IRAN-UNITED STATES CLAIMS TRIBUNAL

180 — 257
۱۸۰-۲۵۷

دیوان داوری

ORIGINAL DOCUMENTS

Case No. 180 Date of filing: 3 MAY 85

** 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 _____

- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of Richard Mosk

- Date 29 April 85
18 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

_____

- Date _____
_____ pages in English _____ pages in Farsi

R/12

CASE NO. 180

CHAMBER THREE

AWARD NO. 175-180-3

HARNISCHFEGER CORPORATION,

Claimant,

and

MINISTRY OF ROADS AND TRANSPORTATION, INDUSTRIAL DEVELOPMENT AND RENOVATION ORGANIZATION OF IRAN, MACHINE SAZI ARAK AND MACHINE SAZI PARS,

Respondents.

DISSENTING OPINION OF RICHARD M. MOSK
FROM FINAL AWARD

I dissent from the Final Award.

INTRODUCTION

I agree with the Tribunal's view that the Claimant's amendment specifying Machine Sazi Arak ("MSA") as a respondent in Claims 6 and 7 should not be rejected. I respectfully dissent from the Final Award because I believe that the Claimant is entitled to damages for the breaches of contracts by MSA. In my opinion the Tribunal has, by

utilizing theories that are not based on appropriate legal principles and were not raised by the parties, erroneously concluded that MSA is not liable for its breaches of contracts.

MSA IS A PROPER PARTY

The Tribunal was correct in reaching the merits of the allegations in the Claimant's amendment specifying or adding MSA as a respondent to Claims 6 and 7.

In Claims 6 and 7 the Claimant originally did not specify that it was seeking relief for the actions of MSA in its capacity either as an agent or as a principal. It did appear that Claims 6 and 7 were not directed against MSA, but rather against the Ministry of Roads and Transportation ("MORT"). By its amendment, the Claimant, in Claims 6 and 7 sought to hold MSA responsible for breaching obligations under the purchase orders already submitted with the original claim, which purchase orders showed MSA as the obligor. The Claimant maintained its position that MORT was also responsible.

The original claim referred to MSA as an agent with respect to Claims 6 and 7. The prayer for relief does not state which Iranian entity or agency specifically is

responsible. Yet, the accompanying documents, which constitute part of the claim, show MSA as the purchaser of the cranes. As the Government of Iran is responsible for payment of awards out of the Security Account, it should not matter which Iranian government entity bears direct responsibility -- at least for purposes of determining the existence of liability to United States claimants. Moreover, even under Claims 6 and 7 as originally presented, MSA could be held liable as an agent for an undisclosed principal. See American Law Institute, Restatement (Second) of Agency § 322 (1958). One of the purposes of the Pre-Hearing Conference is to clarify the pleadings. This was done, and thus the Tribunal invited the Claimant to submit an amendment referring to MSA as a specifically named party to Claims 6 and 7. The Claimant made such a submission. In so doing, the Claimant was not naming a new party. MSA was already a party in the proceeding, although it had not been specified as a respondent to Claims 6 and 7. In view of these factors, perhaps the amendment could be accepted as a clarification of a claim. See In re Refusal to File Claim of AMF Overseas Corporation, Decision No. 17-Ref 20-FT (8 Dec. 1982), reprinted at 1 Iran-U.S. C.T.R. 392 (permitting specification of a party by amendment to clarify a claim).

Even if the Claimant's amendment is considered an attempt to add MSA as a new Respondent to Claims 6 and 7,

the Claimant should be able to do so and to have the amendment relate back to the date of the filing of the claim so that the amendment would not be barred by the time limitation for filing claims. A question arises as to whether the Tribunal, in determining if such an amendment is to relate back, should interpret and apply its own rules or look to the municipal law applicable under choice-of-law principles.

Whether an amendment should be permitted is a question that is normally considered to be procedural. Indeed, there is Tribunal jurisprudence concerning the adding of parties by amendment.

Yet, the issue is outcome-determinative and thus could be considered more "substantive" than "procedural." In the United States, some federal courts have applied more liberal state rules regarding the relation back of amendments rather than federal rules, thereby indicating that the issue is one of substantive law. See Marshall v. Mulrenin 508 F. 2d 39 (1st Cir. 1974). Other United States authorities have suggested that the issue is one of procedure governed by the federal rules which are applicable to cases in federal courts. See 3 Moore's Federal Practice § 15.15(2) at 15.186-93 (2d ed. 1985); Loudenslager v. Teeple, 466 F. 2d 249 (3d Cir. 1972). Moreover, with respect to a conflict of laws regarding the statute of limitations, there

is a lack of unanimity as to which law to apply. See Ehrenzweig on Conflict of Laws 428-36 (1962).

However one characterizes the issue of whether an amendment relates back, the Tribunal should develop and, indeed, has developed, its own law on the subject. The Tribunal is not bound by particular choice-of-law principles, but rather can apply whatever law it deems most appropriate.[1] In the instant case, several jurisdictions are involved, and ascertaining municipal law on this issue would be particularly difficult.[2] International tribunals have applied their own rules in permitting amendments to pleadings, including amendments which add or change

---

[1] Article V of the Claims Settlement Declaration provides that "[t]he Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."

[2] Such an amendment would not necessarily be precluded in various municipal jurisdictions. See Rule 15(c) of the United States Federal Rules of Civil Procedure; Sections 263 and 264 of the German Code of Civil Procedure; A. Baumbach, W. Lauterbach, J. Albers & P. Hartmann, Zivilprozessordnung §§ 263-264 (41st ed. 1983) (discussion of judicial practice in Germany to permit change of parties and of legal theories).

parties. See A.H. Feller, The Mexican Claims Commissions 118, 238-41 (1935); J. Simpson & H. Fox, International Arbitration 182-83 (1959).

MSA was already a party to the proceeding and thus had notice of all of the claims. Indeed, it responded on the merits to the claims in question in its first Statement of Defence. Neither the claims for damages, the form of the claims, nor the bases of liability were altered. The only change was one specifically referring to MSA as an obligor. As noted supra, MSA could be liable under the original claim as an agent for an undisclosed principal. The claim was part of a series of dealings in which MSA was already named as a party. Under these circumstances, and based on the practice of international tribunals to be liberal in permitting such amendments, MSA can be added to Claims 6 and 7, which amended claims would relate back to the date of the filing of the original claim. See Samuel Davies (U.S.A.) v. United Mexican States, 4 R.I.A.A. 517 (1929); Mary Evangeline Arnold Munroe (U.S.A.) v. United Mexican States, 4 R.I.A.A. 538 (1929); Gervase Scrope (Great Britain) v. United Mexican States, 5 R.I.A.A. 254 (1931); see also Rep. Alemana (Juan Laue y Cia., en Liquidación) v. Estados-Unidos Mexicanos, Decision 44, German-Mexican Claims Commission, cited in A.H. Feller, The Mexican Claims Commission, supra at 118 n. 113.

Tribunal precedent does not preclude the amendment. In Kimberly-Clark Corp. and Bank Markazi Iran, Award No. 46-57-2 (25 May 1983), reprinted at 2 Iran-U.S. C.T.R. 334, the Tribunal held that an unnamed party could be named as a party respondent by an amendment under Tribunal Rule 20 after the time period for filing claims had expired.

Tribunal Rule 20 provides as follows:

> During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that it falls outside the jurisidiction of the arbitral tribunal.

The rule by its terms contemplates the validity of an amendment adding or changing a party. See Kimberly Clark Corp. and Bank Markazi Iran, supra. There is no indication that Rule 20 does not apply to all amendments - or that it excludes adding or changing parties. Even if Rule 20 were not specifically applicable, its terms would provide "guidance" as to the appropriate procedures. American International Group, Inc. and Iran, Award No. 93-2-3 at p.9 (19 Dec. 1983).

This Tribunal has generally allowed Iranian respondents substantial freedom to amend their pleadings at various stages of proceedings. It has not rejected a claimant's amendment adding a new claimant after the period for filing claims expired. Id.; In re Refusal to File Claim of AMF Overseas Corporation, supra. Likewise it has not precluded a claimant from adding a new respondent to a claim after the time for filing a claim had expired. Kimberly-Clark Corp. and Bank Markazi Iran, supra.

In In Re Refusal to Accept the Claim of Raymond International (U.K.) Ltd., Decision No. 18-Ref 21-FT (8 Dec. 1982), reprinted at 1 Iran-U.S. C.T.R. 394, the Tribunal, by a 5 to 4 majority, refused to permit the substitution of a new claimant for the original one. Although I believe that decision to be wrong, it is distinguishable from the instant case in which the Respondent was already a named party to the action and was being added as a respondent to specific sub-claims.

The essence of Rule 20 is that amendments are permitted, subject to a countervailing showing of unreasonable delay by a claimant or prejudice to a respondent. There has not been any indication that either of these two circumstances exists in the instant case. Indeed, the Tribunal accepted the amendment, and all of the parties and the Tribunal proceeded on the merits.

Apparently, had the Claimant listed Iran in the caption or specified with greater particularity each Respondent in each Claim, there would have been no need to amend the Claim. But it must be recalled that when the Claim was filed, there were few Tribunal guidelines on pleadings and no Tribunal jurisprudence.

A workable rule is the modern rule in the United States which permits an amended pleading adding a party or changing the capacity of a party after the limitations period has expired if that party had adequate notice of the action and of the plaintiff's mistake in failing to name it at the outset. See 6 Wright and Miller, Federal Practice and Procedure: Civil § 1497 at 499 (1971); 3 Moore's Federal Practice, supra at § 15.15[4] at 15-211-12; Annot, 8 ALR 2d 6 (1949). This "modern rule" is "the result of a development which, in furtherance of the policy that cases should be decided on their merits, gradually broadened the right of a party to amend a pleading without incurring the bar of the statute of limitations." Austin v. Massachusetts Bonding & Insurance Co., 56 Cal. 2d 596, 600, 364 P.2d 681, 683 (1961). In the instant case, at the earliest stages of the proceeding, MSA was informed of the action and, as is clear from its defenses, knew that it was the proper party to the dispute.

Judge Lauterpacht has noted that in international cases "the importance of the interests at stake precludes excessive or decisive reliance upon formal and technical rules." H. Lauterpacht, The Development of International Law by the International Court 336 (1958). A commentator on the International Court of Justice pointed out that "the Court is not prepared to turn a case upon a technical rule of evidence or procedure." Alford, "Fact Finding by the World Court," 4 Vill. L. Rev. 37, 80-81 (1958). As Judge Manfred Lachs of the International Court of Justice has commented, "exaggerated formalism may . . . in some circumstances deny the administration of justice." M. Lachs, "The Revised Procedure of the International Court of Justice," Essays on the Development of the International Legal Order 24-5 (F. Kalshoven, P.J. Kuyper & J. G. Lammers, eds. 1980); see also Dissent of Howard M. Holtzmann to In re Refusal to Accept the Claim of Raymond International (U.K.) Ltd. supra, reprinted at 1 Iran U.S. C.T.R. at 396-402.

The Tribunal should follow these views and avoid the now much criticized approach to pleading prevalent in eighteenth century England. One court, in allowing an amendment substituting a party to relate back to the filing of the action so as to avoid the bar of the statute of limitations, stated as follows:

> There was a time in England and in this country when the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtle, artificial, and technical rules governing the statement of actions and defenses -- for the entire system of special pleading was built up by the judges without the sanction of any written law -- that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of.

McDonald v. Nebraska, 101 F. 171, 182 (8th Cir. 1900).

The court added,

> Happily for mankind, and for the law itself, that epoch is past in England and in this country, and we now have an epoch in which substance is more considered than form, in which justice and right of the cause determines its decision, and not some technical error or mistake in the pleading.

Id.

CHOICE-OF-LAW

In Claim 6, the purchase orders in question were placed with the Claimant in the United States. Thus, under traditional choice-of-law principles and the holding of the

Partial Award, United States law, in particular the Uniform Commercial Code, would generally be applicable to those transactions. Claim 7 involved an indirect claim brought on behalf of Claimant's German subsidiary. German law would normally be applicable to the transactions in that claim. The law applicable to allegations concerning the creation of the contracts, including agency principles, is not clear. See discussion in Concurring Opinion of Richard M. Mosk in Oil Field of Texas, Inc. and Iran, Interlocutory Award No. ITL 10-43-FT (10 December 1982), reprinted at 1 Iran - U.S. C.T.R. 347, 363, 377-78.

Unfortunately the majority does not discuss the source of the law it applies. I recognize that it is not always necessary to discuss the source of the law utilized, even when multiple jurisdictions are involved. It may be difficult for the Tribunal to obtain any consensus on the appropriate source of the legal principles applied. Often the parties do not raise any choice-of-law questions. Moreover, under Article V of the Claims Settlement Declaration, the Tribunal has great flexibility in its choice of law. Accordingly, the Tribunal sometimes has rejected the application of municipal law and has applied general principles of law. It has also adopted its own procedural law and choice-of-law principles. See Bellet, "Forward," 16 Law & Policy Int'l Bus. 667, 672-74 (1984).

As Judge Pierre Bellet has written, "the modern view seems to be that international arbitrators need no longer be bound by strict rules of conflicts of law." Id. at 673. In addition, determining the law of any jurisdiction, especially without the assistance of the parties, can be difficult. For example, the Tribunal has no access to reported judicial decisions in Iran. Similarly, in various systems, the doctrine of stare decisis is not necessarily applicable. See A. Von Mehren & J. Gordley, The Civil Law System 1133-39 (1977); Ancel,"Case Law in France," 16 J. of Comp. Leg. & Int'l. Law 1, 16-17 (1934). United States law is not always uniform, as there may be conflicts within and between jurisdictions in the United States. The application of choice-of-law doctrines, in practice, is not precise. Finally, there is often no indication that issues would be decided any differently under whatever laws might be applicable.

The majority's opinion in this case, however, might be more comprehensible if it contained a discussion of the source of the law applied. With respect to Claims 6 and 7 there appears to be choice-of-law issues. Indeed, in the Partial Award, the Tribunal specifically discussed its choice of law with respect to transactions similar to those involved in Claims 6 and 7. Yet, in the instant matter, the Tribunal gives little indication that it considered the possibility that different law might apply to different

transactions and to different issues involved in this case. One cannot discern from the majority's opinion how the majority derived whatever legal principles it invokes.

MSA'S LIABILITY

The majority acknowledges that MSA submitted purchase orders to the Claimant, which purchase orders were accepted. The majority then seems to agree that the contracts were not void under the doctrine of mistake of fact. Finally, the majority seems to suggest, in effect, that MSA can avoid liability for its breach of contracts on the theory that it would be "contrary to good faith" to permit the Claimant to rely on the contracts when MSA's expectations were not realized.

This seemingly novel theory was not raised or discussed by any of the parties. Generally a defense seeking to make a contract unenforceable should at least be raised by a respondent as an affirmative defense.

The majority offers little support for its decision. The legal authority cited by the majority does not support its conclusion. That authority discusses the concept of mistake as a ground for rescinding a contract. Of course, in the instant case, MSA did not seek to rescind

the contracts, but rather denied that the contracts ever came into existence. Indeed MSA's only defense was that its obtaining the issuance of a letter of credit was a condition precedent to the contracts - a defense rejected by the Tribunal in similar claims in the Partial Award.

It is difficult to conceive of the application of a concept of good faith against the Claimant. The Claimant performed its obligations and did nothing to inhibit MSA in the performance of its duties. If anyone lacked good faith, it would be MSA. MSA knew that the Claimant was manufacturing machines to meet stringent time deadlines, and MSA took steps to arrange for the shipment of the goods. Despite these facts, MSA failed to obtain the issuance of letters of credit as it had promised to do.

I realize that the record is somewhat unclear as to MORT's position in the transaction. Yet, the majority's speculation on MSA's role is not supported by the evidence. MSA did indicate at one point that it did not wish to acquire the machines unless it had contracts to resell the machines to MORT. MSA also insisted that the Claimant be subject to a penalty for late delivery even if MORT did not provide for such a penalty in its contracts with MSA. Moreover, MSA was to receive more money for its resale of the machines than it paid for them. It should be

noted that MSA purchased other equipment from the Claimant and presumably then resold that equipment for a profit. In addition there is correspondence between MSA and MORT in which MSA sought to sell MORT equipment. In the Partial Award, the Tribunal held MSA liable for its purchases from the Claimant and also held MORT liable on some of its purchase orders to the Claimant. All of this evidence shows that MSA acted as an independent entity and did not invariably rely on the Claimant to arrange sales to MORT or to others.

The majority acknowledges that there were purchase orders. If MSA was not a party to them, MORT had to be the party. But, if one is to speculate on what really occurred, I would infer from the evidence that MORT did order the equipment from MSA, and thus, when MORT'S highway construction project was terminated, MORT reneged on its contracts with MSA.

Whether MSA is called a "conduit" or "middleman" or "wholesaler," it entered into enforceable agreements with the Claimant. If MSA did not have firm or enforceable agreements with MORT then MSA took the risk that it would purchase goods without being able immediately to resell them. If MSA was so careless that it did not have binding contracts for the resale of the equipment, I see no reason

why the Claimant should bear the entire loss. That the Claimant was involved in trying to have the proposed ultimate purchaser, MORT, acquire the goods is a normal commercial practice which should not affect MSA's responsibility. The Claimant received specifications and purchase orders and promptly acted upon them. Thus, I do not believe there is sufficient evidence to establish the Claimant's lack of good faith.

The majority refers to Section 242 of the German Civil Code, which section provides that, "The debtor is obliged to perform in such a manner as good faith requires, regard being paid to general practice." N. Horn, H. Kötz & H. Leser, German Private and Commercial Law: An Introduction 135, 142 (T. Weir, trans. 1982). Under the facts of this case, that section does not appear relevant. In discussing that provision, it is stated in an authoritative work as follows:

> There is certainly much dispute over the details. What is clear is that the courts will not depart from the principle that contracts must be honoured and risks lie where the parties have agreed except when such a departure is necessary to avoid intolerable results which are irreconcilable with law and justice. In other words, it must be grossly unfair to expect the debtor to perform the original contract. If so, the contract is adapted to the extent that the obligations are susceptible of adaptation, or particular

> provisions may be treated as void; only in extreme cases is the whole contract rescinded.

Id. at 143-4. Surely, this case is not such an "extreme" one as might cause a German Court to rescind the contracts. In view of MSA's conduct, it is "grossly unfair" to exempt MSA from all responsibility.

THE PROCEEDINGS

I remain troubled by the notion that one claim can be divided into different majorities, thereby giving the Chairman the power to dictate the results on various segments of the case. See Dissenting Opinion of Richard M. Mosk in Final Award, Ultrasystems Incorporated and Iran, Award No. 89-84-3 (7 Dec. 1983); cf. Klanseck v. Anderson Sales & Service, Inc., 356 N. W. 2d 275, 279 (Mich. App. 1984) (the same jurors comprising the majority must agree on liability and damages).

CONCLUSION

Based on the foregoing, I dissent from the Final Award in this case. I would have held MSA liable under Claims 6 and 7.

Dated, The Hague,

29 April, 1985

Richard M. Mosk

Richard M. Mosk