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IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران ـ ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 165 Date of filing 20 June 1983

[redacted]

_____ AWARD. Date of Award _____

_____ pages in English. _____ pages in Farsi.

_____ DECISION. Date of Decision _____

_____ pages in English. _____ pages in Farsi.

_____ ORDER. Date of Order _____

_____ pages in English. _____ pages in Farsi.

✓ CONCURRING OPINION of Judge Holtzmann

Date 20 June 1983 8 pages in English. — pages in Farsi.

_____ DISSENTING OPINION of _____

Date _____ _____pages in English. _____pages in Farsi.

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Date _____ _____pages in English. _____pages in Farsi.

IRAN-UNITED STATES CLAIMS TRIBUNAL

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CASE NO. 165
CHAMBER ONE
AWARD NO. 55-165-1

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date ۱۳۶۲/۳/۳۰ تاریخ
20 JUN 1983
No. 165 ۱۶۵ شماره

ECONOMY FORMS CORPORATION,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN; THE MINISTRY OF ENERGY; DAM & WATER WORKS CONSTRUCTION CO. ("SABIR"); SHERKAT SAKATEMANI MANI SAHAMI KASS ("MANA"); and BANK MELLAT (formerly BANK OF TEHRAN),

Respondents.

CONCURRING OPINION OF HOWARD M. HOLTZMANN

I.

I concur in the Award in this Case. The Award correctly holds that contracts of sale were formed, that the Respondents breached those contracts and that they are liable to pay damages. Unfortunately, however, the damages awarded are only about half of what the governing law requires.

Why then do I concur in this inadequate Award, rather than dissenting from it? The answer is based on the realistic old saying that there are circumstances in which

"something is better than nothing." The operative circumstances here are that under Article 31, paragraph 1 of the Tribunal Rules (as well as under the UNCITRAL Arbitration Rules), "When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators." Thus, in a three-member Chamber a majority of two members must join, or there can be no Award. My colleague Dr. Kashani having dissented, I am faced with the choice of either joining in the present Award or accepting the prospect of an indefinite postponement of any Award in this case. For, as Professor Sanders has explained in his Commentary on UNCITRAL Arbitration Rules, arbitrators must continue their deliberations until a majority has been reached. II Yearbook Commercial Arbitration [1977] 208. The deliberations in this case have continued long enough; the hearing was closed on February 15, 1983, four months ago. Neither the parties nor the Tribunal will, in my view, benefit from further delay.[1]

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[1]The importance of not postponing the disposition of cases is underscored by the fact that as this Chamber enters its Ramadan recess, the following backlog of cases remains undecided:

Case	Hearing Closed
148	November 15, 1982
24	February 14, 1983
174	March 3, 1983
33	April 19, 1983
87	April 29, 1983
134	May 23, 1987
61	June 2, 1983

I am deeply concerned by this backlog. See, e.g., Dissent of Howard M. Holtzmann from Orders Permitting Post-Hearing Statements (Case Nos. 33, 87 and 174), filed 20 June 1983.

II.

The Award correctly holds that the Claimant, Economy Forms Corporation ("Economy Forms") entered into five binding contracts with a company called Sherkat Sakatemani Mani Sahami Kass ("Mana"). The contracts provided for the Claimant to manufacture certain forms and related materials for use in concrete construction. The major part of those materials were designed to meet Mana's unique engineering requirements. Most of the goods are in the particular shapes, metric sizes and specifications needed for Mana's special purposes; the rest of the goods are accessories. After the goods were manufactured Mana refused to pay for them and, as a result, they were not shipped. The proper measure of damages is to be determined in accordance with Iowa law, which the Award correctly holds governs these contracts. Iowa has enacted the Uniform Commercial Code. Iowa Code §§ 554.1101-09, 1965 (61 G.A.) c. 413 (effective July 4, 1966) ("U.C.C.").

Under the governing law, Economy Forms is entitled to recover from Mana the contract price, together with any incidental damages, including appropriate handling and storage charges, if it "is unable after reasonable effort to resell them at a reasonable price." U.C.C. §§ 2-709 (1)(b), 2-710. The uncontradicted evidence given by the president of Economy Forms is that the company tried for more than four years to sell the goods through its 43 sales offices in

the United States and its 12 overseas offices, including those in Europe, the Middle East and Asia. It even enlisted the aid of Mana in attempting to find buyers. Economy Forms, of course, had a strong business incentive to sell the goods: Mana had informed Economy Forms that it would no longer accept the materials, and it was obviously preferable for Economy Forms to have money in hand rather than unsold materials in a warehouse. A diligent sales effort having been made, and having been unavailing, recovery of the full contract price is provided by law. The fact that no one will buy the goods is the most convincing possible evidence that they have no present commercial value. Indeed, it appears that the goods may be an economic burden to the Claimant, not a benefit.

In addition to the contract price and incidental damages, the Claimant is entitled to interest based on bank rates in effect from the date of the breach. The average rate of 15% which Claimant seeks is not unreasonable in the light of publicly available data on interest rates during this period of more than four years, which included times of historically high interest rates. Indeed, in various claims

and counterclaims, Iranian parties have routinely demanded interest of 18%, occasionally even 19%.[2]

The Statement of Claim seeks damages from Mana of $2,689,782, based on the contract price and handling charges, plus storage charges and interest from the dates of completion of manufacture to October 31, 1981. Additionally, the Statement of Claim seeks payment of storage charges and interest from October 31, 1981 to the date the Award is paid.[3] I calculate that additional amount to be $389,844. Claimant thus seeks total damages of $3,079,459 from Mana.

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[2] See, e.g., counter-claim of Iran Aircraft Industries Company in Case 15 (Chamber 1) seeking 18% interest. In a letter to President Lagergren filed in that case on January 19, 1983, Mr. A.F. Kashan, Agent of the Islamic Republic of Iran, stated:

> In reply to another question by the President about the basis for the 18%, I stated that this matter should be answered by the original Respondent. However, I added, the rate of interest had probably been calculated based on the tentative gain the Respondent could have received in the normal commercial and banking custom provided the project was implemented properly and therefore there was no Counterclaim.

See also counter-claim of the Ministry of Roads and Transportation in Case 127 (Chamber 3) seeking 18%; claim of Bank Markazi Iran in Case 786 (Chamber 2) seeking interest at 19% based on rate schedule of Bank Melli Iran, London Branch. (The foregoing list is illustrative and is, by no means, exhaustive).

[3] The amounts of the contract price, handling charges and storage charges with respect to each of the five contracts with Mana are set forth in the Award under the heading "Facts and Contentions", and need not be repeated here.

I would, however, not award the full amount claimed, but would reduce the damages by a total of $313,435 in view of the following factors:

(i) I would deduct $200,000 from the $408,591 claimed for handling and storage charges. Economy Forms has claimed amounts which it alleges to be its "standard" charges, but has submitted no evidence of its standard practice. (It should be noted, however, that Mana never challenged the Claimant's figures for these charges, and this may explain the Claimant's not submitting supporting evidence.) I find it necessary to reduce the damages in this respect to $208,591, an amount which is unquestionably reasonable for handling such a large amount of material and for storing it for more than 4½ years.

(ii) I would deduct $71,750 from the interest awarded because I would not calculate interest from the date of completion of manufacture, as claimed, but from 90 days thereafter. Mana's breach of contract cannot definitely be said to have occurred at the moment manufacture was completed.[4]

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[4]Also with respect to interest computations, I do not agree with the statement in the Award that interest on handling and storage charges should accrue only from the date of filing the claim, rather than the dates of breach on the ground that "those charges could not be ascertained from the contracts themselves." Iowa law provides that remedies "shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed." U.C.C. §1-106. Thus, Mana should be liable for interest on all incidental damages from the date on which they were incurred, since only by this means can the Claimant be restored to "as good a position as if [Mana] had fully performed."

(iii) I would deduct $41,685 from the $59,503 claimed for "C. & F. Iran" in connection with the shipment which was aborted when the ship's captain refused to accept goods bound for Iran due to difficulties in unloading there during the Revolution. Based on an invoice submitted, it appears that Economy Forms incurred costs for inland freight to and from the port which should be allowed, but costs of ocean freight cannot be included because it is not clear whether such costs were actually incurred.

Accordingly, in my view, the amount of damages due to Economy Forms from Mana should be $2,766,024. Instead, the Award grants only $1,500,000. The Award states that the lump-sum amount of $1,500,000 was determined "equitably" and includes no details concerning the computation of damages

The facts and the law are clear. In these circumstances, there is no need to resort to "equity" in order to determine lump-sum damages, as the Award has done, and no justification for ignoring principles of contractual remedies under Iowa law, which the Award correctly holds governs these transactions. In any event, even the equitable principles of international law "do not permit an individual judge to pursue merely personal predilections, and they must not be taken to undermine the established principles of the law." M. Hudson, The Permanent Court of International Justice 1920-1942 617 (1943). This is particularly so in a

Tribunal established by a treaty which mandates that we shall "decide all cases on the basis of respect for law." Claims Settlement Declaration, Article V.

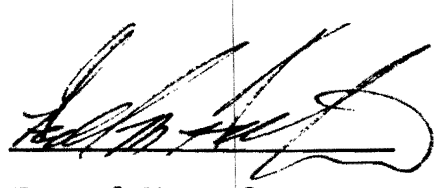
The Award grants Economy Forms damages of $6,000 from Dam & Water Works Construction Company ("Sabir"). Although precise calculation of the damage would yield a slightly higher result, the difference is not material.

The Claimant is, in my view, also entitled to reasonable costs and attorneys' fees in accordance with Articles 38 and 40 of the Tribunal Rules. The Award includes costs of $10,000, but no attorneys' fees. Claimant has requested attorney's fees, expressly leaving the amount to the discretion of the Tribunal. I consider that attorney's fees of $25,000 would be reasonable.

III.

For the reasons stated above, I concur in the "Conclusions" set forth in Part IV of the Award in this case.

Dated, The Hague
20 June, 1983



Howard M. Holtzmann