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دیوان داوری دعاوی ایران - ایالات متحده

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** CONCURRING OPINION of _____

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- Date _____

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- Date _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 12783 44
CHAMBER THREE
AWARD NO. 275-12783-3

PARGUIN PRIVATE JOINT STOCK COMPANY
a Claim of less than US$ 250,000,
presented by THE ISLAMIC
REPUBLIC OF IRAN,

Claimant,

and

THE UNITED STATES OF AMERICA,

Respondent.

AWARD

Appearances:

For the Claimant: Mr. Mohammad K. Eshragh,
Agent of the Islamic Republic of Iran;
Mr. Nozar Dabiran,
Adviser to the Agent;
Mr. Abdolmajid Aghighi,
Assistant to the Agent.

For the Respondent: Mr. John R. Crook,
Agent of the United States of America;
Mr. Michael F. Raboin,
Deputy Agent;
Ms. Mary Catherine Malin,
Adviser to the Agent.

I. PROCEEDINGS

1. On 18 January 1982 Parguin Private Joint Stock Company ("Claimant") filed a Statement of Claim listing as the Respondent the "U.S.Government, representing Military Advisory Group in Iran, Procurement Office U.S. Support Activity" ("Respondent"). The Claim sought Rls. 3,406,780 allegedly due under two invoices issued pursuant to a construction Contract between the Parties, and Rls. 5,000,000 as damages arising from the termination of the Contract by the Respondent. The Claim was filed as Case No. 766.

2. On 3 February 1983 the United States filed a Statement of Defense requesting dismissal of the Claim on the ground that because it is for less than US$250,000 the filing by the Claimant itself and not the Government of the Islamic Republic of Iran was contrary to Article III, paragraph 3 of the Claims Settlement Declaration.

3. On 16 May 1983 the Claimant submitted a "Replication in Response to Statement of Defence," stating that in fact the Claim had been presented to the Tribunal "by the Islamic Republic of Iran under the Government insignia and through the Islamic Republic Government's representative."

4. On 20 December 1983 the Tribunal rendered a Decision in which it found that the Claim should have been presented by the Islamic Republic of Iran rather than by the Claimant, but held that "the delivery of a Claim less than US$250,000 without the Claimant being represented by its Government does not justify dismissal of the Claim on jurisdictional grounds." The Tribunal therefore rejected the United States' motion to dismiss the Claim. Parguin Private Joint Stock Company and United States of America, Decision No. DEC 28-766-3 (20 December 1983), reprinted in 4 Iran-U.S. C.T.R. 210.

5. On 5 June 1984 the Tribunal issued an Order directing the Registry to reclassify the case as a claim of less than US$250,000, and on 6 June 1984 it was so reclassified and assigned No. 12783.

6. Proceedings in the Case were extended repeatedly at the Parties' request to permit settlement negotiations. On 3 March 1986 the United States informed the Tribunal that despite lengthy negotiations no settlement had been reached. Thereafter, on 22 May 1986, the Respondent submitted a Rejoinder to the Claimant's Replication.

7. A Hearing was held on 7 October 1986.

II. JURISDICTION

8. The Claim arises out of, or relates to, a Contract within the meaning of Article II, paragraph 1 of the Claims Settlement Declaration. This Claim was outstanding on 19 January 1981 and was continuously owned by the Claimant from the date it arose until this date.

9. The Claimant, in the captions in both its Statement of Claim and its Replication, stated that it was "of Iranian nationality, domiciled in Iran." While its name implies that it is a corporation, it made no assertion regarding the nationality of its shareholders and has not otherwise attempted to prove its nationality. On the other hand, the Respondent did not object to the Claimant's representations prior to the Hearing.

10. Notwithstanding the absence of any dispute between the Parties, the Tribunal must satisfy itself that it has jurisdiction over the Claim. In view of that, the Tribunal notes that this Claim is presented through the Government of the Islamic Republic of Iran, pursuant to Article III, paragraph 3 of the Claims Settlement Declaration. The

Tribunal cannot doubt that before presenting such a Claim the government concerned has taken the necessary steps to establish that the nationality of the Claimant is in conformity with the Algiers Accords. Therefore, the presentation of a case by a government creates a presumption that the Claimant is a national within the meaning of Article VII of the Claims Settlement Declaration. This presumption could be rebutted in this Case had the Respondent denied the allegation as to the Claimant's nationality or were there anything in the record giving rise to any doubts. In the absence of such objection or evidence the Tribunal is satisfied that the nationality of the Claimant fulfills the requirements of Article VII of the Claims Settlement Declaration.

11. Clearly, the Respondent (whose official name is Procurement Office, United States Support Activity-Iran), an instrumentality of the U.S. Army, falls within the Claims Settlement Declaration definition of United States. Accordingly, the Tribunal finds that it has jurisdiction over the Claim.

III. THE MERITS

A. The Background of the Claim

12. The Claimant and the Respondent entered into a Contract ("the Contract") on 5 November 1978 for the construction of four two-story cabins and related site development at the Chalus Recreation Area, near the Caspian Sea in northern Iran. The Contract was for a fixed price of Rls. 17,108,151. All payments were to be made in rials.

13. The Claimant began work pursuant to the Contract in November 1978. On 7 November 1978 and 15 January 1979 it presented two invoices, numbered 1 and 2, totalling Rls.

9,580,564 to the Respondent at its offices in Tehran. The Parties agree that these invoices were paid in full.

14. On 7 February 1979 the Claimant submitted Invoice No. 3 for Rls. 2,746,780 and on 8 March 1979 Invoice No. 4 for Rls. 660,000. The payment of these two invoices is at issue in this Case.

15. By notice dated 27 March 1979 the Respondent terminated its Contract with the Claimant and instructed the Claimant to "stop all work, make no further shipment and place no further Order in connection with the Contract." The Respondent contends that the termination of contracts with Iranian contractors generally, and with the Claimant in particular, conformed strictly with standard termination provisions required by U.S. law for contracts with the United States Government (Defense Acquisition Regulation 7-602.29).

16. The Claimant does not dispute the Respondent's right to terminate the Contract under this standard clause. However, it claims Rls. 5,648,943 for amounts outstanding under the invoices issued and for related damages resulting from termination of the Contract, plus interest. This amount is composed as follows:

i. Rls. 3,406,780 representing the full amount billed by Invoices Nos. 3 and 4.

ii. Rls. 1,400,000 requested by the Claimant as paid to various suppliers for the preparation and purchase of certain items pursuant to the Contract.

iii. Rls. 342,163 as the value of two percent of the Contract for the additional work allegedly done by the Claimant after submission of Invoice No. 4 and before the date of termination of the Contract.

iv. Rls. 500,000 as legal and other costs.

v. Interest on the amounts claimed at a rate of 14 percent accruing from 27 March 1979.

B. Claim for Payment of Invoices Nos. 3 and 4

17. The Respondent initially denied any liability towards the Claimant. It stated that it already had paid to the Claimant all amounts due for the work to which Invoices Nos. 3 and 4 relate. In its Rejoinder filed 22 May 1986, however, the Respondent stated that on further investigation it had discovered that its intended payment of its debt to the Claimant was in fact not completed because of the seizure of the U.S. Embassy in Tehran in November 1979. It conceded that it owes the Claimant Rls. 3,184,682.

18. The Respondent asserts that on 5 May 1979 the Claimant's work at the Chalus Recreation Area was inspected by an Iranian engineer employed by the Respondent's Civil Engineering Section to determine the amount of final payment to which the Claimant was entitled under its Contract. The inspecting engineer determined that the Claimant had completed 74.615% of the work under the Contract, a finding certified by U.S. Army Corps of Engineers' Major John A. Mills. Because the Contract was concluded at a fixed price of Rls. 17,108,151, the Respondent determined that the total pro rata amount payable to the Claimant was Rls. 12,765,246.[1] Reducing that amount by the Rls. 9,580,564 already paid under the Contract, the Respondent determined that it owed the Claimant the balance, i.e., Rls. 3,184,682. This certification, the Respondent contends, conformed

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[1] It appears that the calculation originally performed by the Respondent and shown on Major Mills' certification contained a minor mathematical error in calculation as it refers to a total pro rata amount payable of Rls. 12,765,386 and a balance due of Rls. 3,184,822 while in fact 74.615% of Rls. 17,108,151 is Rls. 12,765,246, leaving a balance of Rls. 3,184,682. The error apparently was corrected during subsequent processing of the invoice, as the check was made out in the proper amount.

strictly to United States Government regulations for payment of contractors in accordance with the Contract termination clause.

19. Major Mills' certification of the approved amount was sent to Stuttgart, West Germany, for processing by the U.S. Army VII Corps Regional Finance and Accounting Office ("VII Corps"). A payment voucher was prepared on 27 October 1979 for Rls. 3,184,682. The VII Corps then arranged to purchase the necessary rials for payment from Bank Melli Iran ("BMI") through an intermediary, the American Express Bank, Ltd. Military Banking Facilities ("Amex") in West Germany. Amex established a rial account at BMI, deposited the rials purchased by the Respondent, and on 1 November 1979 drew a rial check in favor of the Claimant for Rls. 3,184,682. Amex forwarded the check to the Claimant care of the U.S. Embassy in Tehran via the U.S. Consulate in Frankfurt.

20. After Amex disbursed the check, however, the process of payment was interrupted. The Respondent contends that because of the seizure of the U.S. Embassy in Tehran on 4 November 1979 the check could not be delivered to the Embassy for forwarding to the Claimant, and ultimately it was returned to Amex on 16 January 1980 as undeliverable.

21. The Respondent contends that it filed its Statement of Defense in this Case in 1983 under the mistaken impression that payment had reached the Claimant because the records of the VII Corps contained the payment voucher and showed that it purchased Rls. 3,184,682 from BMI through AMEX under the currency exchange procedure discussed above. Now aware, apparently from Amex records, that payment in fact never was effected, the Respondent concedes that the amount for which the check was drawn is due and payable.

22. In light of the Respondent's admission that Rls. 3,184,682 is properly due and payable for Invoices Nos. 3

and 4, only the balance of the invoices, Rls. 222,098, is at issue. The Respondent argues that it owes only the lower amount approved by its engineer. Under the Contract,[2] no payment could be made without a certification by the designated official to the effect that the work for which payment relates was completed. The attempted payment of Rls. 3,184,682 was based on the engineer's inspection and statement of the amount of work completed. Therefore, the Respondent denies that there is any basis for the Claim for a further amount.

23. The Claimant alleges its right to payment of the entire amount of the invoices. However, the Claimant has submitted no evidence other than the invoices to support its Claim that it has performed a greater amount of work than that certified by the Respondent's officials. The Tribunal takes into account that the inspection by the Respondent's engineer was carried out on 5 May 1979, six weeks after the Respondent instructed the Claimant to cease work on the project and two months after submission of the final Invoice No. 4. The Tribunal concludes that this inspection would have taken into account all work carried out by the Claimant to the date of inspection. Therefore the Tribunal awards the amount certified as owing by the Respondent, i.e., Rls. 3,184,682.

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[2]The Contract was not submitted by either Party. The Claimant submitted only three pages of the 87 page Contract. The Respondent stated that it had no access to its copy of the Contract since it had been kept at the U.S. Embassy in Tehran and was lost at the time the Embassy was taken over. The Respondent has stated, however, that the terms of the Contract were standard terms included in all U.S. Government contracts, and the Claimant has not contested the existence of any of the terms alleged by the Respondent.

C. Claim for Money Paid to Suppliers

24. The Claimant alleges that it paid the amount of Rls. 1,140,000 to "various suppliers" for the preparation and purchase of certain items pursuant to the Contract but which remains unreimbursed by the Respondent. In support of its contention the Claimant presented two pages of the Contract which list certain materials apparently required to be provided by the Claimant under the Contract.

25. The Respondent argues that the lists submitted show only that the items listed were authorized for purchase, but that there is no evidence that they were in fact purchased or that the sums of Rls. 9,580,564 already paid by the Respondent, together with those sums now awarded to the Claimant, did not compensate the Claimant for those purchases. The Tribunal agrees and dismisses this portion of the Claim for lack of proof.

D. Claim for Additional Work

26. The remainder of the amount claimed, Rls. 342,163, is for additional work allegedly performed by the Claimant following the billing date reflected in Invoice No. 4, apparently 8 March 1979, and before the date of termination, 27 March 1979. The Claimant states that it performed "about 2% more of the work" during the interval, but has provided no further evidence.

27. The Respondent argues that the Claim for the additional 2% is baseless since the inspection of the construction site on which the amount admitted payable was based took place on 5 May 1979, two months after the final invoice was issued and six weeks after termination. The Respondent argues accordingly that any work done between the invoice date and termination was included and compensated in the amounts approved. Since the termination notice given on 27 March 1979 specifically ordered the Claimant to "stop all work," the Respondent argues that any work done subsequent to the

date of the inspection would have been at the Claimant's peril.

28. The Tribunal finds that the Claimant has not substantiated its Claim for the additional amount. This portion of the Claim is, therefore, denied.

IV. CURRENCY OF THE AWARD

29. The Tribunal notes that the Contract provided for payment in Iranian rials. In addition the payment of the amounts awarded will not be effected from the Security Account, which is denominated in dollars. Therefore, according to the principles set out in McCollough & Company, Inc. and Ministry of Post, Telegraph and Telephone, Award No. 225-89-3, paras. 105-112 (22 April 1986), payment shall be made in rials.

V. INTEREST AND COSTS

A. Interest

30. The Claimant requests interest at 14% on any award in its favor. The Respondent argues that interest is not appropriate in the circumstances of this Case and should not be awarded. It argues that the applicable law in this case under Article V of the Claims Settlement Declaration is the law of the United States, and that American law prohibits awards of interest against the United States in this Case. It states that traditionally contractors with the U.S. Government were barred from obtaining interest against the Government, and that while a recent statute (The Contract Disputes Act of 1978, 41 U.S.C. §601 et seq.) has changed this rule, the statute is inapplicable to this Case because it requires that any dispute be brought formally before an

appropriate contracting official at a stated time, which was not done here.

31. The Respondent contends in addition that the Tribunal's previous practice demonstrates that interest should not be awarded. It argues that "interest has been awarded where the Tribunal has found that the respondent has knowingly withheld payment due a claimant or where a fair result in the case requires an award of both principal and interest." The Respondent argues that these conditions are not satisfied here since the Respondent attempted in good faith to make the payment that it acknowledged was due. It argues further that it has not had access in the meantime to the money, which has been held in a non-interest bearing account at Bank Melli in Tehran.

32. Arguments based on the American law prohibiting interest in awards against the United States such as those of the Respondent in this Case were raised by the United States in Atomic Energy Organization of Iran and United States of America, Award No. 246-B7-1 (15 August 1986). There the Tribunal stated:

> It has been the practice of the Tribunal to award interest, when claimed and due, to compensate for damages suffered due to delay in payment, whether the contract in question provides for it or not and notwithstanding general choice of law provisions.

In conformity with this precedent, the Tribunal holds that the law of the Contract is not applicable to the payment of interest and that there is no circumstance in this Case justifying a departure from its practice.

33. The Respondent's general argument that an award of interest in the circumstances of this Case would be "unfair" seems to assume that interest is payable on amounts due only if the party owing the debt was acting in bad faith or

itself earned interest on the withheld funds. While such factors may contribute to a determination of the rate of interest and time of commencement of interest calculations, interest generally is intended to compensate the successful Claimant for the loss of use of the funds owed, not to punish a recalcitrant Respondent or to extract from a Respondent interest it may have earned on amounts withheld.

34. The Tribunal takes into account that the Respondent could have taken action to deliver the check directly to the Claimant or otherwise effect payment once it was informed by Amex on 16 January 1980 that the check had not been delivered via the Embassy. Accordingly, interest will commence on 16 January 1980, the date the Respondent was notified of the failure to deliver the check to the Claimant. By application of the principles enunciated in McCollough, supra, paras. 97-103, interest is awarded at the rate of 10%.

B. Costs

35. The Claimant alleges the existence of costs in the amount of "more than Rials 500,000 [paid] to its attorney and responsible officials as expenses for the recovery of the unpaid amounts." The Claimant has provided no evidence that it incurred these costs or that they related to the present proceedings. Considering this and all of the circumstances of this Case, the Tribunal determines that each Party shall bear its own costs of arbitration.

VI. AWARD

36. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a. THE UNITED STATES OF AMERICA is obligated to pay PARGUIN PRIVATE JOINT STOCK COMPANY the sum of Three Million One Hundred Eighty Four Thousand Six Hundred Eighty Two Rials (Rls. 3,184,682) plus simple interest at the rate of 10% per annum (365 day basis) calculated from 16 January 1980 up to and including the date of payment.

b. The remainder of the Claim is dismissed on the merits.

c. Each Party shall bear its own costs of arbitration.

Dated, The Hague,
15 December 1986

Michel Virally
Chairman
Chamber Three

In the name of God

Charles N. Brower

Parviz Ansari Moin

Concurring

With regard to the issues of interest and costs, see my Separate Opinion in McCollough, supra, 20 May 1986.