep. 1970, p.4 ff.

offer a solution, recourse should be had to accepted principles of municipal law. An indirect claim, as set forth in Article VII, paragraph 2 of the Declaration, is in actuality a kind of derivative suit. At times a company's legal organs fail to act to vindicate its rights, in which event the law permits persons holding a certain specified percentage of the company's shares to bring claim in its name. In such an eventuality, the judgment sum is not turned over to those shareholders who have filed claim on the company's behalf, because a shareholder is not entitled to receive monies due the company directly, and this is in fact the philosophy behind the creation of the company's juridical personality, independent of that of its shareholders. In asserting its jurisdiction, the Tribunal might rely upon Article VII, paragraph 2 of the Declaration. However, a finding in favor of its jurisdiction differs from the issuance of an award in the name of the shareholders, who must necessarily bring their claim on behalf and on the part of the company. Even if it might be supposed that the claimant and legal party in interest are identical in a claim of expropriation, there is a decisive difference between the claimant and true party in interest in a claim for recovery of debts owed a company, and the Tribunal is not justified in lifting the veil shielding a juridical person, on the pretext of ambiguities in the Declaration. Since this Tribunal cannot take cognizance of the direct claim of the Liberian corporation owing to problems of jurisdiction, it should not, logically, adjudicate a derivative suit by the corporation's shareholders either, because the original claim does not come within the Tribunal's jurisdictional ambit. In this way, it is necessary to consider the actual purpose of Article VII, paragraph 2.

It is my opinion that even supposing that Article VII, paragraph 2 does provide that the claims of United States shareholders in non-United States companies may be heard, nonetheless, the purpose of paragraph 2 of the said article is simply that awards shall be rendered in favor of shareholders to that amount due the shareholders on the basis of an examination of the company's accounts and balance-sheet, and after its possible liabilities have been deducted. In other words, in an indirect claim, the shareholder claims that since a part of the monies due the company as a result of contracts entered into between the company and the respondent has not been paid, the company of which he is a shareholder has been unable to pay him that amount of dividends which he would have received had the company been paid the monies due it. The amount of such a claimant's entitlement is determined after an examination of the company's accounts and a determination of its liabilities and of the profits due such a shareholder once the company has received the monies owed it. As the majority has noted in paragraph 32 of its Award, the Tribunal cannot compel the Claimants to share the judgment sum with the other shareholders. This being the case, the Tribunal should a fortiori ensure that the claimants in the indirect claims have not been paid more than that to which they are entitled (namely, their share of the company's distributable profits after it has received the monies due it under the Contract). In actuality, just as the Tribunal cannot oblige the Claimants to share the award with the company's creditors or other shareholders, so too it cannot prevent a Liberian corporation, which does not come under its jurisdiction, from bringing a vexatious proceeding against the Respondents before other fora. For this reason, there is no justification for issuing an award to

the Claimants which exceeds their actual entitlement, ie. that amount of the profits which could be distributed to them.

III. Conversion of the rial invoices to dollars at the rate obtaining at the time the invoices were prepared constitutes an alteration of the Contract's provisions, and is contrary to the principle of applying that currency to which the Parties had agreed (currency of contract.)[2] Nonetheless, in the present case, as the majority has noted, the Respondent has not objected to this point, and for this reason I shall merely observe that this portion of the Award should not be invoked as precedent.

IV. In paragraph 47 of the Award, the majority opines that the 1971 Amendment to the Contract was covered by the tax provisions of the underlying contract; and on this basis, it also awards against the Respondent for payment of those taxes imposed following conclusion of the Amendment to the Contract. In this regard, I shall state the general rule that it is contrary to the legal principles to be obliged to pay another taxpayer's tax obligations, and I therefore conclude that any obligation of this sort must be strictly and narrowly interpreted. In this connection, the decision rendered by the [Iranian] tax court, to the effect that the 1971 Amendment did not fall under the provisions of Article 7 of the underlying contract, conforms to [the relevant] principles.

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[2] In this connection, see my Memorandum dated 10 June 1986 in Case 68 to my colleagues in Chamber Two.

Furthermore, by its decision this Tribunal has disregarded a final judgment having the force of a res judicata, rendered by a municipal Iranian judicial forum within its competence and upon the Claimant's request, after having examined the protests filed by the latter.

V. In connection with the man-month invoices, in sections 59-61 of the Award the majority has failed to differentiate between defects in performance which the employer could discover while the works were in progress (and which would naturally fall under the provisions of Article 13), and those general technical defects whose effects and consequences would by and large not be clear to the employer while the works were being carried out. The Respondent's position is roughly that according to the finding by the expert appointed by the Tribunal, Harza should have made additional boreholes in the right abutment to the dam during the course of its preliminary investigations, and that owing to the defects in these investigations, completion of the project was substantially delayed; and further, that the Respondent is, therefore, not liable for payment on the invoices for the additional work made necessary by the consulting engineers. However, the Tribunal states, without taking this point into account, that it

> "would be grossly unfair to permit an employer, like KWPA, to induce an engineer to work for five years on the promise of compensation, supported by periodic partial payments and reassurances and then, at the end, to deny that any compensation was due."

This argument is, of course, devoid of any legal weight. Indeed, it seems to me that it would be even more grossly unfair for the consulting engineer to assume full control over the completion of a huge project, based on his assertion that he has the requisite technical know-how,

after which it comes to light that owing to his mistakes, he has burdened the employer with astronomical and unavoidable costs; and that in addition to reaping enormous gains as a result of his own professional errors and negligence, he now lays claims as well to the rest of those gains which he expected to receive owing to his mistakes.

Aside from equitable issues not here applicable, in examining this claim the Tribunal should take note of [the relevant] legal standards, in conformity to Article V of the Declaration. In this connection, the applicable law is that law which governs the Contract -- namely Iranian law. The Tribunal could also ascertain and apply those principles which were made use of in the relations between the consulting engineer and the employer; and from the point of view of Iranian law (and, in general, other legal systems as well), the issue is clear. The consulting engineer had undertaken to carry out the necessary geological studies (using the then-available expertise), but due to his failure to carry out these investigations as required under the contract, he caused the employer to sustain injury while the employer, owing to his lack of technical expertise, did not discover the true reason for the losses with which he was faced at the time the work was carried out. In such a case, such a consulting engineer is not entitled to receive compensation for works improperly carried out; moreover, he will also be liable for indemnifying the employer. The injury inflicted upon the employer shall be discussed below in connection with the counterclaims, but it can be said that strictly from the legal point of view, the counterclaim is a kind of defence to the claim; and now that the Respondent's counterclaim, for an amount many times over the amount of the invoices, has been implicitly corroborated by the expert, the Tribunal should have refrained

from issuing an award on such claims by the Claimant, so that the losses occasioned by the latter might be relatively compensated for.

VI. Dismissal of counterclaims accepted by the Tribunal-appointed expert:

As can be deduced from the final sentence of Paragraph 86 of the Award, the majority decided to dismiss the various counterclaims even before entering into an examination of their merits. In this way, it has supported the Claimants even in those instances where the expert had expressly held that the consulting engineer was at fault; and it states that

> "The points of dispute between the Claimants and Mr. Kerisel concern matters of engineering judgment, for which, the evidence indicates, no clear technical or professional standards exist..." (Paragraph 99 of the Award).

Prior to taking up the issue of the Claimant's liability from the legal point of view, I believe it is necessary to deal with this part of the Award, which relates to the matters of the impact of the expert's opinion on professional issues.

It goes without saying that the Tribunal, like any other judicial forum, is not bound by the opinion of the expert. Nor have the Tribunal Rules made express provision to the contrary. However, the opinion of the expert appointed by the Tribunal itself cannot simply be set aside in reliance on the opinion of the experts chosen by the adverse party. Assuming that the difference of opinion between the Claimants and Mr. Kerisel relates to matters of engineering judgment, the Tribunal should accept the judgment of that expert whom it has

itself appointed. Since the Tribunal has no expertise in engineering matters, it has appointed an expert; and it is to be presumed that the expert thus appointed has based his opinions on standard engineering practice, in conformity to the [Interlocutory] Award referring the matter to an expert opinion. The Tribunal cannot now disregard prevailing engineering practice as determined by its impartial expert, merely on the basis of objections on the part of the opposing party's experts. Moreover, the opinion of the expert on professional matters constitutes a kind of weighing of evidence. Where testimony is given on matters of a non-specialized nature, the Tribunal must itself assess the weight of that testimony; but in appointing its expert, the Tribunal has referred to the expert the task of weighing that evidence which it could not assess directly. The assessment of evidence carried out in this way by the expert should not be impugned simply by virtue of the Tribunal's over-all discretionary power. As Sandifer has stated in Evidence Before International Tribunals (1975, p.5),

> "The vital interests of states, directly concerning the welfare of thousands of people, may be adversely affected by a decision based upon a misconception of the facts."

For this reason, international fora should be extremely rigorous in assessing evidence, especially where such evidence is used against a state. Or, in the words of the International Court of Justice in the Channel Case, [3] the judges should attain a degree of certainty, before rendering a decision against a state. Therefore, it is

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[3] See: Channel Case, 1949, I.C.J. Reports, 10,17,69.

my opinion, assuming that the majority has given weight to the opposing testimony by Harza's experts, that in rendering a decision finding against that state which is a party to the claim, it cannot pass over the opinion of the expert appointed by itself, by regarding it as merely a "matter of engineering judgment". The Tribunal may reject the engineering judgment of the expert appointed by itself only where it has ascertained that this judgment constitutes merely his personal opinion, and that is inconsistent with conventional engineering standards. Furthermore, such a determination would necessitate that the said expert be challenged. Therefore, it is my opinion that the majority was not justified in rejecting the opinion of the expert appointed by the Tribunal, and that this detracts from the validity of the Award as a reliable precedent.

VII. The majority's legal arguments for dismissing the counterclaims:

Article 13 of the Contract has been taken as the main basis for dismissing the counterclaims of Khuzestan Water and Power Authority. Paragraph 1 of the said Article provides that:

> "If the Ministry notices that the ENGINEER has not sufficient technical knowledge and/or has not exercised the amount of care reasonably to be expected of a first class engineering firm, or has not taken care of the equipment entrusted to him by the MINISTRY, or should this work be delayed through the shortcomings or the fault of the Engineer, or should in general the Engineer not respect the Contract... the MINISTRY will give notice to the ENGINEER for the remedy of the work and the ENGINEER shall have to correct the faults in a specified time which, under no circumstances will exceed three (3) months..."

I am of the opinion that this Article does not preclude adjudication of the Respondent's counterclaims and, on principle, that it does not cover the counterclaims as referred to the experts for an opinion. Indeed, it is for this reason that the Claimant has not relied upon this Article of the Contract in its submissions.

A. From the procedural point of view, the Tribunal's reliance upon Article 13 of the Contract after having issued an [Interlocutory] Award referring the matter to an expert opinion is unjustified, because if the Tribunal did regard Article 13 as covering the Respondent's counterclaims, then why did it have to waste so much of the Parties' time, in referring to the experts disputes which they could not take up; and then, without taking their opinions into account, to provide evidence on its own against the Respondent, in reliance on the said Article? Therefore, the Tribunal is now bound by the consequences of its prior decision, pursuant to its Interlocutory Award referring the matter to an expert opinion. In other words, the said Interlocutory Award has the standing of a res judicata with respect to the Tribunal's having accepted on principle that the consulting engineer can be held liable, because the Tribunal Rules apparently do not empower the Tribunal to reconsider its own decisions.

B. Article 13 constitutes a discretionary power granted the employer, by virtue of which he could give notice to the consulting engineer to correct faults in instances where the former found the exercise of this authority to be in his own interests and where the shortcomings in the work could be remedied within the time prescribed by the Contract (three months). Yet, the Respondent's counterclaims do not deal with deficiencies in certain of the

works; rather, they relate on the whole to the [consulting engineer's] failure to perform the work in the manner expected of a first class engineering firm. The consequences of nonperformance on this obligation would become clear to the Respondent, who did not claim to have a first class engineering expertise, only after the work was completed; and once the work was carried out, it became clear to the Respondent that these deficiencies could not be remedied within three months. Moreover, if it had availed itself of its power to terminate the [consulting] Engineer's services, it would have had to bear the entirety of the expenses it had incurred till then. Thus, as a responsible Government agency, the Respondent was unable to terminate the services of the consulting engineer prior to completion of the works, after having spent such enormous sums already.

In referring the counterclaims to an expert opinion, the Tribunal has accepted, on principle, that the Claimant can be held liable. It therefore cannot now repudiate the principle of the consulting engineer's liability, and thereby ignore the Respondent's counterclaims, in cases where the expert has found the said consulting engineer to be negligent. In Paragraph 82 of its Award (No. 225-89-3) in McCollough & Company, Inc., and The National Iranian Oil Company, the Tribunal dismissed the respondent's counterclaims on the argument that, in the opinion of Chamber Three,

> "The Tribunal... cannot with any reasonable degree of certainty establish either that the Claimant's inadequate performance has been the sole determinative cause of the damage incurred or the degree in which it may have contributed to such damage."

However, in the present claim, the expert appointed by the Tribunal has confirmed the mistakes of the consulting

engineer; and it is unnecessary to establish the causal connection between the faulty investigations by the consulting engineer and the losses incurred.

C. In connection with professional liability, inter alia, that of consulting engineers, the Tribunal must determine, with respect to professional negligence, firstly, whether or not the employer had relied upon the consulting engineer; secondly, whether or not the losses were incurred as a result of the employer's reliance upon the opinion of the consulting engineer; and lastly, whether or not the consulting engineer could have foreseen that his mistakes would cause the employer to incur losses.[4] In this claim, it is clear that the Respondent has incurred losses, and that the Respondent had on principle employed the consulting engineer in order to carry out the project in accordance with his opinions or under his supervision. Moreover, a first class engineer should have foreseen that faulty preliminary investigations might cause enormous losses in the course of completing such a huge project. Furthermore, the Tribunal's argument that the Respondent should have terminated the Contract once it became aware of the defects in the work does not release the consulting engineer from liability, since the Respondent would have thereby incurred still further losses. On principle, in accordance with accepted legal standards in this profession, the employer has no duty to specify defects in the course of the works or to bring them to the attention of the consulting engineer, because it is presumed that the employer does not have the necessary expertise to discover fundamental and basic defects in

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[4] See R.M. Jackson & J.L. Powell, Professional Negligence, London, 1982, pp. 4-8, 116.

the work in progress; in actuality, it is the result of the work that reveals whether the latter was properly or improperly carried out.

D. In section 123 of the Award, the Tribunal takes note of the expert's opinion that Harza International made mistakes while supervising the completion of the project. The Award then goes on to note the expert's further opinion, to the effect that the existence of such soils (collapsible soils) ought to have led to a different design for the canals. The majority next goes on in its Award to reject the opinion of its own expert; and in section 125, it states that the Claimants had produced evidence that

> "at no time did [Harza International] accept or approve the defective canal linings, nor did it recommend the final acceptance of any of the works or recommend final payment."

From this, it draws the conclusion that Harza International had satisfactorily fulfilled its supervisory duties in connection with the canal walls. In my opinion, this section of the Award does not conform to the legal principles applicable with respect to liability on the part of consulting engineers; furthermore, it is inconsistent with the Tribunal's decision on the Respondent's position.

The consulting engineer may not invoke mistakes on the part of others, in order to acquit himself of his own liability, because the other experts-- and even the contractors-- were supposed to work in accordance with the directions and advice of the consulting engineer. In the case of Columbus v. Clowes,[5] the court held the architect

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[5] See, Columbus v. Clowes, [1903] I K.B. 247.

liable for the losses incurred, even though the latter had not personally made errors but merely worked on the basis of the incorrect computations and measurements made by other persons. In the present claim too, it is not enough for Harza to state that it did not approve the defective canal linings and to assert that the pay orders which it gave were not final. The consulting engineer had the duty to refuse altogether to issue pay orders where it determined that a contractor was at fault. Furthermore, the expert appointed by the Tribunal has stated that owing to the presence of collapsible soils, the consulting engineer should have prepared a different design for the canals. I do not understand how the majority has disregarded this negligence on the part of the consulting engineer.

In my opinion, the very fact that pay orders were issued (even if not final) even though the consulting engineer had determined that there were errors in the work, confirms its liability and establishes that it was at fault in failing to exercise proper supervision. The majority itself holds in section 61 of the Award that the Respondent's position that it paid the invoices "on account" and without a final review is unjustified; yet, I do not see why it has accepted the Claimant's assertion in this instance, to the effect that the pay orders which it issued for faulty work were made on a temporary basis and without final review. The fact is, that the Respondent was not in a position to subject the invoices submitted by the consulting engineer to a final review; and therefore, it made payments on account in order to expedite completion of the project. However, how can the consulting engineer, who was selected primarily to supervise the technical works, possibly assert that it was unable to subject the invoices submitted by the contractors to a final examination, and that it had therefore agreed to their payment on account?!

E. The majority has dismissed yet another specific counterclaim of the Respondent, namely that which relates to submission of the as-built drawings, without addressing the merits of the counterclaim. Harza had undertaken to submit "at the completion of the construction works, five complete copies of the final report on the executed works including the [relevant] as-built drawings..." Yet the Tribunal now states that

> "Clearly, the disputed documents were to be submitted only upon the completion of the construction works. Since force majeure conditions prevented these works from being completed, the Tribunal rules that Harza International was excused from preparing the as-built drawings and final reports."

In my opinion, the occurrence of force majeure conditions excuses the obligor only from continuing to perform on the work; it can in no way be construed as excusing the consulting engineer from submitting his report on those works which he had carried out as of the date on which force majeure conditions arose-- works for which he received compensation. Therefore, Article 19 of the Contract should logically and rationally be interpreted as requiring the consulting engineer at least to prepare his report on those works which he completed up to the date on which he ceased work. This is particularly the case here, where such reports should have been prepared in stages, while the works were being carried out, and where this does not constitute a new obligation to be borne by the consulting engineer. Release of the Claimant from his duty to carry out his obligation-- that is, at least to submit the drawings for those works already completed -- causes injury to the Respondent. I do not understand why the Respondent should have to employ a new consulting engineer to prepare the as-built drawings for those works already carried out under the supervision of

another consulting engineer who has received compensation therefor.

In light of the foregoing, I dissent to those sections of the Award referred to in the present Opinion.

The Hague,
Dated 30 Mordad 1365/ 21 August 1986

Hamid Bahrami-Ahmadi