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Case No. 154 Date of filing: 9 Dec 87

** AWARD - Type of Award _____

- Date of Award _____

_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of Mr Ansari

- Date 18. Nov 87

11 pages in English _____ pages in Farsi

** DISSENTING OPINION of _____

- Date _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

102

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.

SEPARATE OPINION OF JUDGE PARVIZ ANSARI

INTRODUCTION

In actuality, the claim brought by the Claimant in the present Case consists of two distinct parts, with the distinction between them being the result of the different standing of the National Iranian Oil Company (NIOC) with respect to each of those parts.

As to the first part, NIOC is a direct party to the purchase order for a consignment of turbo oil. As to the second part, NIOC is not a direct party to the contractual relations with the Claimant; rather, a different and independent juridical person, called Iranian Oil Services Ltd. (IROS), is involved in this relationship and is the direct party to the contract with the Claimant. For this reason, it will be appropriate to comment on each of these two parts separately.

A. THE CONTRACTUAL RELATIONSHIP BETWEEN THE CLAIMANT AND NIOC

1. This contractual relationship arose out of NIOC's purchase order for a quantity of turbo oil, and the Claimant's acceptance thereof. There is no dispute between the Parties as to the fact that NIOC was a party to the contract, over delivery of the shipment, or as to the merits of the Claimant's claim for payment of the price of the said shipment. What the Parties do dispute, and what has occasioned my dissent as to this part of the Award, is the fact that assessment of interest is inconsistent with the rule of law and standards of justice, in view of the appropriate measures taken by the Respondent in an effort to pay its debt, as shall be explained below.

2. As is reflected in paragraph 17 of the Award, on November 14, 1979-- i.e., the date on which Iranian assets in the United States were frozen-- the Claimant submitted to the Respondent's agent in New York the documents necessary for receipt of the sales price of the turbo oil. With the continuation of the freeze on assets, the severance of diplomatic relations and the crisis resulting from this situation (matters which have been set forth time and again and need not be reiterated here), there was no way for the Respondent to pay for the transaction. Nonetheless, in order to demonstrate its good faith in seeking to perform on the contract, the Respondent sent communications through "Kala Ltd." in the United Kingdom, the last of which communications were telexes dated 26 November 1981 and 5 February 1982, whereby it requested the Claimant to draw on NIOC a draft through a European bank for payment of the amount concerned, and it emphasized

that payment would be made at first presentation. The Claimant failed to avail itself of this opportunity to collect on its demand; nor was it able to explain, in the proceedings in the instant Case, why it had neglected to take action.

3. From this act of good faith on the part of the Respondent in expressing its willingness to pay in February 1982, the majority has inferred that it could have made payment through a European bank at any time prior to the above-mentioned date (i.e., from 14 November 1979 on), and it has consequently required the Respondent to pay interest computed as from 30 days after the issuance of the Claimant's invoice.

The clear fact is, however, that the Respondent was excused from any obligation to pay during the period from 14 November 1979, due to the existence of force majeure conditions arising out of the freeze on its assets in the United States. See: Dissenting Opinion of Mr. Ameli in Pepsico, Inc. and The Government of the Islamic Republic of Iran, et al, Award No. 260-18-1, at 65 et seq. The error in the majority's reasoning in the Award is due to its failure to take into account the efforts of the Respondent to make payment in 1981, that is, after announcement of the Algiers Declarations, and finally in February 1982. For it was after the lifting of the freeze order, that the Respondent declared its willingness to pay the amount in question. Therefore, I do not see any reason to construe the Respondent's subsequent offer to pay the amount involved via a European bank as signifying that it could have paid prior to that date as well. This is something which the Claimant ought to have proved; yet there has been no evidence produced in proof thereof. As a result, in the absence of any evidence to the contrary, judicial logic dictates that the Claimant bear the consequences of its own inaction and failure.

B. THE CLAIMANT'S CONTRACTUAL RELATIONSHIP WITH IROS

4. The second part of the Claimant's claim consists of two claims arising out of

the Claimant's contractual relationship with Iranian Oil Services Ltd. (IROS). NIOC was not a direct party to any of the transactions involved in this contractual relationship. Therefore, the whole of the majority's argument deals with whether or not IROS acted as the agent of the Oil Services Company of Iran (OSCO), and whether, assuming the first eventuality, in succeeding to OSCO's obligations, NIOC succeeded to those of IROS as well.

5. In my opinion, the reasons and arguments set forth in the Award do not suffice to establish such a direct legal relationship between IROS and NIOC. For this reason, I deem it necessary to reexamine and reiterate the reasons and facts at our disposal.

6. In actual fact, the majority's argument rests upon two contracts: the contract dated 20 November 1973 between IROS and OSCO, and the 1973 Service Contract between NIOC and OSCO. Not only do paragraphs 48 and 49 of the Award (1)

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(1) "48. IROS bears none of the characteristics one would expect of an independent contractor. It did not present bids or proposals to OSCO but acted only upon OSCO's specific request. It bore no risk and earned no profit, its expenses being entirely reimbursed by NIOC through OSCO. It did not seek to make its services available to other persons but was created for and employed exclusively by OSCO. It did not warehouse goods or maintain a staff of employees capable of providing services to OSCO but merely procured the goods and services requested by OSCO. As stated by its company secretary, IROS did not consider itself liable for any debts it incurred on OSCO's behalf, but considered itself merely a conduit between contractors, such as the Claimant and OSCO." (emphasis added)

"49. A reading of the agreement of 20 November 1973 between IROS and OSCO and of the 1973 Service Agreement between NIOC and OSCO confirms that IROS was set up with the sole purpose of providing 'administrative and technical services' to OSCO. Moreover, even in the absence of a clear characterization of the contract, it would be unreasonable to conclude that IROS acted as an independent contractor in light of the express provision of the purchase orders that 'work shall be performed in accordance with OSCO agreement' and 'shall be paid after approval by OSCO.'" (emphasis added)

make inferences which cannot be derived from the two aforementioned contracts, but the Claimant has not even asserted these matters as expressly set forth in the Award, such that they might have been taken up and examined by the Parties, which would then have thought it necessary to produce evidence of IROS' other commercial activities with third parties or with OSCO in other forms. Instead, therefore, their discussion was necessarily limited to the contracts concerned, and these do not support the inference made in paragraph 49 of the Award, in connection with the word "sole." No matter how we read Article 5 of the 1973 Service Contract between NIOC and OSCO, it does not lend itself to the highly far-fetched conclusions of the majority.(2) So too, the 1973 contract between IROS and OSCO does not rule out the existence of other forms of commercial relationships between those two parties or between IROS and third parties.

As stated above, the issue as to whether or not IROS engaged in other commercial activities in connection with OSCO or third parties is not at issue in the present Case, and the Parties have not deemed it necessary to brief this matter. In the present Case, however, it so happens that we have at our disposal the letter of 15 December 1983 by Mr. McWhirter, IROS' Legal Adviser. While this letter was submitted for a different purpose, it at the same time reveals that IROS had commercial dealings with other parties as well. The said letter reads, in relevant part, as follows:

> "...IROS then entered into a principal to principal Service Contract with National Iranian Oil Company and Oil Service Company of Iran and National Iranian Gas Company..."

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(2) "Article 5: Contract with Iranian Oil Services Limited

The Service Company shall contract with Iranian Oil Services Limited, by which Iranian Oil Services Limited shall provide services related to the procurement, inspection and expediting of materials and such administrative and technical services as the Service Company may require to be performed outside Iran.

Some or all of these services may also be performed by other organisations, in a manner to be agreed between the parties, provided that those services can be obtained on a competitive basis."

7. Another argument put forth by the majority in paragraph 48 of the Award in justification of its decision, is that "IROS...bore no risk and earned no profit, its expenses being entirely reimbursed by NIOC through OSCO..." This matter is provided for as follows in Article 2 of the November 20, 1973 contract between OSCO and IROS :

> "2. The Service Company will pay IROS the actual cost to it of all services performed hereunder including administrative overhead and all other expenses properly allocable thereto on the basis of generally accepted accounting principles (hereinafter called 'actual cost'). IROS will annually provide a copy of the current account between the Service Company and IROS duly audited by agreed Auditors as at 31st December in each year. The Audit Certificate will state whether or not the amounts charged to the Service Company in respect of expenditure incurred at the request of the Service Company represents the actual cost to IROS for such items and that the proportion of the actual cost to IROS of its administrative overhead and other expenses charged to the Service Company have been allocated on the basis of generally accepted accounting principles."

The payment mechanism described above is not restricted to an agent-principal relationship, and it thus cannot serve as the criterion for determining the nature of the relationship between the parties to the contract. That mechanism is applicable, for example, to various forms of employer- contractor relationships as well. In this connection, I refer to Oil Field of Texas, Inc. and The Government of the Islamic Republic of Iran, et al, Award No. ITL 10-43-FT, wherein the Full Tribunal declined to find that the presence of a similar provision in the 1973 Service Contract between NIOC and OSCO established the existence of an agency relationship.

Article 10 of that contract provides as follows:

> "Article 10: Costs: Funding: Accounts: Auditors
>
> The Service Company shall carry out its duties under this Contract without profit, and all costs and expenses incurred by the Service Company shall be on behalf and for the account of NIOC. The

> Service Company shall deliver to NIOC in respect of each year (and monthly on a provisional basis) accounts of such costs, in a form to be agreed with NIOC..."

Finding that the existence of such a provision in the contract under discussion was not proof of an agency relationship, the Full Tribunal went further, to hold on page 14 of the award in that case, that

> "The fact that OSCO was required to act on behalf of NIOC is not inconsistent with the role of independent contractor. Indeed, it is in the very nature of contractors to perform services at another's behest and to obtain a benefit for another."

Here, it is to be noted that the November 20, 1973 contract between OSCO and IROS contained no language such as "on behalf" and "for the account of," as may be found in Article 10 of the above-cited contract between NIOC and OSCO. A fortiori, this fact makes it difficult to infer that there was an agency relationship between OSCO and IROS.

8. A further argument of the majority in paragraph 49 of the Award is that

> "...Moreover, even in the absence of a clear characterization of the contract, it would be unreasonable to conclude that IROS acted as an independent contractor in light of the express provision of the purchase orders that 'work shall be performed in accordance with OSCO agreement' and 'shall be paid after approval by OSCO.'"

Contrary to this statement it is, on principle, common for the parties to a contract to make the manner of performance or payment contingent upon a decision by the ultimate user of the goods or services or even third party (such as an expert or consulting engineer), without this fact constituting evidence of an agency relationship with one of the parties in a sequence of contracts. It must be noted that the preceding conditions are included in the purchase orders issued by the Claimant and are addressed to a third party, the original supplier of the goods. Therefore, it cannot have an effect upon the legal relationship between IROS and OSCO, or upon the nature of the contractual relationship between IROS and the

Claimant, which rests upon the contract of June 1974, such as to change the nature of that relationship into the contrary of what is expressly set forth in that contract itself.

The underlying contract at issue in this part of the instant claim, a contract with which the majority has failed to acquaint itself, is the June 1974 contract between IROS and Exxon Company U.S.A. (a division of Exxon Corporation).(3)

This contract does not contain the slightest provision which even implies that IROS entered into the contract as OSCO's agent. IROS' standing in this contract is manifestly that of a principal. Moreover, IROS has there undertaken an obligation to pay all the Claimant's expenses independently, rather than as OSCO's agent. From the standpoint of the relationship between the Parties, we see as well that the Claimant always asked IROS to pay its invoices. Thus, based on the terms of these contracts, as well as on other reasons, there can be no doubt that IROS acted as a principal in entering into the transaction with the Claimant.

9. Invoking a further argument based on the letter by IROS' company secretary, the majority states in paragraph 48 of the Award that

> "IROS did not consider itself liable for any debts it incurred on OSCO's behalf, but considered itself merely a conduit between contractors, such as the Claimant and OSCO."

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(3) Even where the majority makes passing reference to this contract, incidental to its recounting of the factual background (paragraph 27 of the Award), the clear language of the relevant part of the said contract leaves no room for doubt that the Claimant recognized that IROS alone was the other party to its contract:

"All necessary or desirable arrangements, including execution of documents on your behalf, payment of monies, and settling claims, shall be made in <u>your</u> name by Exxon Company, U.S.A... and [Exxon Company, U.S.A.] will debit <u>you</u> through inter-company channels." (emphasis added)

This statement apparently constitutes the majority's inference from the letter of 18 July 1983 by Mr. Cooper, IROS' company secretary, a part of which is quoted in paragraph 37 of the Award. It must be observed that the contents of the said letter, as evidenced by its caption, its full text, and the repeated emphasis placed therein, bear solely upon the invoices relating to the services of the member companies of the Consortium (M.C.A.), which services comprise the subject of the third claim in the instant Case, and are not directed to the second claim, which is dealt with in paragraph 48 of the Award. Furthermore, the above statement cannot, in any event, be regarded as governing the relations between the Parties in the face of the other contractual representations and stipulations between them. At the same time, the abovementioned statements of IROS' company secretary are countered by the statements made by Mr. McWhirter, IROS' Legal Adviser, in his letter of 15 December 1983 (supra, paragraph 6). Logic would dictate that we give preference to the view of IROS' Legal Adviser over that of its secretary where they contradict one another-- especially where legal matters are concerned. Yet the majority has acted directly opposite this logic, which is founded upon the principle of privity of contracts, whereas the Claimant's claim needs -- and lacks-- more weighty reasons before such a principle may be set aside. See: Sea-Land Service, Inc. and The Government of the Islamic Republic of Iran, Ports and Shipping Organization, Award No. 135-33-1, at 14-16; and the Concurring Opinion of Judge Parviz Ansari in Futura Trading Incorporated and The National Iranian Oil Company, Award No. 263-324-3.

10. In paragraph 50, the majority goes on to argue that

> "Finally, as a member of the Oil Consortium which owned both IROS and OSCO, the Claimant must have been fully aware of the legal relationship between IROS and OSCO."

This argument carries no weight whatsoever, because the nature of the commercial activities of an independent juridical person cannot be explained on the basis of statements by a shareholder in such an entity, here the Claimant itself, which has an interest in the legal positions taken with respect to that entity. This is particularly the case here, where the majority's argument contains a patent

contradiction. That is, IROS, which is wholly-owned by the members of the Consortium, is on the one hand regarded as OSCO's agent, while on the other hand the necessary evidence and information regarding the nature of the transactions at issue in this Case are in the hands of said "agent," which belongs to the Claimant in the instant Case. As a result of this contradiction, the Respondent has been unable to mount a defence on the merits of these claims, a point which it has stated explicitly.

11. It will be clear from the foregoing that NIOC is not the proper respondent to answer the second part of the Claimant's claim, and as a result this claim is not attributable to such a respondent.

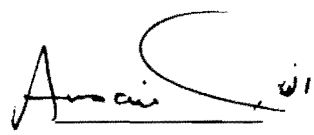
C. INTEREST AND COSTS OF ARBITRATION

12. I see no need to reiterate my previously-stated views in connection with interest and costs. See: Separate Opinion of Judge Parviz Ansari in McCollough and Company, Inc. and The Ministry of Post, Telegraph and Telephone, et al, Award No. 225-89-3; and the Concurring Opinion of Judge Parviz Ansari in H.A. Spalding, Inc. and Ministry of Roads and Transport of the Islamic Republic of Iran, Award No. 212-437-3.

13. I feel compelled to note that no judicial forum may award that which a claimant has neither claimed nor requested; nor may it require a respondent to pay what has not been claimed. Such an award, if rendered, is invalid and gives grounds for a reversal of award or retrial where the municipal fora are concerned, while in the case of an arbitral award this will constitute cause for quashing and overturning the decision. In the instant Case, the Tribunal has correctly taken the date of issuance of the Award as the date up to which interest is to be assessed.

The only effect of encouraging the Tribunal to award more than that sought by the Claimant, would be to invalidate the Award.(4)

The Hague,
27 Abanmah 1366/ 18 November 1987



Parviz Ansari

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(4) See: The Concurring Opinion of Judge Brower dated 28 October 1987, in the instant Case.