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IRAN-UNITED STATES

دیوان داورى دعوى ایران - ایالات متحده

DUPLICATE ORIGINAL
نسخه برابر اصل

CASE NO. 160

CHAMBER ONE

AWARD NO. ITM 30-160-1

RCA GLOBCOM COMMUNICATIONS
INC. (RCA GLOBCOM INC.),
RCA GLOBAL COMMUNICATIONS
DISC, INC. (RCA GLOBCOM DISC),
RCA GLOBCOM SYSTEMS, INC.,
Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN,
TELECOMMUNICATION COMPANY OF IRAN,
THE ISLAMIC REPUBLIC OF IRAN'S
ARMY JOINT STAFF,
BANK MELLI IRAN, BANK MARKAZI,
FOREIGN TRADE BANK OF IRAN,
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داورى دعوى ایران - ایالات متحده
ثبت شد - FILED
1362 / 9 / 29 NOV 1983
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DISSENT OF HOWARD M. HOLTZMANN
FROM INTERIM AWARD

This case involves the latest of a series of attempts by the Government of the Islamic Republic of Iran to circumvent the Claims Settlement Declaration by suing a United States corporation in the Public Court of Tehran on an issue already pending in a case before this Tribunal. This time two separate court actions were instituted in Iran, both of them against RCA Globcom Communications Inc. and RCA Global Communications Disc., Inc. (collectively "RCA"). The

~~circumstances are further aggravated because in one of these~~
cases the Government of Iran violated the explicit Order of
this Tribunal to stay the Iranian court proceedings, and
procured a judgment in absentia against RCA. We had issued
the stay Order to maintain the status quo while the Tribunal
awaited Iran's response to RCA's motion for relief. It is
noteworthy that the Government of Iran sought an extension
of time to give its response, and when it was granted the
extension it used the time to secure the Tehran judgment
without informing the Tribunal or RCA that it was proceeding
to do so.

Despite those aggravated circumstances, the Tribunal on
31 October 1983 issued an Interim Award, No. 30-160-1,
denying RCA's motion to require the Government of Iran to
take steps to vacate the judgment obtained in violation of
our Order. I consider that denial wrong, and I dissent with
regret.¹

¹ On the same day that the Tribunal issued Interim Award
No. 30-160-1, it also issued Interim Award No. 29-160-1,
which relates to a different suit in Tehran brought by the
Army Joint Staff seeking to recover damages for RCA's
alleged breach of the MSPO contract at issue in RCA's
claim before the Tribunal. That Interim Award, No.
29-160-1, ordered the Government of Iran or its Army Joint
Staff "to take all appropriate measures to ensure that the
present proceedings before the Public Court of Tehran be
stayed." The Tribunal correctly noted that it appears
that the Tribunal has jurisdiction over RCA's claim, and
held that the suit in the Tehran court "involves the same
legal and factual issues" as does RCA's claim here. I
joined fully in Interim Award 29-160-1.

1. Background

One of the claims in this case arises out of a contract between RCA and what is now known as the Army Joint Staff of the Islamic Republic of Iran. Under the contract (known as the "MSPO contract"), RCA was to provide and install certain switching equipment for automatic telegraph systems in Iran. A provision of the MSPO contract required RCA to obtain an all-risk insurance policy in connection with its activities in performing the contract; RCA did so by arranging for a policy with Iran Insurance Company.

RCA asserts that it was forced by events in Iran to invoke the force majeure provisions of the MSPO contract and that it is entitled, inter alia, to compensation for certain damages under the contract. The Army Joint Staff in its Statement of Defense denies that RCA was entitled to cancel the MSPO contract for reasons of force majeure and alleges that RCA breached the contract by failing to perform its obligations thereunder.

Despite the fact that RCA's claim was pending before us, and in the face of the Tribunal's numerous Interim Awards in other cases holding that parallel proceedings in

Iranian courts should be stayed,² two court cases were instituted in Tehran against RCA.

2. The Court Proceedings in Tehran and Subsequent Proceedings Before the Tribunal

In the Tehran court action at issue in this dissent, it is alleged that RCA failed to pay premiums called for under the all-risk policy which it had obtained pursuant to the MSPO contract.³ The nominal plaintiff in that suit is Iran Insurance Company, but it is to be noted that the

² The first Interim Award ordering a stay of proceedings in an Iranian court was issued by the Full Tribunal in E-Systems, Inc. and the Government of the Islamic Republic of Iran, Case No. 388 (filed 4 February 1983). Thereafter, each of the Chambers has issued such orders. See, e.g., Questech, Inc. and the Islamic Republic of Iran, Interim Award, Case No. 59 (Chamber One, filed 1 March 1983); Ford Aerospace & Communications Corp. and The Government of Iran, Interim Award, Case No. 93 (Chamber Two, filed 27 April 1983); Rockwell International Systems, Inc. and The Government of the Islamic Republic of Iran, Interim Award, Case No. 430 (Chamber One, filed 5 May 1983), and Interim Award, Case No. 430 (Chamber One, filed 6 June 1983); Watkins-Johnson Co. and Islamic Republic of Iran, Interim Award, Case No. 370 (Chamber Two, filed 26 May 1983); Touche Ross & Co. and The Government of the Islamic Republic of Iran, Order, Case No. 480 (Chamber One, filed 30 May 1983), Interim Award (filed 13 June 1983), and Interim Award (filed 17 August 1983); Ford Aerospace & Communications Corp. and The Air Force of the Islamic Republic of Iran, Interim Award, Case No. 159 (Chamber Three, filed 20 October 1983). Analogous Awards have been entered against United States Claimants. See, e.g., Behring International, Inc. and Islamic Republic Iranian Air Force, Interim Award, Case No. 382 (Chamber Three, filed 10 August 1983); The Government of the United States of America, on behalf of and for the benefit of Shipperside Packing Co., and The Islamic Republic of Iran, Interim Award, Case No. 11875 (Chamber One, filed 6 September 1983).

³ The other court action against RCA in Tehran is described in note 1, supra.

company, like all Iranian insurance companies, has been nationalized. See Law of Nationalization of Insurance and Credit Enterprises, dated 25 June 1979.

In May 1983 RCA filed a Motion informing the Tribunal that it had been summoned to appear in the Public Court of Tehran on 8 June. RCA requested us to direct the Government of Iran to stay that court action pending our resolution of the claim already before us. RCA pointed out that the issues raised in the suit in Tehran were closely linked to those in the claim here. The record appears to support that assertion, for the text of the insurance policy provides that upon termination of the MSPO contract or stoppage of the work thereunder "the Policy shall be avoided." Thus the insurance policy itself appears to recognize that RCA would have no need for insurance after work on the MSPO contract had stopped, that the insurance company would then bear no further risk, and that it therefore would be entitled to no further premiums. The same issues concerning the stoppage of work and the termination of the MSPO contract are thus central to the claim before us and to the claim in the Tehran court.

In view of the short time before the June 8 date on which RCA had been summoned to appear in the Tehran court, the Tribunal considered the matter immediately. In accordance with our usual practice, we requested the Respondents to file a reply by 23 May so that we might have the benefit

of their views before deciding RCA's Motion. The Respondents, however, sought an extension of that deadline. The Tribunal granted an extension to 1 August. In order to maintain the status quo during that extended period, and to give the Tribunal the necessary time to decide RCA's Motion after having received Respondents' views, we ordered the Government of Iran to take whatever steps were necessary to stay the Iranian court proceedings until 15 August.⁴

The Government of Iran, having been granted an extension, then totally disregarded our Order to stay the court proceedings in Tehran. During the period of the extension

⁴ The Order "requests" the Government of Iran to take all appropriate measures to stay the Tehran court proceedings. The word "request" is typically used by the Tribunal, particularly when an Order is addressed to one of the two Governments. A "request" is understood in this context to be tantamount to an "order." Thus in the E-Systems Case, supra, the Full Tribunal used the word "requests" but explained that its decision stating what Iran "should" do was made in the exercise of its "inherent power to issue such orders." (Emphasis added.) Similarly, the Chairman of Chamber Three has issued an explanation concerning this use of the word "requests":

There have been inquiries by the Agents of the Governments of Iran and of the United States concerning the meaning of the word "request" which appears in the Interim Award filed 10 August 1983. The word "request" in this type of case and in this context is tantamount to and constitutes an order.

Re. Interim Award in Case No. 382 (Chamber Three, filed 12 August 1983). See also Concurring Opinion of Howard M. Holtzmann and Richard M. Mosk to Interim Award re Stay of Proceedings Before a Court in Iran, issued in the E-Systems Case, supra (filed 9 February 1983).

granted to it, it went forward and on 8 June secured a judgment in absentia against RCA for \$120,405. It did not tell the Tribunal or RCA that it was doing so; it first informed us of the fait accompli when it filed its response on 1 August. This Chamber has emphasized that the Government of Iran is bound by its international treaty obligation to comply with our orders to stay pending Iranian court proceedings.⁵ Iran's excuse that the Iranian Code of Civil Procedure does not contain a provision which authorizes such a stay of a pending case is unavailing because under international law the Government of Iran is responsible for the actions of its judiciary in violation of its international obligations. See J. Simpson and H. Fox, International Arbitration 262 (1959); C. Eagleton, The Responsibility of States in International Law 68-71 (1928).

It must be emphasized that the judgment of the Tehran court cannot prevail over any Award of the Tribunal, whether our Award comes before or after the court judgment. As the Full Tribunal stated in the E-Systems Case,

the award to be rendered in this case by the Tribunal, which was established by inter-governmental agreement, will prevail over any decisions inconsistent with it rendered by Iranian or United States courts.

However, the existence of the Tehran court judgment can be a serious inconvenience to RCA, which will be required to expend time and money for defense if enforcement of the judgment is sought.

⁵ See, e.g., the Interim Award in Rockwell International Systems (6 June 1983), note 2 supra, and Interim Award No. 29-160-1 in this case, discussed at note 1 supra.

Accordingly, RCA filed a Motion with the Tribunal on 26 August, requesting us to direct the Government of Iran to take whatever steps are necessary to vacate the judgment of the Tehran Court. RCA pointed out that the refusal of the Government of Iran to take the necessary steps to stay the proceedings in Iran constituted a contemptuous disregard of the Tribunal's Order and was a breach of Iran's obligation to resolve outstanding disputes in accordance with the Claims Settlement Declaration.

By Interim Award No. ITM-30-160-1 the Tribunal has denied RCA's request. I consider that to be unjust; it denies RCA relief to which it is entitled and, at the same time, rewards the Government of Iran which flouted our Order to stay the Tehran court proceedings.

The majority of this Chamber attempts to justify the Interim Award on two grounds. First, the majority states that the parties in the case in Tehran are different from those in the claim here. That ground is unconvincing. RCA is, of course, a party in both cases. So is the Government of Iran. The Government of Iran is a named party in the case before us, along with its Army Joint Staff; it is also effectively a party in the Tehran court action instituted in the name of one of its nationalized insurance companies. Moreover, it is the identity of issues, not the formal names of parties, which should be dispositive of the matter before us.

Second, the majority states that the relationship between the issues in the two cases "is not quite clear." As explained above, however, the two cases are closely linked by express provisions of both the MSPO contract and the insurance policy. The same issue -- the question of whether the MSPO contract was properly terminated by RCA -- is central to the disposition of both cases; this Tribunal has the jurisdiction to determine that issue. Under the Claims Settlement Declaration, this Tribunal's determination of the issue will be "final and binding" upon the Government of Iran, including its Joint Army Staff, its nationalized insurance company and its judiciary. Claims Settlement Declaration, Article IV, paragraph 1.

But even if the relationship between the two cases were "not quite clear" now, as the majority believes, surely that relationship will become clearer in the course of the presentations by the parties on the merits of the claim before us. At the very least, it is premature for the Tribunal to deny RCA temporary relief pending further clarification by the parties.

For the above reasons, I believe that the Tribunal should have ordered the Government of Iran to take whatever measures are necessary to vacate the Tehran court judgment. As a minimum, the Tribunal should have ordered the Government of Iran to refrain from enforcing the Tehran judgment until the links between the two cases have been clarified and we have had the opportunity to take appropriate action.

In the circumstances of this case, it is hard for me to understand why the majority rushes to deny relief to RCA when it believes that the situation is "not quite clear." Nor do I understand how the majority can so easily overlook the conduct of the Government of Iran, which obtained an extension of its time to reply to RCA's Motion for relief -- and thus delayed our consideration of the Motion -- only to use the time given it to secure a judgment against RCA in the Tehran court. Such conduct should not be condoned, much less rewarded.

Dated, The Hague
29 November 1983



Howard M. Holtzmann