IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 188

Date of filing 27 July 1983

188-104

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✓ AWARD. Date of Award 27 July 1983

24 pages in English. 20 pages in Farsi.

_____ DECISION. Date of Decision _____

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IRAN-UNITED STATES CLAIMS TR[redacted] دیوان داوری دعاوی ایران - ایالات

CASE NO. 188

CHAMBER TWO

AWARD NO.61-188-2

GRUEN ASSOCIATES, INC.,

Claimant,

and

IRAN HOUSING COMPANY, MINISTRY OF HEALTH AND SOCIAL WELFARE, GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date ۱۳۶۲ /۵/ ۵ تاریخ
27 JUL 1983
File 188 ۱۸۸ شماره

AWARD

Appearances:

For Claimant:

Mr. Ralph E. Erickson
Mr. Marc C. McGuire
Ms. Susan Currie
Attorneys for Claimant
Mr. Daniel M. Branigan
Vice President of Claimant

For Respondents:

Mr. A.F. Kashan
Agent of the Islamic Republic of Iran
Prof. J. Niaki
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Mr. A. Fallahzadegan
Assistant to the Legal Adviser
Dr. Yahya Aboulfotuh
Attorney for Iran Housing Co.
Mr. Hasan Naghshineh
Mr. Mir Faramarz Tabaie Bigdoli
Representatives of Iran Housing Co.

DUPLICATE ORIGINAL
«نسخه برابر اصل»

Also present:

Ms. Jamison M. Selby
Deputy Agent of the United States of America
Ms. Frances A. Armstrong
Legal Adviser to the Agent

I. The Proceedings

The Claimant filed its Statement of Claim on 28 December 1981, naming as Respondents the Iran Housing Company, the Ministry of Health and Social Welfare and the Government of the Islamic Republic of Iran. The claim was for U.S. $3,123,375, plus interest and costs, and was based principally on a contract dated 15 May 1977 for architectural and engineering services in connection with a medical center to be built in Tabriz, Iran.

The Respondent Iran Housing Company filed a Statement of Defense on 15 March 1982 denying the jurisdiction of the Tribunal, denying liability and setting forth counterclaims in the amount of Iranian rials 59,298,896 based on alleged deficiencies in performance by the Claimant and on taxes and social security payments allegedly due. The Ministry of Health also filed its Statement of Defense on 15 March 1982, denying that the claim was attributable to it.

The Claimant filed its evidence, in the form of four affidavits and fifty exhibits, accompanied by a summary of evidence and a legal brief, on 28 March 1983. The Respondent Iran Housing Company filed both a brief memorandum and a "Reply to the Claimant's Summary of Evidence and Legal Brief" on 29 April 1983. The Claimant filed a rebuttal brief and additional evidence, composed of one affidavit and eleven exhibits, on 16 May 1983. The Hearing was held on 26 May 1983 at which the Claimant, the Iran Housing Company and

the Government of the Islamic Republic of Iran were represented. During the Hearing, the Respondent Iran Housing Company submitted a memorial which, with the permission of the Tribunal, was served upon the Claimant. The Claimant filed two additional affidavits, one on 26 May 1983 and one on 27 May 1983.

At the request of the Tribunal, the Claimant deposited with the Registry on 1, 2 and 27 June 1983 for ultimate transfer to the Iran Housing Company documents it had produced under the contract but had not transferred. The Claimant also filed on 27 June 1983 a post-hearing brief and post-hearing evidence, composed of two affidavits and twenty-two exhibits. On the same date, the Respondent Iran Housing Company filed a post-hearing brief accompanied by two exhibits.

It should be noted that, before setting a schedule for evidence, briefs and hearing, the Tribunal did not request any reply and rejoinder because the parties had signed a settlement agreement and because the contract contained a forum clause of a type that raised questions whether the Tribunal had jurisdiction over the claim. It was clear that the Respondents might find it difficult to request an award on agreed terms in a case with a forum clause of a type that they were simultaneously asserting ousted the Tribunal of jurisdiction. Therefore, the Tribunal decided to take no further initiative in the case until the forum clause question was decided.

After the forum clause decisions were rendered in November 1982, the Tribunal assumed, because of the settlement agreement, that the parties could respond promptly and established an expedited schedule for further pleadings and Hearing. In fact, however, the Respondents made numerous requests for extensions, which the Tribunal refused, and the Claimant withdrew its acceptance of the settlement agreement. In order to ensure that all relevant arguments and evidence were presented, the Tribunal, as noted above, requested and received post-hearing submissions.

At the Hearing, the Respondents argued for the first time that the claim in this case was linked so closely to the claim of the medical planning company involved in the same project (Claim No. 179 of AHFI Planning Associates, Inc.), that any decision in this claim should be postponed until that other claim could also be heard. Despite the untimeliness of that argument, the Tribunal agreed to consider it and join it to the merits.

II. The Facts

A. The Contract

In March 1977 the Claimant's President and Vice President met with the Minister and Deputy Minister of Health and Social Welfare and, at their suggestion, negotiated a contract with the Managing Director of the Iran Housing Company for studies and supervision of architectural works at a large medical center, including an 1100 bed hospital

and medical school, to be built at Tabriz. The contract was signed on 19 March 1977, jointly and severally as the Consulting Engineer, by the Claimant and by NASCO Consulting Engineering Company, an Iranian firm. Iran Housing Company signed as the Employer on 15 May 1977. The contract and its appendices provided for the division of the work, and of the fees between the Claimant and NASCO. In essence, NASCO was to co-ordinate services and to give special attention to the cost estimates of the project, while most of the technical work was to be performed by the Claimant. The fees for all work under the contract were 0.75% of the project cost for NASCO, 4.75% of the project cost for the Claimant.

The work was divided into three phases (Article 2.1). Phase I, to be completed within nine months from the date of the contract, covered the preliminary studies. Under Phase II, which was to be completed within eleven months from the date of approval of the report on Phase I, the Claimant was to prepare, on the basis of the schematic design reached in Phase I and of services to be provided by Medical Planning Associates, a U.S. medical consulting engineering firm, the detailed specifications, executive and final drawings and all technical calculations for the implementation of the Project. Phase III related to the supervision of the construction works. In the course of the performance of each phase, the Architect was obliged to submit monthly reports to the Employer.

The contract gave the Employer the right to change the scope of the required servcies at any time, in which event the fees would then accordingly be reduced or increased (Article 2.2). Along the same lines, it was also provided (Article 2.3): "After completion of any of the phases of the Contract the Employer shall not in any way be obligated to employ the services of the said Consulting Engineer for subsequent phase(s)."

Of the aggregate fees of 4.75% of project cost to be paid to the Claimant for all services under the three phases, 0.95% related to Phase I, 2.375% related to Phase II and 1.425% related to Phase III. For payment of the 2.375% fees related to Phase II, which are disputed in the instant case, a 20% advance payment was to be made on the start of the work on this phase, and four further 20% payments were to be made, one after expiration of one third of the duration of that phase, another after two thirds of the duration, another after submission of the report and documents of the phase and the last after approval of such report. Furthermore, the contract contemplated an adjustment of fees in cases where the period of execution of any phase would be extended beyond the time limits for reasons other than the default of the Consulting Engineer. In such cases, Article 13.3 of the contract provided that fees for the extension period were to be calculated on the basis of 75% of the average monthly fees in the relevant phase.

Finally, as to the termination of the contract, the contract contained two provisions of interest in the instant case. Article 17(b) contemplated a termination for the Employer's convenience. Such termination was allowed with a two month notice. The Consulting Engineer was then entitled to receive all fees for the works carried out until the date of the termination, after deduction of the amounts previously paid in this respect, and to be reimbursed for all specified costs incurred for the execution of the contract. Article 17(b) specifically excluded any other compensation for damages resulting from the termination. Article 22 contemplated a termination by either party in case of force majeure. This Article elliptically provided that "[i]n such event, the Consulting Engineer shall, within one month from such declaration of termination of Contract, submit to the Employer a bill listing the amounts that are to be paid to it by the Employer, and the latter shall, within thirty (30) calendar days after the receipt of the said bill consider it and pay all the payable amounts to the Consulting Engineer."

B. Performance of the Contract

Phase I of the contract was performed normally and without any dispute arising between the parties. The evidence shows that monthly reports were regularly submitted to Iran Housing Company, as the contract required, and the final Phase I documents were submitted in February 1978. On 18 March 1978, a meeting was held between the Consulting Engineer and the governmental authorities. According to the

Claimant, oral approval of the Report was given on this occasion. The evidence also shows that in early April 1978 the Employer still had some objections concerning the part of the report related to the use of local resources for achievement of the Project. In any event, on 2 May 1978 after discussions during several review meetings, Iran Housing Company confirmed to the Consulting Engineer in writing that it approved a supplementary report concerning the structural systems and materials to be used in the Project. On 20 May 1978, Iran Housing Company recommended to the Ministry of Health the approval of the "Project". On 3 June 1978, the cost estimate of Phase I was agreed upon in the course of a meeting among Iranian Housing Company and the Claimant and NASCO. On 10 June 1978, Iran Housing Company requested the Ministry to pay the balance of the fees due for Phase I, this phase having been approved. A copy of this request was sent to the Claimant. This payment was effectively made on 26 July 1978, and the good performance guarantee was released one month later.

As early as 6 June 1978, the Claimant requested Iran Housing Company to pay Rls. 76,121,451 as advance payment for Phase II, stating that the Phase II studies had already started. On 9 July 1978, Iran Housing Company wrote NASCO and Gruen advising them to start the work on Phase II. On 23 July 1978, the Consulting Engineer wrote to Iran Housing Company stating that the start of studies on Phase II of

the Project depended on the receipt of finalized instructions concerning patient rooms. On 9 August 1978, NASCO and Gruen requested Iran Housing Company to made the advance payment of Phase II, stating that the start of the studies was not possible without such payment. Several other, similar letters were also sent to the Housing Company. Moreover, no monthly reports were submitted by the Consulting Engineers after the end of Phase I. Finally on 9 October 1978, Iran Housing Company notified NASCO and Gruen that "it has been informed that any further studies concerning this project should be postponed until the policy of the Ministry of Health and the status of the project are cleared. Therefore we would like to ask you to see to the postponing of any action until further advised and also to submit a report on the action performed up to this date."

The requested report on the services performed was submitted by NASCO and Gruen on 14 November 1978. It summarized the status of the work by building. On the same date, Gruen requested Iran Housing Company to make the second payment of fees contemplated for Phase II, since one third of the duration of this phase had by this date expired. On 18 December 1978, NASCO requested Iran Housing Company to pay it 20 percent of its Phase II fee, asserting that "about 20 percent" of the studies had been done.

III. Contentions of the Parties

On the basis of the above facts, the Claimant requests an award of:

1) U.S. $2,835,687 for amounts allegedly due under the contract but unpaid for Phase II from 10 June to 9 December 1978;

2) U.S. $93,611 allegedly due under the contract for expenses resulting from termination, including $63,630 for property allegedly lost or expropriated;

3) Interest on the above amounts at the contractual rate of 6 percent per annum from the dates due; and

4) U.S. $120,000 as the costs of arbitration.

Respondent, the Iran Housing Company, denies the jurisdiction of the Tribunal on three grounds: 1) that the Claimant has not proved it is a national of the United States as defined in Article VII, paragraph 1 of the Claims Settlement Declaration; 2) that the Iran Housing Company is not controlled by the Iranian government so as to be "Iran" as defined in Article VII, paragraph 3 of the Declaration; and 3) that the contract provides that all disputes thereunder are within the sole jurisdiction of the Iranian courts and is thereby excluded from our jurisdiction by Article II, paragraph 1 of the Declaration.

On the merits, Iran Housing Company contends:

1) that no Phase II work was done by the Claimant and it is therefore entitled to no compensation under Phase II;

2) that the claimed termination costs are not due because the contract was not terminated, because the situation was one of force majeure and because no expropriation has been proved; and

3) that any award should calculate the conversion of rials to dollars only at the rate on the date of execution of the award, not the date of alleged breach.

Iran Housing Company further asserts three counterclaims:

1) 40 million Iranian rials for alleged defects in the Phase I work;

2) 10,480,500 Iranian rials allegedly due to the Social Security Organization by the Claimant as Social Security payments; and

3) 8,818,396 Iranian rials allegedly due by the Claimant to the Ministry of Economic Affairs and Finance as taxes.

The Iran Housing Company also seeks its costs.

The Claimant denies all three counterclaims and asserts that the tax and social security claims are outside the jurisdiction of the Tribunal.

The Respondent Ministry of Health and Social Welfare denies that the claim is attributable to it. The Respondent Government of the Islamic Republic of Iran filed no

pleadings in its own name, although it was represented at the Hearing.

IV. Jurisdiction

A. Nationality

The Claimant has satisfied the Tribunal that it met the requirements of Article VII, paragraph 1 of the Declaration as a national of the United States. It has supplied a certificate of the Michigan Department of Commerce indicating that Gruen Associates, Inc. was organized under the laws of the state of Michigan on 12 October 1955 and that it continuously maintained its legal corporate existence from that time through 19 January 1981. The Claimant has also provided the complete list of its partners from March 1977 through 19 January 1983 and their records of birth or naturalization certificates showing that they are all citizens of the United States. Such evidence, which has not been rebutted by the Respondents, is conclusive. The fact that the Claimant corporation was dissolved in 1982 does not affect this question, as the only relevant period for the purpose of jurisdiction is the period from the time the claim arose until 19 January 1981. Furthermore, payment can still be made to the Claimant as, under the law of Michigan, it apparently continues to exist for the purpose of prosecuting and recovering claims.

B. Status of Iran Housing Company

While the "Employer" in the contract is the Iran Housing Company, not the Ministry of Health and Social Welfare, evidence was presented that identified the Ministry as the real party in interest, with key decisions being made by the Ministry or, in some cases, by higher levels of the Government. Any doubts about whether the Housing Company is "Iran" within the meaning of Article VII, paragraph 3 of the Declaration were removed when the Claimant brought to the attention of the Tribunal Article 7 of a law enacted in July 1979 amending the Law for the Formation of the Social Security Organization. (Official Gazette No. 10043, dated 25-5-1358 (16 August 1979)). That Article reads as follows:

> Article 7. As of the date of the enactment of this law, Bank Refah Kargaran and the Iran Housing Company are removed from the Ministry of Health and Welfare; and while preserving their juridical personality and their financial and administrative independence, they shall be administered under the supervision of the Social Security Organization in accordance with the charters which shall be approved by the Council of Ministers upon the recommendation of the High Council of the Organization. Until new charters are approved, the present charters and regulations of each of the above organizations remain effective. (Emphasis supplied).

Thus, the Tribunal concludes that a claim against the Iran Housing Company is a claim against "Iran" pursuant to the Declaration.

C. Forum Clause

Article II, paragraph 1 of the Claims Settlement Declaration excludes from the jurisdiction of the Tribunal "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts...."

Article 23 of the contract, on which the Respondent Iran Housing Company relies to deny the Tribunal's jurisdiction over the claim, provides:

> Should (the parties) fail to solve the dispute on the basis of the Contract and relevant rules and regulations, the matter shall be settled through competent courts according to the Iranian Laws.

The above cited provision of the Claims Settlement Declaration requires that the forum clause specifically provide for the sole jurisdiction of Iranian courts. Consistent with the ruling of the Full Tribunal on similar forum clauses (see, Full Tribunal interlocutory awards in cases no. 6, Gibbs & Hill, no. 68, "HNTB", no. 254, Zokor International Inc.), the instant forum clause does not unambiguously restrict jurisdiction to the Courts of Iran. Consequently it does not exclude the jurisdiction of the Tribunal over the claim based on the contract.

For the foregoing reasons, the Tribunal holds that it has jurisdiction over the claims in this case. The jurisdictional questions raised with respect to the tax and social security counterclaims are discussed briefly below in the section on the merits of those counterclaims.

V. Requested Postponement

As noted at the end of Section I above, the Tribunal agreed to consider a belated request made by the Respondents at the Hearing to postpone any decision in this case until the Tribunal is able to take up and decide also claim no. 179 which has been brought by the company that was providing the medical planning expertise with respect to the Tabriz medical center. Respondents argue, in essence, that the work product of the claimant in case 179 was needed by the Claimant in the present case before it could do its Phase II work and that, if we reach a decision in this case, such decision could prejudice Iran's position in case 179. After examining the question, however, the Tribunal believes that the relation between the two cases is not sufficiently close to justify at this late date their joinder or the postponement of a decision in one until the other is ready for decision. The nature of our present award is such that it should not prejudice the position of any party in case 179. Therefore, the request to postpone the present award is denied.

VI. Reasons for the Award

The Claimant does not contend that the amount of Phase II work it has done is as much as the percentage of the Phase II fee that it is claiming; rather, the Claimant contends that, while the Employer had the right to terminate the contract for its own convenience, the Consulting Engineer was protected by the two-month's notice requirement of Article 17(b) and by the payment provisions of Article 13 requiring payments based upon the passage of time. In other words, there is no disagreement that the Respondents have received very little of the work product called for by the contract for Phase II and that final drawings, in general, have not been made.

On the other hand, there is little doubt that the Claimant incurred expenses in performing uncompensated work after the end of Phase I. While the Respondents may disagree, as stated in Iran Housing Company's post-hearing brief, that the drawings supplied in June are properly attributable to Phase II, there is no reason to believe that many of the structural calculations are not attributable to Phase II, as well as certain other activities, such as consultations with potential construction contractors and calculations with respect to solar heating. Certainly, also, the Claimant incurred expenditures related to the maintenance of its office and personnel in Iran from June to December 1978, although the Claimant admits that it never

assigned to the contract most of the additional personnel needed to do the drawings, citing the Respondent's failure to make any Phase II payments.

We are left with considerable uncertainty about when Phase I ended, when Phase II began, and even whether Phase II began at all in any meaningful way. The Claimant asserts that Phase I ended no later than 10 June 1978 (although in his Report of 14 November 1978 he once says 20 June and at another place says 30 June), but the final payment for Phase I was made only on 26 July 1978 and the good performance retention was released only on 27 August 1978. While the contract reads as if the Iran Housing Company were the Employer, making the decisions and having the obligations, it was clear in fact that the final decisions rested with the Ministry of Health and Social Welfare and, perhaps on some issues, at higher levels. Thus, it is scarcely surprising that the 9 July 1978 letter from Iran Housing Company to NASCO and Gruen, advising them to start the Phase II work, did not produce an assignment of new employees or any tangible increase in the level of their activity; nor is it surprising that NASCO and Gruen sent the Housing Company four letters over the next several months stating that Phase II studies could not begin until the advance payment was made and finalized instructions were received with respect to the enlargement of patient rooms and the addition of showers. While some work attributable to Phase II was done, the Consulting Engineers could not afford to start work in a major way until high level approval and the funding were assured.

Whatever uncertainty exists concerning the phases of work and the time and effort actually spent by the Claimant, the contract states clearly that payments due to the Claimant are "for the services rendered." Moreover, while the contract defines the length of Phase II as "11 months from the approval date of the report on Phase I" (Article 3.1), it also gives the Employer the right to change the scope of services at any time, in which event increases or decreases in the fee are to be made proportionately (Article 2.2), and it states in Article 2.3 that after completion of any phase, the Employer was free not to employ the services of the same Consulting Engineer for the subsequent phases.

Given this analysis, the Tribunal concludes that the Claimant's right to compensation is related unavoidably to the extent of its work subsequent to Phase I, regardless of whether or when Phase II began or of whether force majeure could be invoked. Therefore, we do not need to decide whether Phase II began or the date on which it began. Nor do we need to decide whether the stoppage of work resulted from force majeure, as work done before stoppage requires compensation in any event.

After review of all the evidence, including the Claimant's affidavits, communications between the Consulting Engineer and others, the Consulting Engineer's internal

memoranda and the rebuttal comments contained within and attached to the post-hearing brief submitted by the Respondent Iran Housing Company, the Tribunal holds that the Respondent Iran Housing Company is obligated to pay the Claimant for work performed subsequent to Phase I and for costs of return of persons and items to the United States the amount of U.S. $500,000, which amount includes interest. The Tribunal acknowledges that this amount is an estimate, but it could be made more precise only through additional evidence, including the appointment of an expert, the cost of which in money and time seems of doubtful wisdom in a case of this type and magnitude.

With respect to the claim for that part of the termination costs representing the value of property allegedly lost or expropriated in Iran, the claim is dismissed for lack of proof.

With respect to the counterclaim for alleged defects in the work of Phase I, Iran Housing Company has not proved its case. Its sole evidence is a list of alleged defects, the author of which is not identified. Moreover, the alleged defects seem to reflect more changes of policy with regard to standards and costs rather than latent defects not evident to the Employer when it approved the report on Phase I. Therefore, this counterclaim must be dismissed for lack of proof.

With respect to the counterclaims for taxes and social security payments, they are supported only by conclusory letters from the Iranian authorities concerned. While Article 14 of the contract makes the Consulting Engineer responsible for payment of taxes and social security contributions (with a provision for increase in fee if new taxes or increased amounts are imposed), the evidence indicates that deductions were made before the Claimant was paid. With respect to taxes, for example, the letter from the Ministry of Economic Affairs and Finance submitted by the Respondent Iran Housing Company states that the Claimant's tax obligations are less than the 5.5 percent tax deducted by the Employer. With respect to Social Security contributions, no basis for the asserted amount has been presented, and no proof is made that this amount has been paid by Iran Housing Company. Thus, quite apart from the jurisdictional questions raised by tax and social security counterclaims which were summarized by the Tribunal in its award no.59-220-2 of 27 July 1983 in the claim of Intrend, these counterclaims must be dismissed in this case for lack of proof.

VII. Costs

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

AWARD

The Tribunal awards as follows:

The Respondent Iran Housing Company is obligated to pay the Claimant, Gruen Associates, Inc., U.S. $500,000, which obligation 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 Co-Registrars of the Tribunal shall give the documents deposited by the Claimant during June 1983 with the Registry of the Tribunal to the Agent of the Islamic Republic of Iran for transmittal to the Respondent Iran Housing Company.

The claim for the value of property allegdly lost or expropriated in Iran is dismissed for lack of proof.

The counterclaims are dismissed for lack of proof.

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.

The Hague
27 July 1983

Pierre Bellet
Chairman
Chamber Two

In the Name of God,

Shafie Shafeiei

George H. Aldrich

After the Hearing in this case on 26 May 1983 the three arbitrators agreed to begin deliberations at the end of June. Throughout the period from February to late June the three arbitrators had been in agreement that July would be fully dedicated to the final deliberations in this and the other pending cases, in view of the 1 August effective date of Chairman Bellet's resignation from the Tribunal.

On 23 June 1983, however, Mr. Shafeiei sent Chairman Bellet a note informing him that he intended to be absent from the Tribunal on vacation until the end of July. The Chairman responded by a note dated 29 June saying that, while a brief vacation was acceptable, Mr. Shafeiei was expected after 5 July. Nevertheless, after a further exchange of notes, Mr. Shafeiei has absented himself until the present and has given no address or telephone number where he could be reached. Only yesterday afternoon, too late to be of any use, did Mr. Shafeiei's legal assistant give the Tribunal a telephone number in another country where Mr. Shafeiei might be reached.

The Chairman has had all the successive drafts of this award since Mr. Shafeiei's departure deposited in his office in due time so that, if he had been present, he could have read and commented upon them, but no comments have been received. The Chairman also deposited in Mr. Shafeiei's office on 20 July 1983 a letter informing him of the place

and time of signature. Mr. Shafeiei failed to attend the signing. In these circumstances, an arbitral tribunal cannot permit its work to be frustrated. This statement is made pursuant to Article 32, paragraph 4 of the Tribunal Rules of Procedure.

Pierre Bellet
Chairman
Chamber Two

George H. Aldrich

Dated: The Hague
27 July 1983