IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران و ایالات متحده

194-133
۱۹۴-۱۳۳

ORIGINAL DOCUMENTS IN SAFE

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

194-133
۱۹۴-۱۳۳

Case No. 194
Chamber Two
Award No. 140-194-2

LISCHEM CORPORATION, GIFTED, INC.,
Claimants,

and

ATOMIC ENERGY ORGANIZATION OF IRAN,
BANK MARKAZI IRAN,
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
FILED - ثبت شد
Date ۱۳۶۳/۴/۸
29 JUN 1984
No. 194

AWARD

Appearances

For Claimants:
Mr. Philip M. Risik, Attorney
Mr. Jeff Eerkens, President of Lischem Corp.

For Respondents:
Mr. Mohammad K. Eshragh, Agent of the Islamic Republic of Iran
Mr. Saifollah Mohammadi, Legal Adviser to the Agent
Mr. Mohammad Adib Nazari, Attorney, Atomic Energy Org.
Mr. Ehsanollah Ziaie and
Mr. Reza Khansari Mousavi, Technical Advisers to the Atomic Energy Org.
Ms. Shirin Ershadi, Representative of Bank Markazi

DUPLICATE ORIGINAL
«نسخه برابر اصل»

Also Present:
Mr. John B. Reynolds, III, Legal Adviser to the Agent of the United States of America

I. The Claims

The Claimants, both California corporations, claim for U.S. $630,000, allegedly due under a contract of sale with the Respondent, Atomic Energy Organization. The Claimants seek recovery of this amount, plus interest and costs, from either the purchaser, the Atomic Energy Organization, or from the Respondent, Bank Markazi, the issuer of an irrevocable letter of credit covering the transaction. The contract, the existence of which is not disputed, was formed by a pro forma invoice issued by the Claimant, Gifted, Inc. ("Gifted"), to the Atomic Energy Organization, numbered 4080 and dated 6 July 1977 and by an irrevocable letter of credit issued by Bank Markazi at the request of the Atomic Energy Organization, numbered 08/92282 and dated 15 November 1977. The items covered by the contract were to be manufactured by the Claimant, Lischem Corporation ("Lischem") and were described in the invoice as four carbon monoxide laser systems (25 watt CW, recyclable gas) and four reaction chambers. The Lischem model numbers and prices were listed on the invoice, and the total C & F price on both documents was U.S. $630,000.

Among the terms and conditions contained in the invoice was the following:

> Equipment will be tested by an expert representing the Nuclear Research Center of Iran prior to shipment within the validity of the letter of credit.

The original letter of credit made no direct reference to testing and provided for payment against presentation of the

invoice, the airway bill and the certificate of origin evidencing shipment of "Carbon monoxide laser system and Reaction chamber, As per pro forma invoice No. 4080 dated July 5 1977." There were two amendments of the letter of credit, one extending the term until 15 November 1978 and the other permitting shipment in two parts, authorizing a 25 percent downpayment, and stating that the remaining 75 percent was payable "against required shipping docs and technical test certificate issued by orders representative ...." The Claimants assert that they did not accept the second amendment.

There is no dispute that, in the summer of 1978, Gifted informed the Atomic Energy Organization that the first shipment was ready for inspection and that the latter, after first giving notice of the names of its two inspectors, then declined to send any inspectors and requested the Claimants not to ship the equipment. The Claimants invited a professor of electrical engineering to witness the operation of one of the lasers and certify that its power output was measured at 26 watts and, on 8 November 1978, shipped the equipment to Iran via Iran Air. Bank Markazi refused to pay the letter of credit against presentation of the shipping documents.

Both Respondents deny liability to the Claimants on a number of grounds, including non-fulfillment of the inspection condition, and the Atomic Energy Organization counterclaims in the amount of U.S. $2,349,222, which amount

includes U.S. $630,000 allegedly not released by Bank Markazi because of the claims by the Claimants but represents primarily costs of preparing and equipping a laboratory, which costs it alleges it incurred as part of a broader arrangement with Dr. Jeff Eerkens, the President of Claimant Lischem, for the conduct of research in laser enrichment of uranium.

A hearing was held on 13 April 1984 at which all parties were represented.

II. Jurisdiction

Gifted has acknowledged that it is owned more than fifty percent by persons who are not nationals of the United States and that it is not therefore a "national" of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration. Therefore, the claim of Gifted, along with the counterclaims against it, must be dismissed for lack of jurisdiction.

Lischem has proved to the satisfaction of the Tribunal that it has been at all relevant times a national of the United States. It is indisputable that both Respondents are agencies of the Government of Iran, and therefore that a claim against them is a claim against "Iran" as defined in Article VII, paragraph 3, of the Claims Settlement Declaration.

With respect to the counterclaims against Lischem, the counterclaim for the costs incurred as part of the alleged

broader research arrangement cannot be considered within the jurisdiction of the Tribunal in this case, because the Atomic Energy Organization does not even allege that those arrangements were entered into by Lischem. The evidence shows that the correspondence and discussions concerning that subject were between the Atomic Energy Organization on the one hand and Mr. Eerkens in his personal capacity and an American lawyer who represented Eerkens and his fellow owners of the "Lisosep" process patents on the other. The evidence indicates that Lischem (which until 15 July 1977 was a Florida, rather than a California, corporation) was brought into Mr. Eerkens' correspondence with the Atomic Energy Organization only in January 1977 and solely with respect to the manufacture and sale of lasers and reaction chambers. While that equipment was to be used in the broader research arrangement, if the latter could be worked out, Lischem apparently would have had no part in those broader arrangements except as a manufacturer and seller of equipment. Lischem, not Mr. Eerkens, has brought this claim, and a counterclaim must by definition be against Lischem if it is to be an admissible counterclaim in the case. While this counterclaim may arguably arise out of the "same contract, transaction or occurrence" as the claim, thus meeting that requirement of Article II, paragraph 1, of the Claims Settlement Declaration, it is nevertheless outside the jurisdiction of this Tribunal as it is, in reality, a claim against Mr. Eerkens, not against the Claimant, and the Claims Settlement Declaration does not

provide for jurisdiction over claims or counterclaims against persons who are not themselves claimants. See Decision of the Full Tribunal in Case A/2 of 13 January 1982, 1 Iran-U.S. C.T.R. 101 and American Bell International Inc. and the Government of the Islamic Republic of Iran et al., Interlocutory Award No. ITL 41-48-3 (11 June 1984).

Insofar as the counterclaim relates to the U.S. $630,000, it does relate to the Claimant Lischem and is within the jurisdiction of the Tribunal. The Tribunal notes that the Atomic Energy Organization does not allege that the U.S. $630,000 was ever paid to Lischem, but rather that the existence of the claim has allegedly caused Bank Markazi to hold that sum of money, thus denying its use to the Atomic Energy Organization.

III. The Merits

1. The Letter of Credit Claim. The named seller on the invoice was Gifted, not Lischem, and the letter of credit was quite properly issued in favor of Gifted. It seems clear from the evidence presented that the Atomic Energy Organization knew that Gifted was Lischem's export agent, but there is no evidence that the Bank Markazi knew of Lischem's involvement. Lischem argues that such knowledge was not necessary in order to permit it to maintain an action on the letter of credit as the real party in interest. Bank Markazi points out that the credit in this

case was not transferable and that the claim had consistently been maintained by Gifted, not by Lischem, and asserts that Lischem cannot lawfully recover on the letter of credit to which it is not a party. Lischem responds by pointing to Article 47 of the Uniform Customs and Practice for Documentary Credits (1974 Revision), to which the letter of credit was subject, which provides:

> The fact that a credit is not stated to be transferable shall not affect the beneficiary's rights to assign the proceeds of such credit in accordance with the provisions of the applicable law.

Neither Lischem nor Bank Markazi have cited any relevant judicial decisions on this question of the law of documentary credits. In view of the decision of the Tribunal with respect to the underlying transaction between Lischem and the Atomic Energy Organization set forth in the following section and the fact that obligations of either Respondent to Lischem are payable from the Security Account established by paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria of 19 January 1981, the Tribunal finds it unnecessary in the present case to decide the claim against Bank Markazi based on the letter of credit.

2. The Claim on the Underlying Transaction. The evidence presented in this case indicates that the equipment shipped corresponded to that listed on the pro forma invoice, that is, four carbon monoxide laser systems, Model LCL-516 (25 watts CW, recyclable gas) and four reaction chambers, Model LCR-350. The Atomic Energy Organization

contends, however, that what was stated on the invoice was not what the parties really intended, and it introduced correspondence and other documents, including comparative prices of other CO laser systems as well as testimony of several of its experts, to prove that the real objects of the transaction were halide lasers that would operate at 16 microns. Lischem responds by pointing to correspondence between the parties preceding the issuance of pro forma invoice No. 4080 in which it stated that it could not guarantee that the lasers would work at 16 microns and in which both parties recognized that a 16 micron laser did not then exist. Neither party presented evidence of the oral negotiations between Lischem and the key Atomic Energy Organization official in the summer of 1977 which immediately preceded the issuance of the invoice, although a witness for the Atomic Energy Organization testified that he had been told by that key official that the right of testing, which had been inserted in the invoice, would protect the Respondent by permitting it to reject the equipment if it proved unsatisfactory.

After careful consideration of all the evidence, the Tribunal concludes that the contract was for carbon monoxide lasers and reaction chambers made of special and expensive corrosion-resistant materials to permit use with halogen gases and designed to be easily disassembled for research purposes.

While the objective of the Atomic Energy Organization was clearly uranium enrichment, and therefore it wanted the most efficient laser conceivable for that purpose, that is, one that would operate at 16 microns, it appears that, by mid-1977, the key official who negotiated the contract, if not his assistants, was prepared to settle for that which Lischem could then produce, that is, lasers that could be used for further research and development in Iran, with a view to making them capable of 16 micron output. Thus, the Tribunal concludes that the equipment shipped corresponded to that required by the contract.

The Atomic Energy Organization further contends that it is relieved of its contractual obligation to pay for the laser systems and reaction chambers, because they were shipped without having been tested by its experts. In that connection, the Respondent points out that the test conducted by the seller was not comparable to that which it was entitled to make in that it checked only the power output and checked only one laser system. The Tribunal questions whether a right to test equipment described as carbon monoxide laser systems and reaction chambers is equivalent to a right to reject that equipment because the laser systems are not operable as halide laser systems with a 16 micron output. In any event, the Atomic Energy Organization, in fact, declined to exercise its right to inspect the equipment and refused to send its experts to the United States during the period in which the letter of credit remained in effect. The buyer cannot refuse to pay for

goods on the ground of its own refusal to exercise a testing right given it by the contract. Its refusal to send its experts waived its right to object to shipment in the absence of testing by its experts.

For the above reasons, the Tribunal holds that the Respondent Atomic Energy Organization was obligated to pay the Claimant Lischem Corporation the contract price for the equipment shipped in November 1978 and that its failure to do so constituted a breach of contract entitling the Claimant to damages equivalent to the contract price. This holding obviously requires dismissal of the counterclaim.

IV. Interest

In order to compensate the Claimant Lischem Corporation for the damages it has suffered due to delayed payment, the Tribunal considers it fair to award Claimant interest at the rate of 12 percent on the amount due. The interest shall run from the expiration date of the letter of credit, that is 15 November 1978.

V. Costs

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

AWARD

THE TRIBUNAL AWARDS AS FOLLOWS:

The Respondent, Atomic Energy Organization of Iran, is obligated to pay the Claimant, Lischem Corporation, U.S. $630,000 plus interest at the rate of 12 percent per year from 15 November 1978 to the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account. This obligation shall be satisfied by payment out of the Security Account established by paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria of 19 January 1981.

Once the above payment is effected, the Respondent, Bank Markazi is released from any liability resulting from its refusal to pay under Documentary Credit No. 08/92282 of 15 November 1977.

The counterclaim of Respondent, Atomic Energy Organization of Iran, against the Claimant, Lischem Corporation, with respect to the U.S. $630,000 contract price is dismissed on the merits.

The claim of the Claimant, Gifted, Inc., and the remainder of the counterclaims are dismissed for lack of jurisdiction.

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

In contrast to the previous policy of the majority, the present Award is extremely simple and brief. In practice, the majority has refrained from stating the facts in the case or the contentions of the Iranian Respondent, and has given no logical response in that regard. In brief, the defence of the Atomic Energy Organization of Iran is that although in a proforma relied upon in the claim the words "Carbon Monoxide Lasers" appear, the actual subject of the transaction was 16 micron lasers. Moreover, the price indicated on the proforma is that for 16 micron lasers. The background to the transaction commences with the first letter by Dr. Eerkens, the Claimant, to the former Shah on 11 February 1976, in which the system for enriching Uranium was explicitly mentioned. The Atomic Energy Organization of Iran relies in particular upon the proforma invoices and sample price lists which the Claimant had previously given the Atomic Energy Organization. There is a particularly serious presumption of fraud, and specifically bribery, in the present transaction. In this regard, special reliance has been placed upon the investigative report by the Los Angeles Times dated 22 August 1979. Justice and especially morality, ought to have dictated that the Chamber make a serious investigation of this issue. Unfortunately, however, the majority refused to carry out such an investigation.

In the Name of God,

Shafie Shafeiei