

346-156  
۳۴۶-۱۵۶

CASE NO. 346  
CHAMBER THREE  
AWARD NO. 71-346-3

ALAN CRAIG;  
Claimant,

and

MINISTRY OF ENERGY OF IRAN; WATER  
ENGINEERING SERVICE (MAHAB);  
KHUZESTAN WATER AND POWER AUTHORITY  
(KWPA); KHADAMAT IRAN-ZEMIN ENGINEER-  
ING CONSULTANT SERVICES COMPANY (KIZ),  
RESPONDENTS.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاوی ایران - ایالات متحدہ
فایلد - ثبت شد	
۱۳۶۲ / ۶ / ۱۱	۲
2 SEP 1983	
346	۳۴۶

DUPLICATE  
ORIGINAL  
نسخه برابر اصل

CONCURRING OPINION OF RICHARD M. MOSK

I concur in the Award in order to form a majority for it.

Under general principles of law, the Claimant is entitled to damages for the breach of contract sufficient to put him in the economic position he would have occupied had the Respondent performed its obligations. Ryan, An Introduction to the Civil Law 86-87 (1962); 5 Corbin on Contracts §992, at 5 (1964); 11 Williston on Contracts §1338, at 198 (3d ed. 1968); H. Afchar, "Iran", in Minnatur (ed.), Contractual Remedies in Asian Countries 100-01 (1975).

The Claimant is not entitled to damages for losses he could have avoided by reasonable efforts. Thus, if proven by the Respondent, gains that the Claimant could have made by reasonable efforts as a result of opportunities that he would not have had but for the breach are deductible from the amount that would otherwise be receivable. G. Treitel, "Remedies for Breach of Contract" in 7 Int'l Ency. of Comp. Law, Ch. 16, Contracts in General 75-77 (1976); Afchar, supra, at 103; 5 Corbin on Contracts, supra, §1039 at 251.

In the instant case one must start from the premise that as a result of the breach of the MAHAB contract, Claimant is being deprived of not only the monies that should have been paid to him for services already rendered but also for promised compensation for the life of the contract.<sup>1</sup>

The Claimant had a duty to take only "reasonable" steps to mitigate his damages. This means that if the contract was terminated, Claimant must make "reasonable efforts to seek other employment of a comparable nature." Id. at 76. But that does not mean that the party is required to actually obtain alternative work.

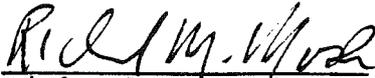
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<sup>1</sup> Although Claimant ultimately terminated the contract after Respondent's breach thereof, Claimant is still entitled to damages. See Treitel, supra at 147.

It is important to recognize that Respondent has the burden to establish that Claimant has not sufficiently mitigated his damages. See Article 24 of the Tribunal Rules; 5 Corbin on Contracts, supra, §1039 at 251.

Claimant made efforts to continue working in Iran. He believed that after the Revolution his services would be needed there. He attempted to find other employment with the condition that he could be released if recalled to Iran. And, according to Claimant, it generally takes him up to six months to find employment. From hindsight, Claimant may have been overly optimistic about his opportunities in Iran, but that does not necessarily mean there is sufficient evidence to support the conclusion that the failure to find comparable work in three months was not reasonable. Nevertheless, since "[t]he rule that an aggrieved party must, but need only, act reasonably to avoid loss gives a good deal of flexibility to the mitigation rule," (Treitel, supra at 77), the Tribunal decision is supportable. Therefore I concur in the Tribunal Award awarding Claimant the amount of \$138,118.40 plus interest thereon and costs in the amount of \$10,000.<sup>2</sup>

Dated, The Hague  
2 September 1983

  
Richard M. Mosk

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<sup>2</sup>My attached legal discussion expands upon the explanation as to why the Tribunal could proceed in the absence of the signature of one of its members.

Additional Comments Related to the  
Reasons for the Absence of Signature

I have concurred in the statement concerning the absence of a signature of one of the members of the Tribunal. Article 32, paragraph 4, of Tribunal Rules.

There is ample authority for the proposition that the Tribunal may proceed with its work despite the circumstances concerning Judge Mostafa Jahangir Sani's purported departure. See Sabotage Claims (U.S. v. Ger.) 8 R. Int'l Arb. Awards 458 (Decision of Roberts, Umpire) and 238-41 (Opinion of Garnett, Commissioner) (1939); Decisions 21 and 22, French-Mexican Claims Commission, 5 R. Int'l Arb. Awards 510-14 (1936); Columbia v. Cauca Co., 190 U.S. 524, 47 L. Ed. 1159 (1902); see also Lena Goldfields Ltd. v. Union of Soviet Socialist Republics, reprinted at 36 Cornell L.Q. 42 (1930). Legal scholars have also suggested that the Tribunal can proceed under circumstances similar to those present in the instant case. See 2 Hyde International Law 1629 (1945); 1 J. Voet, The Selective Voet 749 (Gane ed. and trans. 1955); 3 Phillimore, Commentaries on International Law 4(1885); A. Merignhac, Traité theorique et pratique de l'Arbitrage international 276-77 (1895).

In his Report on Arbitration Procedure to the International Law Commission, Georges Scelle wrote:

Spontaneous withdrawal [of an arbitrator] is inadmissible. The arbitrator was not bound to accept the task entrusted to him; but he can no more give up his functions once they have been conferred upon him than an officially installed magistrate can insist on resigning. Municipal law is categorical on this point . . . . [W]ithdrawal of an arbitrator cannot prevent the tribunal from acting nor from rendering a binding award whenever it is materially able to do so.

Scelle, supra at 32-33.

Among municipal law provisions consistent with this position are those of Iran and the United States. The Civil Procedure Code of Iran (Sabi trans. 1972) provides as follows:

Article 649

After accepting to act as arbiters, the arbiters do not have the right to resign, except where they have a plausible excuse such as a sojourn or sickness and so on . . . .

Note 1 - Where one of the arbiters of choice resigns during the last third part of the period of arbitration his resignation shall be treated as null and void and he shall be regarded as abstaining.

. . . .

Article 660

Where one of the arbiters after he has been informed, does not appear in the session held for proceedings or consultations, or he appears but refuses to give award, the award given by the majority of votes shall be valid even if unanimity of votes has been a condition in the agreement for arbitration. Non-appearance or refusal of arbiter to give an award or signing the same shall be recorded in the award.

Similarly, the Uniform Arbitration Act promulgated by the American Bar Association and enacted by a number of states in the United States provides, in Section 5(c), that when an arbitrator ceases to act, the proceedings may continue.

Authorities which might be construed as leading to a different conclusion are not persuasive, especially when applied to this Tribunal. Because of its nature, schedule and caseload, this Tribunal cannot be subjected to periods of inaction and delay. Parties have expended monies in connection with their claims in reliance on the Tribunal deciding their cases. To delay deciding them is not only unfair, but contrary to generally accepted standards. See Canon. IV(B), Code of Ethics for Arbitrators in Commercial Disputes (Amer. Bar Assoc. and Amer. Arb. Assoc. 1977); Civil Procedure Code of Iran, Sec. 641 (Sabi trans. 1972); Arbitration in Sweden 115 (Stockholm Ch. of Com. 1977).

The Claims Settlement Declaration to which Iran and the United States of America adhered suggests that the Tribunal "conduct its business expeditiously" (Article III, paragraph 1) in order "to ensure that [the] Agreement can be carried out" (Article III, paragraph 2). Delays in deciding cases are inconsistent with the spirit of the Claims Settlement Declaration and with the sound administration of the Tribunal.

Finally it should be noted that another Chamber of the Tribunal has proceeded to issue awards in the absence of one of its members. See e.g., Award Nos. 59-220-2 (Intrend); ITL24-49-2 (Gould); ITL 23-120-2 (Main); 61-188-2 (Gruen).