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CLAIMS TRIBUNAL

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دیوان داوری دعاوی ایران - ایالات متحده

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DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 209
CHAMBER ONE
AWARD NO. 297-209-1

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 22 APR 1987 تاریخ
۱۳۶۶ /۲/ ۲
No. 209 شعبه

WILLIAM J. LEVITT,
Claimant,
and
THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
THE HOUSING ORGANIZATION OF THE ISLAMIC REPUBLIC OF IRAN,
BANK MELLI,
Respondents.

AWARD

Appearances

For the Claimant:
Mr. A. Weitz,
Mr. R. Deitz,
Attorneys;

For the Respondents:
Mr. M. K. Eshragh,
Agent of the Government of the Islamic Republic of Iran;
Mr. A. Nouri,
Adviser to the Agent;
Mr. H. Golami,
Assistant to the Agent;
Mr. M. R. S. Razavi,
Attorney for Housing Organization;

Mr. M. R. Ebrahimi,
Representative of Housing
Organization;

Also present: Mr. J. R. Crook,
Agent of the United States
of America.

I. INTRODUCTION

A. The proceedings

1. On 11 January 1982 the Claimant, Mr. William J. Levitt, a United States national, filed a Statement of Claim with the Tribunal against The Government of the Islamic Republic of Iran ("GOI"), The Ministry of Housing and Urban Development ("MHUD"), The Housing Organization of Iran ("HO") and Bank Melli. The claim is indirect within the meaning of Article VII, paragraph 2, of the Claims Settlement Declaration, and is brought by Mr. Levitt on behalf of International Construction Company (Iran) Ltd., ("ICC"), a Bahamian corporation. The claim is for damages for breach of a contract entered into by ICC and HO on 14 January 1978 for the construction of a housing development at Qanat Kosar, Iran. At the date of the hearing, the amount claimed was U.S. $25,091,162.69 plus interest and costs. In the alternative, the Claimant seeks to recover on theories of unjust enrichment or breach of implied contract.

2. The Respondents filed Statements of Defence and HO filed a counterclaim on 9 February 1983. A pre-hearing conference was held on 31 January 1984. After further exchanges of written pleadings and evidence, a hearing was held on 28 and 29 October 1985, at which the Claimant and the Respondents presented oral evidence and argument. Mr. Levitt, as the Claimant, provided the Tribunal with information at the hearing, but pursuant to a

decision of the Chamber, was not heard as a witness and did not make the declaration required of a witness.

B. Facts and contentions of the Parties

3. The present Claimant, Mr. Levitt, is well known for his wide experience in the construction of moderately-priced housing in the United States and elsewhere. Beginning in 1976, Mr. Levitt held extensive discussions with MHUD officials concerning housing needs in Iran. As a result of these discussions he formed ICC, a Joint Stock Company registered in the Republic of the Bahamas on 29 December 1976, for the purpose of undertaking two housing projects in Iran. Mr. Levitt claims to have been the sole beneficial shareholder in ICC. In order to do business in Iran, ICC registered a branch in Iran on 17 May 1977.

4. On 28 May 1977, MHUD, HO and ICC signed a letter of intent contemplating that ICC would construct 6,000 units of housing at Qanat Kosar. The letter of intent stated the intention of the parties to enter into a contract subject to reaching agreement on all terms and conditions. The letter of intent provided that HO was to make land available to ICC for construction, and that ICC was to act as the agent of MHUD and HO in the marketing and sale of the houses. ICC was to finance the construction, and MHUD was to arrange mortgage financing for the purchase of the individual units.

5. A short while later, on 25 September 1977, a meeting was held between ICC and MHUD at which Mr. Levitt stated that ICC was ready to commence work. The parties also settled upon the terms and conditions which would be incorporated into the forthcoming contract. Finally, on 14 January 1978, HO and ICC signed a contract ("the Contract") for the construction of 2,500 units of housing, together with infrastructure and civic services, on land which HO had acquired for the purpose.

6. Under Article 3 of the Contract, ICC was to deliver certain preliminary plans, specifications and price calculations within 90 days of the date of signature. HO was to approve these within 30 days of receipt, or alternatively, to request any changes within the same period. Meanwhile, Article 3 obliged HO to "obtain approval in principle for connection of water, electricity and gas by the respective departments" within the same 90 day period.

7. Article 5 provided that immediately after approving the documents detailed in Article 3, HO was to make the site available to ICC and to "assure and provide the Company with uninterrupted use of and access to the Site." The cost of providing utilities such as water and gas was to be borne by the Iranian governmental departments or agencies concerned; if ICC had to pay, the cost was to be added to the price of the units. HO undertook the obligation to use its best efforts to assist ICC in obtaining several other services and facilities. Under Article 7, the project was to be financed by ICC, but it was entitled to apply the 25% deposits collected from purchasers to the cost of construction. Article 5 further provided that HO was to assist ICC in selling the units. Article 8 required ICC to submit to HO an audited financial report reflecting the costs and financial activities relating to the construction work within three months of the end of each semi-annual period of each of its fiscal years.

8. Mr. Levitt claims that, commencing from the execution of the letters of intent in May 1977 and thus prior to the date of the Contract, ICC incurred considerable expenditures in preparation for the project. He mentions, in particular, negotiations with banks in New York to organize financing, planning carried out by ICC's New York office to arrange the importation of construction materials, and an extensive advertising campaign. Mr. Levitt states that an office was established on Baghestan Avenue, Tehran, in 1977, for use by himself and three senior members of his staff who began to make frequent visits to Iran

in connection with the project. These premises were retained as living accommodations when, after the signing of the Contract, a larger office was set up at Meremad Avenue, Tehran. Mr. Levitt claims that, apart from the extended visits of these three New York staff members, nine full-time Iranian staff members were hired after the Contract was signed to work on the project, including a civil engineer, two salesmen, two accountants, an administrator, clerks and secretaries. Mr. Ardeshir Azar-Pey, who had served as Managing Director of HO until the end of December 1977, was engaged as President of ICC. Mr. Levitt claims that ICC contracted for various professional services, both in New York and Iran, and commissioned plans and specifications from engineers and architects which were subsequently submitted to HO.

9. Under cover of a letter dated 11 April 1978, ICC transmitted to HO all the plans and specifications required by Article 3 to be approved by HO, with the exception of the construction cost index, which was submitted on 1 August 1978. The site was handed over on 27 August 1978, and on 9 September 1978 HO formally approved the documents submitted. According to the Claimant, ICC selected an Iranian company, Iran Plato Payman Co., as general building contractor, and cleared and graded the site for 950 units so that by October 1978 construction was ready to begin. The Claimant alleges that more than 200 units had been sold, and down payments or deposits totalling over U.S. $1.7 million collected and paid into an account at the Central Office of Tehran Bank. It is further contended that all such down payments were returned to the purchasers in October 1978 because of the uncertain situation, and in order to protect the interests of the purchasers.

10. At this point the project came to a standstill. Mr. Levitt alleges that HO failed in its obligation to obtain approval for the supply of water for the development, without which construction could not proceed. Other services were provided late, or not at all. Further, Mr. Levitt claims that

after mid-1978, civil disturbances interfered with ICC's work, culminating in the occupation of the site by squatters who built houses on the land. Mr. Levitt alleges failure on the part of HO to assure and guarantee ICC access to the site in accordance with the terms of the Contract. He also claims that during 1979 the office of ICC was entered and all records of the housing project seized.

11. After the seizure of the American Embassy in Tehran and the detention of American nationals there in November 1979, ICC officials of United States nationality who had left Iran on routine business were unable to return, according to Mr. Levitt, and, though he was anxious that the project should continue, the eventual lack of cooperation from the GOI led him to conclude that the project had been abandoned and the Contract terminated. ICC wound up its operations in Iran after the end of 1979.

12. The present claim, based on alleged breaches by HO of various of its contractual obligations, is for a total of $25,091,162.69, comprising expenses allegedly incurred but not reimbursed of $5,635,062.69 and anticipated lost profits of $19,456,100. Mr. Levitt bases the claim for lost profits on a profit margin of 18 percent which was included in the proposals attached to the letter of intent, but not in the Contract itself.

13. Mr. Levitt seeks to hold the GOI, MHUD and HO jointly and severally liable on the basis of MHUD's signature of the letter of intent, and of its assurances during the negotiations of government support and approval for the project. The Claimant has withdrawn a claim originally made against Bank Melli, for breach of an alleged obligation to provide mortgage financing. Bank Melli maintains its claim for costs in respect of that claim.

14. Each of the Respondents denies liability. The GOI at first sought to be dismissed on the grounds that the claim was not

attributable to it; it has since taken the position that it should remain as a Respondent in order to argue the issue of the Tribunal's jurisdiction over HO and to raise a counterclaim or set-off of some 42 million Rials in taxes allegedly owed by ICC.

15. MHUD asserts that the letter of intent to which it was a party was superseded by the terms of the Contract signed subsequently, that it was not a party to that Contract, and that consequently no claim based on the Contract can lie against it.

16. HO raises a number of jurisdictional issues. First, it disputes the nationality of Mr. Levitt. Second, it disputes his entitlement to bring an indirect claim owned by a Bahamian corporation and not by a United States corporation. HO requests the Tribunal to postpone its decision on this issue until the Full Tribunal has decided Case A22, in which the Government of Iran has requested an interpretation of the indirect claims provisions of the Claims Settlement Declaration. Third, HO denies that it falls within the definition of an "agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof", contained in Article VII, paragraph 3, of the Claims Settlement Declaration, claiming instead to be an independent, private legal entity. Finally, HO argues that Article 10.2 of the Contract operates to exclude the jurisdiction of the Tribunal pursuant to Article II, paragraph 1, of the Claims Settlement Declaration, which excludes "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, in response to the Majlis position."

17. As to the merits of the claim, HO denies any failure to comply with its contractual obligations. It claims that it obtained the agreements of the respective departments pursuant to Article 3, paragraph 9, of the Contract, and argues, in particular, that it used its best efforts to ensure the availability of a supply of water, and did in fact provide water

for use during the course of construction. HO claims that ICC was itself late in submitting the construction cost index, and that ICC abandoned the project of its own volition, thus breaching the Contract. HO denies liability in any event for the expenses allegedly incurred by ICC in preparation of the project, which were, it says, understood to be a matter for ICC's own risk as it was responsible for financing the construction. As to the lost profits element of the claim, HO takes the position that there was neither any provision nor any guarantee in the Contract as to the level of profit, if any, which ICC would make.

18. HO further raises a counterclaim against ICC based on ICC's alleged breach of the Contract. It seeks damages of some 523 million Rials, which represents the price the Organization had to pay some six hundred existing owners in order to acquire title to the Qanat Kosar land. Having delivered the land to ICC pursuant to the Contract, HO claims that it has been deprived of the use thereof and should be compensated for its loss.

19. A further contention, raised by HO only shortly prior to the hearing and denied by the Claimant, is that the Contract was procured by ICC in circumstances amounting to fraud or corruption.

20. One issue of procedure arose at the hearing: whether the testimony of an individual, notified to the Tribunal as a "rebuttal witness" four days before the hearing, was admissible insofar as it related to allegations not previously made, or to matters not the subject of prior testimony, within the meaning of Note 2 to Article 25 of the Tribunal Rules.

II. REASONS FOR AWARD

A. Procedural issues

(i) the Ministry of Housing as Respondent

21. MHUD has sought to be dismissed from the Case as it was not a party to the Contract. In view of the Government of Iran's participation as a Respondent, the Tribunal sees no need for a Ministry to participate separately from the government of which it is a part. Though MHUD signed the letter of intent, the present claim is not based on this document but on the later Contract, which only HO signed. MHUD is therefore stricken as a Respondent.

(ii) admissibility of rebuttal evidence

22. On 24 October 1985, the Respondents filed a notification purporting to designate a "rebuttal witness" they intended to present at the hearing in this Case pursuant to Note 2 to Article 25 of the Tribunal Rules. The person so named, Mr. Ahmad Zahedi Kermani, was present at the hearing, held four days later on 28 and 29 October 1985, and made statements which principally concerned the course of dealings leading to the Contract.

23. Article 25, paragraph 2, requires each party to communicate at least thirty days before the hearing the names and addresses of any witnesses it will call and the subject on and language in which the witnesses will testify. Note 2 to the same Article subjects this rule to an exception, however, in the case of rebuttal witnesses:

> The information [otherwise required] is not required with respect to any witnesses which an arbitrating party may later decide to present to rebut evidence presented by the other arbitrating party. However, such information concerning any rebuttal witness shall be communicated . . . as far in advance of hearing the witness as is reasonably possible.

In light of the general notice requirement of Article 25, paragraph 2, and the provisions of the second sentence of Note 2, it is clear that the exception for rebuttal witnesses created by the first sentence of Note 2 applies only to witnesses who are called to rebut evidence presented at the hearing or so soon before it as to render the normal period of notice impossible. To construe this limited derogation to encompass witnesses whose testimony would address matters raised earlier in the proceedings would be effectively to exclude from the scope of the general rule a large class of witnesses which it was clearly intended to cover.

24. Mr. Kermani's statements did not address matters recently raised, and hence there was no reason why the Respondents could not have communicated their intention to call him by means of the ordinary Article 25 procedure. Accordingly, his statements are not admissible as rebuttal within the meaning of Note 2 to Article 25 of the Tribunal Rules.

B. The Tribunal's jurisdiction

(i) the Claimant's nationality

25. In response to an Order issued by the Tribunal on 7 February 1984, the Claimant filed a copy of his current passport which establishes that he was a United States national from the date of his birth in New York in 1907 and at the date of issue of his current passport on 4 August 1982. In the absence of any evidence to the contrary, there is no reason to suppose that Mr. Levitt was anything other than a United States national from the date the present claim arose until 19 January 1981.

(ii) the Claimant's entitlement to bring the claim

26. In accordance with the consistent practice of this and the other two Chambers, the Tribunal denies the request that it

defer determination of the Claimant's entitlement to bring the claim until the Full Tribunal has decided Case A22, because "'suspension of jurisdictional determinations would for an indeterminate time bring the work of the Tribunal to a halt,' given the frequency with which such issues occur." Blount Bros. Corp. and Islamic Republic of Iran, Award No. 215-52-1, p. 8 (6 Mar. 1986) (footnote omitted) (quoting Futura Trading, Inc. and Khuzestan Water and Power Authority, Award No. 187-325-3, p. 7 (19 Aug. 1985)). See also McHarg and Islamic Republic of Iran, Award No. 282-10853/10854/10855/10856-1, para. 52 (17 Dec. 1986).

27. In order to satisfy the indirect claim provisions of Article VII, paragraph 2, of the Claims Settlement Declaration, "[t]here must be 'ownership interests' which were sufficient 'to control the corporation or other entity' at the time the claim arose; and the entity in question must not itself be entitled to bring a claim." Blount Bros., supra, p. 9. Here, the Claimant has filed a copy of ICC's Certificate of Incorporation in the Bahamas on 29 December 1976. It is evident from copies of the stock register, and an affidavit of the Corporate Secretary, that 4,996 of the 5,000 shares issued as at 1 January 1977 were held in the name of Mr. Levitt, and that he continued to own the same number on 23 February 1984. The affidavit also states that Mr. Levitt is in fact the beneficial owner of the four remaining shares. This evidence establishes both Mr. Levitt's control of ICC and ICC's ineligibility to proceed before the Tribunal. Accordingly, the Tribunal has jurisdiction over the claim.

(iii) the status of the Housing Organization

28. The Tribunal has already determined that there could be "no dispute" that HO falls within the definition of "Iran" contained in Article VII, paragraph 3, of the Claims Settlement Declaration, and thus is subject to the Tribunal's jurisdiction. See T.C.S.B., Inc. and Islamic Republic of Iran, Award No. 114-140-2, p. 7 (16 Mar. 1984).

(iv) the forum selection clause

29. The Contract was prepared in both English and Farsi, but only signed in Farsi, the governing language. In the English version supplied by HO, Article 10.2 provides that "any dispute arising out of this Agreement shall be settled according to Iranian Laws", and Article 10.3 that "this Agreement shall be interpreted under and governed by the Laws of Iran." The first of these provisions does not appear in the English text supplied by the Claimant, where the governing law clause is Article 10.2.

30. It is by now well settled that in order to constitute an exclusion of the Tribunal's jurisdiction by virtue of Article II, paragraph 1, of the Claims Settlement Declaration, such a clause must, by its terms, "unambiguously restrict" jurisdiction over any disputes arising out of the contract to the courts of Iran. See, e.g., Gibbs and Hill, Inc. and TAVANIR et al., Award No. ITL 1-6-FT, p. 5 (5 Nov. 1982). The Respondents' Article 10.2 contains no mention of the courts of Iran, or any other courts. It simply reaffirms the following Article, 10.3, which provides that the Contract is to be governed by, and interpreted in accordance with, the laws of Iran. Even assuming the version provided by the Respondents to be the more accurate, the Tribunal finds that the words of Article 10.2 are not such as to divest it of jurisdiction over the present Case.

C. The merits

(i) the allegation of fraudulent procurement of the Contract

31. Shortly before the hearing, HO raised for the first time the contention that Mr. Levitt had procured the Contract in circumstances amounting to fraud or corruption, which the Claimant denied. The Tribunal observes that HO's position throughout the proceedings had been to defend the claim on the basis that it had discharged its obligations under the Contract

and that ICC was itself in breach. Its entire defence was predicated on the assumption that the Contract was valid, and the evidence in the record amply demonstrates that HO itself always so considered it. HO offered no reason why its new argument had not been raised in a timely fashion. Moreover, while the Tribunal has determined that the evidence offered by Mr. Kermani in support of this contention for the first time at the hearing is inadmissible under Article 25 of the Tribunal Rules, see para. 26, supra, this evidence would in any event fail to support the allegations. The Tribunal concludes that the Contract was valid.

(ii) HO's breaches of the Contract

32. The Tribunal is satisfied that ICC fulfilled its initial obligations when, under cover of a letter of 11 April 1978, it forwarded to HO all but one of the plans and specifications required to be submitted within ninety days of the signature of the Contract, for HO to approve. The remaining item, the construction cost index, followed on 1 August 1978, but this delay had no apparent effect on the progress of the work, and HO confirmed its approval of the documents in a letter dated 9 September 1978.

33. The Claimant contends, however, that HO breached the Contract in a number of respects so as to entitle ICC to recover damages. The first such allegation concerns the procurement of a permanent supply of water for the Qanat Kosar site. Article 3.9 of the Contract provided:

> "The Organization during the same 90 (ninety) day period referred to in Section 3 above, [i.e. within ninety days of the date of the signing of the Contract] will obtain approval in principle for connection of water, electricity and gas by the respective departments. The Company shall assist the Organization by furnishing the Organization the necessary documents and drawings to obtain such approval."

34. Mr. Levitt contends that the object of this provision was to secure a supply of water and other utilities for the finished

development. HO was to obtain the necessary approvals from these authorities within the prescribed ninety-day period after the signature of the Contract on 14 January 1978, thus enabling the construction to proceed. According to the evidence of Mr. Ralph Della Ratta, a senior vice-president of ICC who was one of the three American staff members engaged on the Qanat Kosar project, the laying of pipes for water, sewerage and gas was to be the first stage in construction after the site had been cleared and graded. However, while grading was completed by October 1978, no approval was forthcoming for the water supply, though ICC had, meanwhile, with HO's assistance, itself secured assurances that gas and electricity would be made available. Thus there was considerable doubt as to the prospects of proceeding with the project.

35. HO denies that it breached this obligation. It describes its obligations under Article 3.9 of the Contract as limited to "establishing contacts" with the responsible authorities, and claims to have discharged it by having "communicated with the related service agencies" and used its best efforts to secure their agreement. As evidence, it has produced a copy of the minutes of a meeting which took place on 14 June 1978 between ICC, HO, the consulting engineer and the Imperial Guard, which record a decision that the local township would make available "one deep well" for the supply of water at the prevailing rate to facilitate the building operations. HO has also produced correspondence detailing its efforts during August 1978 to persuade the Tehran Water Board to reconsider a decision refusing approval for a water supply in connection with a different project, the Lavizan township.

36. In the view of the Tribunal, this material serves only to establish that HO was in contact with the relevant authorities in respect of a different project; and that a supply of water had been negotiated for the duration of the construction work at the site. But the obligation contained in Article 3.9 of the Contract was not merely that of taking up the matter with the

proper authorities; nor was it simply a "best efforts" obligation. It imposed an absolute requirement that approval be obtained for a water supply to serve the finished development, and the inclusion of a ninety-day time limit confirms the Claimant's argument that such approval was a sine qua non of the commencement of the construction. The failure of HO to obtain approval constitutes a clear breach of the Contract which alone would have given rise to a claim for damages as early as April 1978.

37. The Claimant alleges a number of further breaches on the part of HO. Without examining each alleged breach seriatim, the Tribunal finds that HO failed to discharge its contractual obligations in at least one other respect -- that is, by failing to ensure ICC's access to the project site. Article 5.1 of the Contract provided:

> "Immediately after its approval of the documents as provided in Section 3 hereof and provided the Organization has obtained the approval as referred to in Section 3 above, the Organization will make available and deliver to the Company the Site with ingress thereto, and egress therefrom, and will assure and provide the Company with uninterrupted use of and access to the Site."

Such uninterrupted use and access was denied to ICC from mid-1978, at first as the result of general civil disorder, and later, early in 1979, when the previous owners of the land attempted to take advantage of the disturbances in order to regain possession. No effective steps were taken to prevent them from doing so, though Mr. Azar-Pey states that he reported to HO that ICC's guards had been threatened and that he no longer considered it safe to resume work. Finally, after the events of November 1979, much of the site was occupied and built on by unauthorised persons. Thus, by early 1979, HO was in breach of its obligation to provide uninterrupted use and access to the site.

38. Although HO has contended that ICC abandoned the project, it is clear from the evidence that Mr. Levitt and his associates

intended ICC to continue as soon as circumstances allowed. An Iranian firm of contractors had been appointed for the construction work. On 16 October 1978, Mr. Della Ratta sent an internal memorandum to Mr. Levitt reporting that government approval had been obtained for the grant of loans to the eventual purchasers of the houses. At about the same time, however, the decision was taken to pay back deposits paid by 200 prospective purchasers, funds which ICC was entitled to use to finance the construction. This money was transferred on 17 October 1978. While this step is viewed by the Respondents as evidence of ICC's intention to abandon the project, the Tribunal is persuaded by the explanation offered by Mr. Azar-Pey. He stated at the hearing that there had been cases in Iran of developers failing to complete housing projects and absconding with purchasers' deposits. He said that the decision to refund the deposits was taken in order to forestall discontent on the part of those purchasers who had paid deposits and could see no houses being built, and to ensure that the money was not lost or seized during the ensuing Revolution. As such, it was a short-term response to the difficulties ICC had encountered, rather than the first step in a planned withdrawal from the project. Indeed, Mr. Azar-Pey remained in Iran in close contact with HO and MHUD throughout 1979 in an effort to persuade the authorities to carry the project forward.

39. The Tribunal therefore concludes that HO was in breach by virtue of having failed both to obtain approval for the supply of water and to provide uninterrupted use and access to the site. The cumulative effect of these two breaches was to render further performance by ICC impossible. HO is therefore liable in damages. An exact date of termination is impossible to determine, but the Contract must be taken to have come to an end independently of the later events of the Revolution, and at the latest by the end of 1979.

(iii) the measure of damages

40. The Claimant seeks damages of $25,091,162.69. Of this total, $5,635,062.69 consists of expenses incurred by ICC but not reimbursed, and the remaining $19,456,100 is attributable to the loss of profits calculated at 18 percent, a figure included in ICC's proposal documents and attached to the letter of intent.

(a) unreimbursed expenses

41. Damages sustained as a direct result of HO's breaches of contract in the form of unreimbursed expenses are payable to the extent that such expenses were properly incurred as part of ICC's performance of the contract. The standard of evidence required will be more exacting in the case of costs allegedly incurred in the United States, for which documentation should be readily available, than in the case of costs incurred in Iran, to which different considerations apply.

42. There is another factor, specific to this Case, which must enter into the Tribunal's evaluation of the evidence of ICC's expenditure. The Claimant and ICC were during the same period engaged on a different, apparently smaller project, the Dashte Moghan irrigation scheme, which is presently the subject of a separate claim before this Tribunal.[1] While no part of the record in that Case has been introduced even by way of clarification into the present proceedings, this concurrent project raises a serious problem of determining what costs are to be attributed to each of ICC's projects in view of the general character of much of the Claimant's evidence which often fails to identify costs as being related to a particular project.

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[1]Case No. 210, William J. Levitt and The Islamic Republic of Iran, et al., currently pending in Chamber Three.

43. There are nine categories of unreimbursed expenses claimed by Mr. Levitt in respect of the Qanat Kosar project. Each is supported by separate items of evidence, and the Tribunal will deal with them in turn.

Professional services

44. The Claimant seeks $108,580.56 in reimbursement of fees paid for the services of various professional advisers hired in the preparatory stages of the project. It is clear that the plans and specifications submitted to HO in April 1978 were largely the work of professional specialists. Mr. Della Ratta and Mr. Azar-Pey in their respective affidavits mention the hiring of various firms, notably Henderson & Bodwell who produced the engineering drawings. A number of drawings, artists' impressions and advertising materials have been submitted in evidence, together with copies of paid cheques. The Tribunal considers it reasonable to accept the Claimant's figure and award $108,580.56 under this head.

Advertising

45. The Claimant next seeks $125,532.98 in respect of costs of advertising. Clearly, a considerable amount of work was undertaken in this respect, most of it by the Iranian firm of Ziba-McCann Erickson. Mr. Della Ratta, Mr. Azar-Pey and Mr. Levitt state in their affidavits that advertising work had been commissioned. The record contains copies of a number of telegraphic transfers of funds to Ziba-McCann Erickson in Iran, as well as a promotional brochure and several newspaper articles describing the project. Since the Tribunal is satisfied that none of this expenditure is attributable to work done on the irrigation project, which would not have involved advertising, the full amount of $125,532.98 is awarded.

Legal fees

46. A total of $45,613.97 is claimed in respect of legal fees incurred in preparation for the project. Copies of paid checks have been filed in support of this portion of the claim. Here, the evidence does not permit the Tribunal to attribute all of this amount to the Qanat Kosar scheme. Of the total sought, $20,550.94 was paid to Iranian counsel for general corporate advice, and there is no indication of the extent to which the advice related to the housing project or to the irrigation project in which ICC was concurrently involved. Similarly, fees incurred in filing documentation in the Bahamas in respect of ICC's incorporation and in filing certain papers in Iran are not attributable to either project. Another $17,814.25 was paid to various American counsel for general advice as to Iran, but again the evidence does not permit specific attribution. An additional $5,155.62 was paid to the bank's counsel for assistance in securing a loan to finance the housing project, but the Tribunal concludes below that all expenses associated with that loan cannot be attributed to the housing project. See para. 52, infra. Given the Claimant's failure to produce evidence detailing the legal services for which these sums were paid or even specifying the matters in connection with which they were expended -- specifically, the Claimant's failure to produce the relevant invoices or to explain why they could not have been produced -- the Tribunal attributes approximately one-third of the legal fees to the housing project and therefore awards $15,000 under this head.

New York office overhead

47. The Claimant seeks $1,281,891.66 as the "overhead operating expenses" of the office he maintained in New York. He has produced no documentary evidence to support this element of the claim, but only a summary of the different categories of operating expenses incurred during the three 12-month periods between 1 January 1977 and 31 December 1979. The largest element is "payroll and related expenses", including an imputed

salary of $250,000 per year for Mr. Levitt. Only 10 percent of the total expenses for the year 1979 are included.

48. The affidavits and the evidence given at the hearing establish that, apart from Mr. Levitt and Mr. Della Ratta, two other American officers of ICC, Mr. Kamuf and Mr. Green, also based in New York, were spending an appreciable amount of time on the housing project. These officers spent some of their time in Iran, where part of ICC's office was made available as accommodation for them on their visits. It is therefore reasonable to attribute a proportion of the general office overheads of ICC's New York operation, such as rental, postage, telephone and telex charges and maintenance, to the project in question. Nevertheless, the Tribunal assumes, in the absence of any indication to the contrary, that full documentation was available to the Claimant in the United States. Given the Claimant's failure to provide documentary evidence establishing the actual expenditure of the sums claimed and their connection to the Qanat Kosar project, the Tribunal must "determine equitably the damages to be awarded." Economy Forms Corp. and Islamic Republic of Iran, Award No. 55-165-1, p. 21 (14 June 1983). Cf. Gruen Associates, Inc. and Iran Housing Company, Award No. 61-188-2, p. 19 (27 July 1983). Taking into account both the proof concerning the New York office and the insufficiency of the evidence as to actual expenditures, the Tribunal awards one-third of the amount sought, or $425,000, under this head.

General expenses

49. Mr. Levitt claims $32,822.08 as the cost of obtaining graphics, blueprints and photographs, and of courier services, customs and postage charges incurred in connection with the project. Copies of paid checks have been produced, but they are of limited probative value because they show only the name of the payee, not the purpose of the payment. And the only invoices filed, for customs charges on an insured parcel sent to

Iran, and Mr. Della Ratta's cholera vaccination, account for only a very small fraction of the amount sought. On the basis of the same considerations as applied to the New York office expenses, the Tribunal awards $10,000 under this head as a reasonable approximation.

Travel and entertainment

50. Mr. Levitt claims $189,049.31 in travel and related expenses incurred by him and members of his staff working on the housing project. The documentary evidence offered in support of this claim consists of paid checks in favour of the American Express Company, Austin Travel, and the Royal Tehran Hilton Hotel, as well as checks paid to individual staff members allegedly in reimbursement of travel expenses. Affidavit evidence and statements by witnesses at the hearing establish that Mr. Levitt and other ICC officials made numerous trips to Iran, and the travel agency and hotel items largely coincide with the dates on which these visits were made. Otherwise, any attempt to forge a link between the amounts sought and the supporting evidence is, again, largely a matter of conjecture. For this reason, the Tribunal considers it appropriate to award approximately half of the amount sought, or $95,000.

The Tehran apartment

51. A further $14,177.98 is claimed as expenses allegedly incurred in furnishing and equipping the Tehran apartment used to accommodate Mr. Levitt's staff. A number of receipts have been submitted for various items of domestic furnishing purchased by Mr. Levitt's wife in New York. There is nothing, however, to indicate that such items were taken to Iran or used in the apartment in Tehran; still less that they were properly reimbursable under the terms of ICC's contract. This portion of the claim is therefore denied.

Bank interest charges

52. Mr. Levitt claims reimbursement of $2,062,051.20 representing interest payments made on a loan of $5 million granted to ICC on 20 October 1977 by the American Express International Banking Corporation to finance the construction project. The final instalment on the loan was repaid on 12 December 1980. The interest payments, including the variations in rates, are fully documented. It appears reasonable to the Tribunal that before embarking on a major construction project which would inevitably involve heavy initial expenses, ICC should have established some source of credit to assure a reserve of working capital. However, while interest paid on the amount actually drawn under an open line of credit might be considered a necessary expense, and thus a proper head of damage in the circumstances of this case, the same cannot be said with respect to the full amount of interest paid on an outright loan of $5 million. Since it is clear from the date the loan was granted that it was taken out for the purpose of financing the housing project, the Claimant should recover a proportion of the interest that reasonably relates to the amount of the principal actually spent on the project. The Tribunal holds in this Award that only $1,779,113 is recoverable by the Claimant for the project's unreimbursed expenses. See supra paras. 41-45, infra paras. 53-54. That sum must form the starting point for determining the amount of interest to be reimbursed to the Claimant. The Tribunal recognizes that a businessman engaged in a real estate development project might choose to borrow and pay interest on an amount somewhat larger than his immediate expenses. In this Case, however, the Claimant has not provided adequate explanation or proof as to why ICC borrowed as much as $5 million as early as October 1977, and then did not repay the loan until mid-December 1980, despite the fact that by the end of 1979 it had already become clear that there was no prospect of the project continuing. These circumstances raise serious doubts as to whether interest on the entire $5 million loan until 12 December 1980 can reasonably be considered as a

reimbursable expense of the project. The Tribunal must in this connection, as in other aspects of this Case, make a reasonable approximation. See, e.g., para. 57 infra. Accordingly, the Tribunal determines that it is reasonable to award an amount which represents the interest paid by ICC on $1.8 million, a sum reasonably related to the $1,779,113 awarded for other reimbursable expenses but which allows a small margin of flexibility. Based on bank statements in the record, the interest paid by ICC during the 26 months from the date of the loan to 24 December 1979 on the $5 million it actually borrowed was $1,275,868.05. In determining how much of this is recoverable, the Tribunal notes, first, that no basis has been shown for borrowing more than $1.8 million. Second, no explanation has been given why all the borrowing took place at the outset, whereas actual expenditures were spread out over a considerable period of time. In these circumstances, the Tribunal considers it appropriate to allow interest on $1.8 million for a period of 20 months. Reducing the Claimant's figure in corresponding proportion, the Tribunal awards $350,000.

Bank transfers

53. The Claimant seeks to recover a further $1,775,342.25 representing funds allegedly transferred to ICC in Iran to finance expenditure on the project from the Tehran office. Mr. Levitt states that in the absence of any of ICC's locally maintained records, he and his staff have provided a reconstruction from memory as an estimate of how the funds were applied. Mr. Azar-Pey indicates in his affidavit that some of the funds transferred to Iran were spent on local office costs. Money was also transferred to replace the $500,000 to $600,000 of the deposits that had been applied to the project. The amount transferred to Iran up to the end of 1978 appears to have been about $1,700,000. The only contemporaneous document which might be relevant in this respect is a tax return filed by Mr. Azar-Pey as managing director of ICC with the Iranian tax authorities which would suggest that perhaps $300,000 was

expended on the project in 1978 and 1979. The figures appearing in the tax return were compiled on the basis of considerations unknown to the Tribunal, and its evidentiary value for this purpose is thus somewhat limited. In fact it was introduced into the record by the Respondents in an entirely different context, in support of the tax counterclaim.

54. The Tribunal is satisfied that an appreciable amount of work was done in clearing and grading the site, and that considerable incidental expenses must have been incurred by ICC, though there is no specific evidence to support the amount now claimed. The fairest estimate the Tribunal can make of the cost of the work performed in Iran is to give equal weight to the tax return figures and the total transferred, and award $1 million.

b) lost profits

55. In principle, loss of profits constitutes a proper head of damages for breach of contract provided the Claimant can establish to the Tribunal's satisfaction that such profits would have accrued if the contract had proceeded to completion.

56. In the present instance, however, the basis of the claim for $19,456,100 under this head is highly speculative. While a profit margin of 18 percent appeared in the proposal documents submitted for approval and later attached to the letter of intent signed by MHUD, no such provision was carried into the Contract itself. By the time the Contract came to an end only the initial stages of clearing and grading had been completed, and no construction work had begun on the buildings. The project had therefore reached only a very early stage.

57. Initially, the prospects looked favourable. The level of interest shown by prospective purchasers before the Revolution was encouraging, and government approval had been given for the grant of the mortgage financing. Indeed, HO was obliged by the

terms of the Contract to use its best endeavours to obtain such financing. The demand for such housing might well have survived the events of the Revolution. However, the evidence indicates that ICC would have experienced considerable difficulties in proceeding with the major phases of the construction under the prevalent conditions of disruption and unrest, particularly in view of the fact that it was the first such project Mr. Levitt had undertaken in Iran. It is most unlikely that the project could have been completed according to the time schedule originally envisaged, or that the cost would not have been greatly increased by difficulties in providing supervision by the Levitt organisation and in obtaining imported materials.

58. For these reasons the Tribunal finds that the Claimant has not established with a sufficient degree of certainty that the project would have resulted in a profit. The claim in this respect is therefore dismissed.

(iv) The Counterclaims

(a) taxes

59. The GOI initially raised a counterclaim for approximately 42 million Rials in taxes which it alleged were owed by ICC. With the filing of further pleadings it became clear that the liability, if any, arose out of ICC's involvement in the separate irrigation project, and thus the purported counterclaim falls outside the scope of Article II, paragraph 1, of the Claims Settlement Declaration, which requires that a counterclaim arise "out of the same contract, transaction or occurrence that constitutes the subject matter" of the claim.

60. Similarly, the counterclaim, as reformulated pursuant to a Tribunal order, does not establish any contractual basis for the alleged tax liability so to to bring it within the Tribunal's jurisdiction, either as a counterclaim or a set-off. The Contract signed on 14 January 1978 does not contain any

provision for the withholding or collection of taxes. The counterclaim must therefore be dismissed for lack of jurisdiction.

(b) loss of use of land

61. HO claims approximately Rials 523 million representing the price it paid to the numerous owners of the Qanat Kosar land in order to acquire title to the property. It asserts that its inability to make use of the land is attributable to ICC, although the legal basis of this claim is not clear.

62. The evidence shows that once HO acquired the land, it retained title throughout. Title never passed to ICC during the course of the Contract, nor was there any such requirement. Since it is clear from the Tribunal's findings that ICC itself was prevented from using the land as a result of HO's failure to ensure access, there is no basis on which the present counterclaim might be entertained. It is accordingly dismissed.

(v) Interest

63. In view of the Tribunal's determination that the Contract came to an end as a result of HO's breaches at the latest by the end of 1979, the Claimant is entitled to an award of interest from 1 January 1980 on the total amount awarded.

64. As to the rate of interest to be applied, in the absence of a contractually stipulated rate, this Chamber awards interest in an amount approximately equal to the rate a successful claimant would have been able to earn had it invested the sums awarded in a form of commercial investment common in its own country. See, e.g., Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1, pp. 30-34 (27 June 1985); Oil Field of Texas, Inc. and Islamic Republic of Iran, Award No. 258-43-1, para. 49 (8 Oct. 1986). For successful American claimants, the Tribunal customarily uses the average rates earned on six-month

certificates of deposit, as published periodically by an authoritative official source, the Federal Reserve Board. The average rate for the period relevant to this Award, rounded to the nearest quarter-percent, is 10.75 percent.

(vi) Costs

65. The Claimant requests an award of the costs of arbitration. Mr. Levitt has filed a short affidavit stating that he has incurred legal fees of "more than $100,000" and a further sum "in excess of $15,000" in expenses connected with this proceeding. No further details are provided. Having regard to criteria of the kind outlined in Sylvania, supra, pp. 35-38, and taking into account the outcome of this Case and the lack of specificity of the claim for costs, the Tribunal awards the Claimant costs of $10,000.

66. The Tribunal sees no reason to award costs to Bank Melli. The claim against Bank Melli was withdrawn in August 1985, and Bank Melli filed only three short submissions during the course of the proceedings and did not appear at the pre-hearing conference or the hearing.

III. AWARD

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

i) The Respondent THE HOUSING ORGANIZATION OF IRAN is obligated to pay the Claimant WILLIAM J. LEVITT the sum of Two million one hundred twenty-nine thousand one hundred thirteen United States Dollars and fifty-four cents (U.S.$2,129,113.54) plus simple interest thereon at the rate of 10.75 percent per annum (365-day basis) from 1 January 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank

to effect payment out of the Security Account, plus costs of arbitration of U.S.$10,000.

ii) the counterclaims of THE GOVERNMENT OF IRAN and THE HOUSING ORGANIZATION OF IRAN are dismissed.

The above obligation shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria dated 19 January 1981.

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

Dated, The Hague
22 April 1987

Karl-Heinz Böckstiegel
Chairman
Chamber One

In the Name of God

Mohsen Mostafavi
Dissenting Opinion

Howard M. Holtzmann
Joining fully in the Award, except joining solely in order to form a majority as to the award of only $10,000 in costs. See my Separate Opinion in Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985).