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94

Case No. 154Date of filing: 28 OCT 87

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

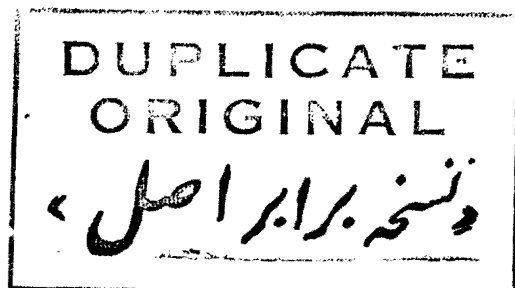
** CONCURRING OPINION of Mr Brower
- Date 28 OCT 87
6 pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

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- Date _____
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CASE NO. 154

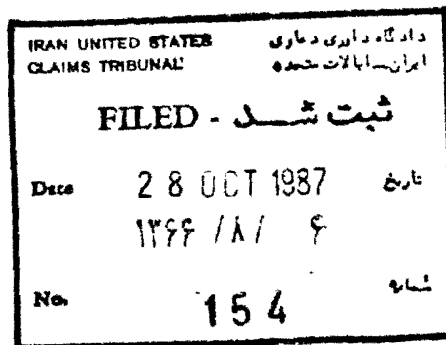
CHAMBER THREE

AWARD NO. 322-154-3

EXXON CORPORATION,
Claimant,

and

NATIONAL IRANIAN OIL COMPANY,
BANK MARKAZI IRAN, and
THE GOVERNMENT OF IRAN,
Respondents.



CONCURRING OPINION OF JUDGE BROWER

1. The Award correctly grants Claimant virtually the entire amount claimed. I append this brief Opinion only to point out what I regard as three defects in the Award's treatment of costs and interest.

I.

2. First, I believe the Award grants insufficient costs. This Claimant has prevailed on virtually the entirety of its claim, and it is clear from the Award that the defenses offered were frivolous, particularly following the Tribunal's decision in Oil Field of Texas, Inc. and Islamic Republic of Iran, Award No. ITL 10-43-FT, at 19-21 (9 December 1982), reprinted in 1 Iran-U.S. C.T.R. 347, 360. Claimant demonstrated that in these proceedings it incurred \$103,890 in fees and costs, excluding the time of Claimant's own "in house" legal staff, which principally handled this Case. I would have awarded the full out-of-pocket expenses proven, \$17,557, plus reasonable legal fees of \$25,000.

II.

3. Second, the Award grants interest on one portion of the claim for a period which in my view is 30 days too short. I refer to that portion of the Award that consists of reimbursement of expenses Claimant paid to a third party contractor, Porta-Kamp, for services Porta-Kamp provided to OSCO. The Award decides that interest on these sums should be calculated beginning 30 days after the dates of Claimant's invoices requesting reimbursement, citing (para. 67) "generally admitted usage." Whatever might be the general usage, however, the specific circumstances of this Case require a different approach. OSCO had already reviewed and approved all of the Porta-Kamp expenses for which Exxon billed OSCO prior even to Exxon paying Porta-Kamp. Indeed, such approval was an express contractual condition to Exxon's payment to Porta-Kamp. Thus the usual justification for a 30-day delay in payment -- to allow a party to review and approve an invoice -- is lacking here. Interest should be calculated from the date of Exxon's invoices to OSCO for Porta-Kamp expenses because Exxon had already expended those funds for OSCO's benefit and with OSCO's approval.

III.

4. Third, I object to the Award's determination, contrary to the long standing practice of the Tribunal, that interest running on the amount awarded will be calculated only up to the date of the filing of this Award, rather than, as in every other case this Chamber has issued since the award in John Carl Warnecke and Associates and Bank Mellat, Award No. 72-124-3 (2 September 1983), reprinted in 3 Iran-U.S. C.T.R. 256, the date of payment (approximated, in awards against Iran, as the day the Escrow Agent (the Central Bank of Algeria) notifies the Depositary Bank (the NV Settlement Bank) to make payment from the Security Account). The

Award's explanation for this aberration is that it is "[i]n accordance with the Claimant's request." (Para. 69.)

5. The request on which the Award relies reads as follows:

In order to fully compensate Exxon for the loss it has suffered in this case, interest should be awarded from the date of each breach of contract until the date of the award.

By taking Claimant so literally, and contravening the established practice of this Chamber,¹ the Award punishes the Claimant for no good reason. Presumably this Claimant, like every other claimant, would prefer to recover interest to the date of actual payment. Such interest is necessary and proper to effect full compensation to claimants from whom funds wrongfully have been withheld. The development of the Tribunal's practice to that effect shows its wisdom and suggests that it should be consistently applied.²

¹Indeed, all of the awards issued by this Chamber in its present composition grant interest to the date of notification, even though that was not specifically requested in at least two of them. (Compare Claimant's Memorial filed 25 March 1985 in Case 89, McCollough & Co. Inc. and Ministry of Post, Telegraph & Telephone, at 22 (requesting interest up to the date of the hearing) and Statement of Claim in Case 487, Logos Development Corporation and Information Systems of the Islamic Republic of Iran (asking for "interest and penalties as granted by the Tribunal" without any specification of an end date) with the awards in McCollough, Award No. 225-89-3 at para. 114 (22 April 1986) and Logos, Award No. 228-487-3 at para. 64 (30 April 1986) (awarding interest up to the date of the Escrow Agent's payment instruction).

²Of 96 contested awards of the Tribunal granting money to the claimant or the respondent, 83 award interest up to a specified terminal date. (Of the other 13 six do not award interest and seven, all of which were issued prior to August of 1983, award interest in a lump sum without specifying how it was derived.) Of those specifying a terminal date only seven (8%) calculate interest only to the date of the award, while 76 (92%) calculate interest either to the date the

(Footnote Continued)

6. The first ten awards issued by the Tribunal which granted interest showed no uniformity as to interest terminal dates: One calculated interest up to the actual date of payment out of the Security Account, two to the date of notification to the Depositary Bank to make payment out of the Security Account, and two to the date of the award, while five granted a lump sum of interest without explaining its derivation or terminal date. At about the time of the last of those awards, however, the Tribunal became aware of delays in payment out of the Security Account of certain awards which had not been signed by one of the members of the Tribunal. See Iranian Assets Litigation Reporter, p. 7472 (18 November 1983). Since then, with rare exceptions, the Tribunal has ordered that interest on awards to American claimants continue to run up to the date the Escrow Agent notifies the Depositary Bank to pay, thus minimizing any loss to those claimants caused by such delay.³ The rare

(Footnote Continued)

Depositary Bank is instructed to make payment (71) or to its equivalent, the date of actual payment (five awards, four of which were awards against the United States or its nationals). Significantly, of the most recent 62 of the 83 awards, all issued since June 1984, only two use the date of award as the terminal date (see INA Corporation and Islamic Republic of Iran, Award No. 184-161-1 (13 August 1985); Walter W. Arensberg and Ministry of Housing and Urban Development of the Islamic Republic of Iran, Award No. 213-61-1 (27 February 1986)), and no Award has done so in this Chamber since its third award, issued in 1982 (see Raygo-Wagner Equipment Company and Star Line Iran Company, Award No. 20-17-3 (15 December 1982), reprinted in 1 Iran-U.S. C.T.R. 411).

³Under customary international law interest is generally calculated up to the date of payment. O'Connell, II International Law 1122 (1970); Administrative Decision III, (U.S. v. Germany) 7 U.N.R.I.A.A. 64, 66 (Mixed Claims Commission 1923) (awarding interest "from the date of the taking to the date of payment"); Libyan American Oil Company (LIAMCO) v. Libyan Arab Republic, 62 I.L.R. 139, 225 (1982) (interest to run to date of payment). This also is consistent with the national practice of the United States. Normally a judgment will calculate interest up to the date

(Footnote Continued)

exceptions since then which grant interest only to the date of the award -- there are five of them -- generally appear to be anomalous and unconscious lapses, since no discussion or explanation is given as to the departure in those cases.⁴

7. I thus feel that responsible judicial practice counsels in favor of the Tribunal's majority approach, heretofore long followed by this Chamber without variance, even where the claimant may not have requested it with meticulous precision. The sums at stake may be considerable. In a recent case, for example, interest at 10% was awarded on an amount of \$68,210,816, which comes to approximately \$18,688 in interest per day.⁵ While generally payment out of the Security Account requires a week to ten days, in that case payment was delayed 29 days beyond the date the award was first filed.⁶

(Footnote Continued)

of judgment. Post-judgment "statutory" interest is automatically added by operation of law up to the date of actual payment. See New York C.P.L.R. §5003 (1982); 28 United States Code §1961 (interest accrues on amounts awarded "from the date of the entry of the judgment"). Here, because both judgment and execution are consolidated, interest to the date of payment out of the Security Account is reasonable and proper. The Tribunal confirms this by invariably ordering U.S. respondents to pay interest up to the date of actual payment.

⁴The one exception is Walter W. Arensberg and Ministry of Housing and Urban Development of the Islamic Republic of Iran, Award No. 213-61-1 at 24 (27 February 1986), in which it was explained that the claimant had, as here, requested interest "up to the date of the Award."

⁵Sedco, Inc. and National Iranian Oil Company, Award No. 309-129-3 (7 July 1987).

⁶The Award in Sedco was issued in English on 7 July 1987 and in Farsi on 9 July 1987. Payment was actually made on 5 August, the same day the Depositary Bank was requested to do so by the Algerian Central Bank.

The delay in the payment to Sedco followed a "Statement" by the Iranian Arbitrator filed with the Award in that

(Footnote Continued)

8. By holding the Claimant to the narrowest literal effect of its generally stated demand the Tribunal in effect allows the Respondents to retain interest free Claimant's funds for as long as it takes for the process of notification and payment to take place. I think that is unfortunate formalism that ill becomes the Tribunal. Fortunately it is easily avoided by claimants in cases not yet decided, who would be well advised to ensure that they have unambiguously requested interest to the date of payment.

Charles N. Brower

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(Footnote Continued)
case as follows:

I believe and would hope that the Escrow Agent will refuse to issue an order for payment of such an unenforceable "award."

Statement by Judge Parviz Ansari Concerning His Reasons for Not Signing the Award in Case No. 129, Sedco, Inc. and National Iranian Oil Company, Award No. 309-129-3 (7 July 1987).