

ORIGINAL DOCUMENTS IN SAFECase No. 166Date of filing: 29 JUN 84

\*\* AWARD - Type of Award FINAL  
 - Date of Award 22 JUN 84  
14 pages in English \_\_\_\_\_ pages in Farsi

\*\* DECISION - Date of Decision \_\_\_\_\_  
 \_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* CONCURRING OPINION of \_\_\_\_\_  
 - Date \_\_\_\_\_  
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\*\* SEPARATE OPINION of \_\_\_\_\_  
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**DUPLICATE  
ORIGINAL**

دستخواهی اصل

TIME, INCORPORATED,  
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,  
THE BANK OF INDUSTRY AND MINES,  
SHERKATEH CHAP VA NASHREH DANESHEH NOW,  
Respondents.

Case No. 166

Chamber Two

Award No. 139 - 166-2

IRAN UNITED STATES CLAIMS TRIBUNAL	دادرسی دادگاهی ایران - ایالت متحده
FILED - ثبت شد	
Date	۱۳۶۴ / ۶ / ۲۹
29 JUN 1984	
No.	166

AWARD

Appearances

For Claimant: Mr. David Branson, Attorney  
Mr. Robert Ellis, Representative

For Respondents: Mr. Mohammad K. Eshragh,  
Agent of the Islamic Republic  
of Iran  
Mr. Saifollah Mohammadi,  
Legal Adviser to the Agent  
Mr. Ali Khalili, Representative  
of Nashreh Danesheh Now  
Mr. Javad Ziaie, Representative  
of the Bank of Industry and  
Mines

Also present: Mr. John B. Reynolds, III  
Ms. Elizabeth J. Keefer,  
Advisers to the Agent of the  
United States of America

I. The Claims

The Claimant, a New York corporation, claims for U.S. \$905,597, allegedly due pursuant to a contract between the Claimant and the Respondent company, Sherkateh Chap Va Nashreh Danesheh Now ("Danesheh Now"), plus interest and costs. The contract, dated 21 September 1976, stated that the Industrial and Mining Development Bank of Iran (a predecessor of the Respondent, Bank of Industry and Mines) had caused the company to be formed to carry out a project "... to establish in Iran a high quality modern publishing structure for the development, production, publication and distribution of books, magazines, and other print and non-print materials...." The contract prescribed the terms and conditions under which the Claimant would "... render expert advice in connection with the management and supervision of the Project...." The contract specified a term of 42 months from 15 September 1976, that is until 15 March 1980.

Compensation to the Claimant was provided by the contract in two forms, first, payment or reimbursement of the costs of providing the expert advice, including salaries and allowances of both on-site and off-site personnel, overhead, travel costs, relocation costs and consultant costs, and second, a fee of U.S. \$2,250,000, payable in six semi-annual installments of U.S. \$375,000 each, with the first due on signature of the contract. The claim is for the one unpaid U.S.\$375,000 installment of the fee and for invoiced but unpaid costs from July 1978 to September 1979, totalling U.S. \$530,597.

Danesheh Now denies liability, alleging that the Claimant did not properly perform its duties and withdrew its personnel prematurely, thus damaging Danesheh Now, and counterclaims in the amount of U.S.\$2,480,000.

A hearing was held on 11 April 1984 at which all parties were represented.

## II. Jurisdiction

The Claimant has proved to the satisfaction of the Tribunal that it has been at all relevant times a national of the United States. It is admitted that the Respondent, Bank of Industry and Mines, was nationalized, along with other Iranian banks, in June 1979, and it thereby became an instrumentality of the Government of Iran. Evidence has been presented showing that, at the time of its registration in 1976, Danesheh Now had issued 10,000 shares of stock, of which 9,998 were owned by the predecessor of the Bank of Industry and Mines. The Respondents do not contend that significant changes occurred in share ownership prior to the dissolution of Danesheh Now on 18 April 1980, and they acknowledge that the Bank of Industry and Mines was appointed liquidator of Danesheh Now. The Tribunal cannot accept Respondents' argument that ownership of Danesheh Now by a Government-owned bank is inadequate to establish control for the purpose of jurisdiction. See Award No. 55-165-1 (Economy Forms Corporation and The Government of the Islamic Republic of Iran, et al.) dated 14 June 1983.

The Tribunal concludes that the claim against Danesheh Now is a claim against "Iran" as defined in Article VII, paragraph 3, of the Claims Settlement Declaration.

Danesheh Now also contends that the failure of the Claimant to present evidence of its claims to the liquidator within a six-month period provided by Iranian law relating to the liquidation of companies is a bar to the maintenance of its present claims, apparently on the theory that any claims were waived prior to the date of the Claims Settlement Declaration and therefore were not outstanding on that date. However, the Tribunal cannot agree that the existence of a local remedy (in addition to the contractually-provided ICC arbitration remedy) affects the jurisdiction of the Tribunal. See Award No. 21-132-3 (Rexnord Inc. and The Islamic Republic of Iran, et al.) dated 10 January 1983.

### III. The Merits

#### A. The Invoiced Costs

The evidence in this case indicated that the invoices covering the months of July through November 1978 were approved by Danesheh Now with certain minor adjustments. The approved total of those five invoices was U.S. \$235,047. This total was not, however, paid, apparently initially because of disruption of banking services caused by the Iranian revolution and then by a suspension of payment instructions on 10 March 1979 by the new management of Danesheh Now installed following the revolution. The

approval of these invoices in the total amount noted above by the appropriate officials of Danesheh Now establishes a prima facie claim for that amount. In the absence of persuasive evidence that such approval was erroneous, the Tribunal holds that the claim for these invoices is valid and that the Respondent, Danesheh Now, therefore owes the Claimant U.S. \$235,047.

In November 1978 the Claimant and Danesheh Now concluded an agreement that four of the seven members of Time's on-site staff in Tehran would be returned to the United States in order to reduce costs. This agreement was recorded in a written document dated 29 November 1978. The agreement referred to circumstances beyond the control of either party that made it impossible for the employees to carry out their duties and provided as follows:

Under the terms of this Agreement, Time Inc. will liquidate all outstanding claims for salaries, benefits and severance covered under the employment agreements of these employees and Daneshe Now shall reimburse Time Inc. for such expenses incurred. This sum is not to exceed their off-site salaries for the duration of their contract periods after their departure from Iran and Administrative Charges at 50% of their salaries to cover their benefits. In the event the said employees are placed in new positions within Time Inc. or with other employers prior to the termination of their contracts with Time Inc., Daneshe Now's obligation for reimbursement shall cease. Under no circumstances shall D.N. be responsible for total sum greater than Rls 6,821,000 for the aforementioned employees, which is itemized in the attached.

An addendum to the agreement provided:

Time accepts that if Daneshe Now elects to use the services of the above employees or in Time's judgement and with D.N.'s approval, their equivalents, Time shall provide on-site or off-site staff for a total of the unused portion of the above employees' contracts at a total cost equivalent to the net savings shown on the attached sheet.

This agreement of November 1978 appears consistent with several provisions of the contract. Article 8 provided that the parties may agree to change the scope or duration of the project, "... provided, however, that no such agreement changing the scope of the Project or the term of this Agreement shall be effective or binding unless set forth in a written instrument duly executed by both parties hereto."

Article 10, entitled "Force Majeure" provided as follows:

- (a) In the event that either party hereto is prevented from performing its obligations hereunder by reason of any Act of God; unavoidable accident; fire; epidemic; strike; lockout; or other labor dispute; shortage of material or labor; civil disturbance; war; rule; order or act of government or government instrumentality or any other condition or cause of a similar or different nature beyond the party's control, the time within which such obligations are to be performed shall be extended for a period equal to the period during which such condition exists, provided that if such conditions shall continue for a period of three months or more, either party hereto shall have the right to terminate the Agreement thereafter during the continuation by giving the other party at least thirty (30) days prior written notice of such termination.

- (b) In the event that such condition shall occur, the party whose performance is thereby prevented shall give prompt notice to the other party of the nature of such condition, the time when such condition first occurred, and the time when such condition shall have ceased.
- (c) In the event of such termination by either party, the Company shall make all payments up to and including payment for that month in which the work has been performed. Thereafter neither party hereto shall be under any further liability or obligation to the other hereunder. Further, if either party shall so terminate this Agreement, the Company shall be responsible for and bear all costs to Time of the termination of Time's contractual obligations to others in connection with the Project, and for the cost involved in the return to their homes of all personnel of Time.

Finally, Article 14, entitled "Termination" provided as follows:

The Company may terminate the Project and may terminate this Agreement on December 15th, 1977, or on December 15th, 1978, by giving at least ninety (90) days prior written notice to Time of such termination. In such event, the Company shall pay Time all sums payable hereunder up to the date of such termination plus the fee for the six month period specified in sub-paragraph 7 (i) in which the termination occurred, which fee shall be payable within fifteen (15) days after Time shall have given notice to the Company of the amount of the fee. Further, the Company shall be responsible for and shall reimburse Time for the costs to Time of terminating its contractual obligations to others in connection with the Project of which, prior to the notice of termination, the Company has been informed, and for the costs involved in the return to their homes of all personnel of Time.

Thus, while Danesheh Now could have terminated the contract or extended its term under the force majeure clause, it would still have been liable in the event of termination for the costs of terminating the Claimant's

contractual obligations to the personnel and their repatriation costs. Moreover, the parties appear to have hoped in November 1978 that future developments in Iran might make possible a full resumption of activity on the project. In those circumstances, the agreement dated 29 November 1978 can be understood as a means of reducing Danesheh Now's potential liability, while preserving the capability to resume work with a fuller staff.

The Claimant alleges that further similar agreements were reached orally in February and March 1979 for the return of two of the three remaining on-site personnel, but the only evidence of such alleged agreements that has been presented is the testimony of Mr. Ellis, and the Claimant does not allege that the agreements were recorded in writing as would have been required by Article 8 of the contract if they were considered changes in the scope of the project. Rather, the Claimant asserts that the agreements were merely reaffirmations by Danesheh Now of the pre-existing contract commitment to reimburse the Claimant for the costs of the remainder of the contracts of the individuals in question. The Tribunal notes, however, that the contractual commitment relates to termination of the contract, not to withdrawal of the on-site personnel in the absence of termination, which properly must be considered a change in the scope of the project and therefore is required to be in writing.

In the case of one of the two individuals allegedly withdrawn pursuant to these oral agreements, his contract was at an end, so no further salary costs or administrative charges were invoiced concerning him, except for certain costs of relocation which were appropriate under the contract in any event. In the case of the other individual, however, the invoiced charges for his salary and the related administrative charges continued to be made through September 1979, and the Tribunal finds them unauthorized in the absence either of a written agreement changing the scope of the project or of the invocation of force majeure by the Claimant.

The project director remained in Tehran until September 1979, but he was apparently not paid by Danesheh Now after February 1979, and the Claimant included amounts for his salary and the related administrative charges in each of its invoices from March through September. Under the contract between the Claimant and Danesheh Now, the salaries of on-site personnel were to be paid directly to such personnel by Danesheh Now, and the administrative charges relating to these individuals (overhead, retirement benefits, insurance, etc.) were to be invoiced by the Claimant. The Claimant, while stating on each invoice that the salary of the project director after February 1979 was paid by the Claimant, has not presented any evidence that it in fact paid that salary, and it has not provided a copy of its employment contract with the project director, so the Tribunal cannot know

whether it had an obligation to make such payment. Therefore, the Tribunal considers that the claim for the salary of the project director from March through November 1979 fails for lack of proof.

The total amount claimed on the invoices covering the months December 1978 through September 1979 is U.S. \$295,550. From this the Tribunal deducts the charges it has found unauthorized or not proved in the amount of U.S. \$61,818, leaving a net amount of U.S. \$233,732 owed by Danesheh Now to the Claimant with respect to those invoices.

B. The Fee

The final installment of the Claimant's fee was due on 21 March 1979. The contract states that the fee and the overhead costs cover the following:

- i. the expertise, experience and know-how of Time personnel On-Site and Off-Site.
- ii. the association of Time with its goodwill, reputation and high quality standards with the Project.
- iii. access to and use of specific existing systems, techniques and processes in Time's management, editorial, marketing and production areas, as specified in Schedule C attached hereto.
- iv. the preparation by Time of actual training programs, instruction and procedure manuals specifically for the Company and its permanent unlimited use as specified in Schedule C attached hereto.
- v. the exclusive right in Iran to acquire Time Life Book licenses, books and related materials for ten years from the date hereof as specified in Schedule C attached hereto.

The parties appear to agree that the month of March 1979 represented a critical turning point in their relations. In that month Danesheh Now, under new management, suspended payment instructions to the banks, and the Claimant, with the oral agreement of Danesheh Now, withdrew its last on-site expert other than the project manager. On the other hand, the project manager remained for six months more and the copyright privileges remained in effect, and will remain in effect until 1986. Most importantly, neither party invoked force majeure nor took steps to terminate the contract, actions that could have raised questions about the Claimant's right to the March 1979 fee installment. In circumstances such as this, a failure to act may give rise to liability. Certainly there are grounds to support a finding that Danesheh Now breached the contract no later than March 1979 by suspending its payment order for the outstanding invoices and ceasing payment of the salary of on-site personnel, but it could not by its own breach relieve itself of its contractual obligation to pay the fee installment due in March 1979. The question arises whether the entitlement of the Claimant to the final installment of the fee is affected by the fact that the contract states that the fee and the Claimant's overhead costs cover the services to be rendered by the Claimant during the 42 month period of the contract and the privileged access to the Claimant's copyrights until 15 September 1986. Should the Tribunal adjust the fee in view of the premature termination of the services? In the present case, it seems clear that

the contractual provisions preclude such adjustment. Article 7(i) provides fixed dates for the fee installments to become due. Article 14 provides that, in case of termination by Danesheh Now on 15 December 1977 or on 15 December 1978 (which were the two contractually permitted early termination dates) in addition to all sums due up to that date, the fee for the six-month period in which the termination occurred would become due. Article 10(c) provides that in case of termination for force majeure conditions lasting three months or more, Danesheh Now "shall make all payments up to and including payment for that month in which the work has been performed." Thus, the parties have dealt with the fee question with sufficient specificity so that no basis exists for adjustment of the fee by the Tribunal.

Taking into account all these considerations, the Tribunal holds that the Respondent, Danesheh Now, is obligated to pay the Claimant the U.S.\$375,000 fee that was due on 21 March 1979.

C. The Counterclaim

Danesheh Now has introduced no evidence to support its allegation that the Claimant failed to abide by its contractual obligations, asserting merely that the fact it was liquidated in 1980 demonstrates that the Claimant failed to give adequate advice. The counterclaim is dismissed for lack of proof.

**IV. Interest**

In order to compensate the Claimant for the damages it has suffered due to delayed payments, the Tribunal considers it fair to award the Claimant interest at the rate of 12 percent on the amounts due. For the July through November 1978 invoices, the interest shall run from 10 March 1979, the date on which the payment orders were suspended. For the remaining invoices, interest shall run from 31 October 1979. For the fee installment, interest shall run from 21 April 1979.

**V. Costs**

Each party shall be left to bear its own costs of arbitration.

**AWARD**

**THE TRIBUNAL AWARDS AS FOLLOWS:**

The Respondent, Danesheh Now is obligated to pay the Claimant, Time, Inc. U.S. \$843,779 plus interest at the rate of 12 percent per year, calculated as from the dates indicated below, to the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account:

- a) on U.S. \$235,047 from 10 March 1979;
- b) on U.S. \$375,000 from 21 April 1979; and
- c) on U.S. \$233,732 from 31 October 1979.

These obligations shall be satisfied by payment out of the Security Account established by paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981.

The remainder of the claim and the counterclaim are dismissed on the merits.

Each of the parties shall bear its own costs of arbitrating this claim.

This Award is hereby submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

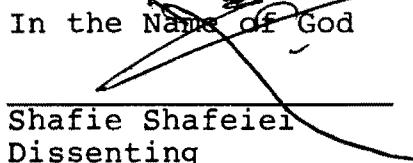
Dated, The Hague  
22 June 1984

Willem Riphagen  
Chairman  
Chamber Two

  
George H. Aldrich

I dissent to the present Award and shall state my dissenting views in the future. But here we should simply note that a portion of the monies which Times, the Claimant company, has already been paid or is now to be paid by virtue of the present Award, constitutes a consideration for cultural services which Times is obligated to perform for the Respondent company until 1986. But the fact is that cultural relations between Iran and America have been totally severed, the circumstances and conditions have completely changed, and the subject of this obligation has on principle been frustrated. Times shall never be able to render the said services until 1986, and yet the majority, acting without regard for these facts and in a vacuum, has awarded against the Iranian company for payment of the monies and interest to Times. This demonstrates the non-legalistic and unjust nature of the Award.

In the Name of God

  
Shafie Shafeiei  
Dissenting