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** AWARD - Type of Award _____
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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____

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** SEPARATE OPINION of _____

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** DISSENTING OPINION of Mr Mostafavi award 297-209-1

- Date 4 May 1987
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In the Name of God

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

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.

DISSENTING OPINION OF MOHSEN MOSTAFAVI

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1. I concur in the dismissal of the claims relating to lost profits and the Tehran apartment, but not with the reasoning reflected in the majority's Award. Although I consider the arguments set forth in the Award in this respect to be correct -- so far as they go -- I do not regard the Respondent as being guilty of breach of contract, and I thus believe that it should be relieved of all liability in this connection.

The Claimant adduces several points on the basis of which he considers the Respondent liable for damages arising from breach of contract. The majority,

however, has satisfied itself with taking up only two of these points; and in reliance thereon, it has found the Respondent liable for damages. These two points are as follows:

A) Pursuant to Article 3.9 of the Agreement, the Respondent had the obligation to provide the buildings with the necessary water. It has been found liable for payment of damages in this regard, however, on the grounds that it failed to meet this obligation. The majority is not satisfied by the Respondent's defence that it had made its best efforts to supply the water, having arranged to have a deep well in the area made available to supply the water needed for the construction. The majority holds that Article 3.9

> "... 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 [Housing Organization] 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."

Although the text of this Article is reflected in the majority's Award, the majority has construed it in a manner contrary to its clear language. That Article expressly provides that

> "The Organization during the same 90 (ninety) day period referred to in Section 3 above, will obtain approval in principle for connection of water, electricity and gas by the respective departments." (emphasis added)

Therefore, the Respondent's obligation as to the water supply was limited to "obtaining approval in principle," and there are thus no grounds for the majority's expanding that obligation to include "the finished development stage," thereby increasing the scope of the Respondent's liability. Moreover, the Claimant has asserted that "approval in principle for connection of water --- by the respective departments" had, in principle, already been obtained. When he states in his

Affidavit that he met with various Iranian Government officials and engaged in discussions with the Minister of Housing, and that even the Prime Minister had endorsed his ideas on housing construction, and Iranian journals had written a number of articles on the importance of the project, all this indicates that the Government organizations had in principle approved provision of the necessary construction facilities for the said project. At the same time, it goes without saying that where a foreign company-- which would be unfamiliar with the relevant regulations-- decides to establish an extensive facility necessitating contact with various Government organizations, the latter (and particularly organizations which are a party to the contract itself) should extend whatever assistance is required to such foreign firms, in order to expedite completion of the works. This is the obligation which the Housing Organization undertook pursuant to Article 3.9 of the Agreement; and, as it has stated, it did fulfill this obligation. The Minutes of the verbal discussions dated 25 May 1978, wherein a decision was taken to make a deep well available to ICC (and this meeting was attended by a representative of ICC, which points to his concurrence with this arrangement) clearly indicates that this obligation was met. In principle, it is inconceivable that a Government which had, as stated by Mr. Levitt, attached such exceptional importance to his housing construction program, would balk at providing water for the construction, despite having carried out all of its other obligations.

The majority has magnified "obtaining approval in principle" out of all proportion. In itself, obtaining approval in principle would not contribute to completion of the works; nor would failure to obtain it prevent progress thereon. According to the statement of Mr. Della Ratta, grading was completed by October 1978. At that time, assurances had been given in connection with gas and electricity, but since the situation regarding the water supply was unclear, there was doubt as to the prospects of proceeding with the project. Therefore, if obtaining approval in principle for the water supply can be regarded as affecting progress on the construction works, its effects would have become manifest from October 1978 on, whereas at that time water was available from a deep well. Unfortunately, my colleagues have attached an exaggerated importance to something which had no practical impact on the completion of the construction activities; and this has

adversely affected the process of discovering the facts. If [failure to obtain] approval in principle to provide water can be deemed to constitute breach of contract and grounds for liability-- merely because approval was not obtained within the time period stipulated in the Agreement, and whether or not it affected progress on the construction activities-- then the [Claimant's] failure to provide the construction cost index (which was submitted only in August 1978, rather than in April of that year as provided under the Agreement) could entail precisely the same consequences. Even though this was a contractual obligation, the majority argues in connection with the latter point, that

> "... 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."

Yet, this very argument is equally applicable to the issue of the water supply. It is therefore improper to treat the Parties differently with respect to a single, entirely analogous issue. It must, moreover, be noted that where the Claimant agreed on 25 May 1978 (by the presence of Mr. Azar-Pey, as set forth in the Minutes of the verbal discussions relating thereto) to having the water needed for construction purposes provided from a deep well located in the vicinity of the lands of the construction project, it is clear that he consented, in this way, to the new arrangement. This point is confirmed by the fact that there were no subsequent complaints regarding water throughout the period when work continued on the project. Therefore, for the reasons set forth above, the Respondent cannot be held liable for "failure to obtain approval in principle" for the water supply.

B) The second point on which the majority has found the Housing Organization to be in breach of contract, is its failure to ensure ICC's uninterrupted access to the worksite. The majority states its views in this connection as follows:

> "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 [ICC with] uninterrupted use and access to the site."

Notwithstanding the categorical manner in which the majority has assigned a date to the occupation of the land, we come across evidence to the contrary on this point. It is stated in the Award that the Claimant's company was denied access to the land from mid-1978 on, whereas in paragraph 28 of his Affidavit Mr. Azar-Pey, a witness for the Claimant, states that "after ICC finished the clearing and grading of the land in late 1978, we lost access to it." I shall discuss below the significance of this discrepancy in dates. It should, however, be observed that Article 5.1 of the Agreement does not intend that ICC was to have no duties in response to an occupation of the land, apart from the mere obligation of informing the Housing Organization to request that it evict the squatters and restore the land to the possession of the company. Pursuant to Article 10.2 of the Agreement, the Parties stipulated that the Agreement was to be "interpreted under and governed by the laws of Iran." As an agency vested with commercial functions, the Housing Organization lacked the authority of an enforcement agency; and since it had no enforcement powers, it was on principle incapable of ejecting the squatters. Therefore, Article 5.1 of the Agreement should not be construed as meaning that provision of "uninterrupted use of and access to the Site" entailed the performance even of duties which under Iranian law were to be carried out by the courts. Rather, that Article intended that so far as permitted by its legal duties and authority, the Housing Organization had the duty to assure and provide uninterrupted use of and access to the worksite. It would be neither logical nor practicable for a commercial (albeit Governmental) agency to undertake, pursuant to a contract, duties which it could discharge only in the event that there were a change in the nation's fundamental laws. At the Hearing conference, Mr. Azar-Pey explicitly stated, in response to a question, that the company (which was the lawful possessor of the land) had neither brought suit before the Ministry of Justice, nor requested police assistance in evicting the squatters. Yet he had formerly been the Managing Director of the Housing Organization and was thus acquainted with the regulations, which provided that such requests could be entertained from no one (even the Housing Organization) other than the actual

[legal] possessor. Even if the Government had been a party to the Agreement, it would have been unable to assume such an obligation. Therefore, the Organization's obligation could not have gone beyond extending its cooperation in order to have the squatters evicted; and if the legal possessors themselves failed to take direct legal action to have the squatters evicted, there was no way for the Organization to offer its assistance in support of the necessary measures.

The fact is, that ICC had by then perceived that as a result of changed circumstances, it would be unable to realize the enormous profits which it had anticipated. Therefore, when the Revolution picked up momentum after mid-1978, and in fact in October of that year, ICC decided to refund the advance deposits which its customers had put down on their houses. In his Affidavit, Mr. Azar-Pey states that

> "By October 1978 the situation in Iran was deteriorating rapidly and I called Mr. Levitt and suggested that ICC should return the 25% deposit money to the purchasers to avoid loss or confiscation of the funds during the Revolution. Mr. Levitt agreed with my assessment of the situation and immediately transferred funds to Iran... ICC got in touch with the depositors... within two months we returned every rial deposited..." (emphasis added)

This decision was taken at a time when, according to Mr. Levitt,

> "the Revolution had provided a pretext for dissatisfied people to try to gain possession of parts of the land at Qanat Kosar. ICC guards protecting the construction site were threatened and our construction hut was sacked."

As the Claimant states, it was in this same period that "During the Revolution, ICC withdrew its American personnel temporarily" (Claimant's Hearing Memorial, paragraph 55). Therefore, the abovementioned events occurred in close succession, and indeed virtually simultaneously. First, the Revolution picked up momentum in October. Then, following upon the revolutionary events, the land was occupied by the people; and after this, Mr. Levitt agreed with Mr. Azar-Pey's "assessment" that the customers' money should be returned to them. The company's American personnel left Iran at the same time. Therefore, this event did not transpire as

reflected in the majority's Award (ie. that ICC was denied access to the site in mid-1978 as a result of general civil disorder). Rather, as the Claimant himself states, this event occurred several months later, at the height of the Revolution. Thus, even if we accept the premise that the Housing Organization had the responsibility to evict the squatters, in any event that Organization cannot be held liable, since the said event was a clear case of force majeure. By creating this gap in time, the majority separates interrelated events; it also dismisses the Respondent's defence that the Claimant had abandoned the project, arguing that

> "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."

This argument is unconvincing for the following reasons:

a) More than succeeding in demonstrating Mr. Levitt's intention of continuing with the project, the report by Mr. Della Ratta proves that the Respondent wanted the project completed. This is because in granting loans for purchasing the houses, the Respondent was in actuality endorsing the carrying out of the construction activities.

b) It is true that Mr. Azar-Pey stated in his oral comments, that [the deposits] were repaid in order to forestall discontent on the part of purchasers who had paid for their houses but had not received them. However, this explanation is utterly unconvincing, because Mr. Azar-Pey also stated that many customers having refused to take back their deposits, the company insisted on returning their money to them. In his Affidavit, he also writes that it took two months to return this money, because some people were difficult to locate. It is therefore manifest that the customers had not made any request to have their deposits refunded, whereby it might be supposed that they were discontented and that there was an intention of forestalling the spread of such discontent. In this way, ICC's insistence on refunding the deposits can signify nothing other than its intention of abandoning the project.

c) That argument also states that Mr. Azar-Pey remained in Iran in order to pursuade the authorities to carry the project forward. This argument seems particularly odd, because Mr. Azar-Pey was Iranian and would naturally have remained in Iran. Thus, his need to remain in Iran cannot possibly support the Claimant's assertion or be invoked as an argument in justification thereof.

2. Even if it be assumed, in arguendo, that the Respondent was in breach of contract, the Tribunal has calculated [the damages arising therefrom] improperly. As a result, and even if the majority's premises be accepted, the Respondent has suffered injury amounting to a considerable sum of money as a consequence of the Award, as the following analysis reveals:

A) Professional services: The Claimant sought $108,580.56 in reimbursement of fees paid to various professional advisors hired in the preparatory stages of the project. The majority has accepted this claim in its entirety, arguing that

> "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... 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."

The copies of the paid cheques indicate that $10,841.60 of the above-mentioned figure relates to the year 1976-- and at that, to the early part (March 1976) thereof. In view of the fact that the Parties entered into the Letter of Intent on 28 May 1977, and that there was no agreement over the plans and drawings until the Agreement (on the basis of which those plans and drawings were approved) was signed on 14 January 1978, no monies can properly be awarded in this respect. The Claimant has, it is true, asserted that along with the signing of the Letter of Intent in the negotiations conducted with officials of the Housing Organization, he also obtained their agreement over the plans and drawings, although he has not produced any evidence in support of this assertion, either. However, in view of the fact that some of these checks were issued even prior to the date on which the Letter of Intent was concluded, it is certain that the works relating to those checks were unrelated to the Agreement in the instant case, and that the Respondent should not properly have been required to pay on them.

B) New York office overhead: The Claimant sought $1,281,891.66 as the overhead operating expenses of his New York office. Although the majority has held that

> "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,"

it has nonetheless awarded "one-third of the amount sought, or $525,000 under this head." In addition, the Claimant has not proved that the New York office is a part of ICC, because as stated in the present case, Mr. Levitt has had forty years' experience in housing construction, whereas ICC was established in the Bahamas only in 1976. We have no information as to when the New York office was established, and we do not know what relationship there was between ICC and the New York office. What is most likely, in view of Mr. Levitt's long experience in the field, is that the New York office related to his United States activities.

Considering that it is the Claimant who bears the burden of proof, it is improper to attribute one-third of the expenses of the said office to the instant project, in the absence of any logical, justifiable standard whatsoever, particularly since

> "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 did not have such evidence at its disposal. Therefore, where the Claimant knowingly failed to provide evidence and to produce documents available to him, he should not profit from his own acts of omission. Determining equitably the damages to be awarded relates to instances where it is beyond the claimant's power and ability to produce evidence-- and not to instances where he purposely avoids doing so.

C) General expenses: the preceding observations hold true for general expenses as well, because while the Tribunal believes, in connection with the documentary evidence submitted to it, that

> "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," (emphasis added)

the Tribunal nonetheless "awards $10,000 under this head as a reasonable approximation." In other words, the Tribunal is stating that despite the absence of sufficient evidence and the fact that only "a very small fraction of the amount sought" has been proved, it is increasing this amount and bringing it up to one-third of the total amount claimed!

D) Bank transfers: The Claimant asserts that he transferred $1,775,342.25 to Iran for payment of costs of the Tehran office and the related project. He asserts that because he had no access to the financial records in the Tehran office, he and

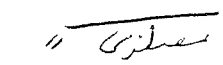
his staff have reconstructed from memory the amounts set forth in this claim. The majority has found the Claimant to be entitled to, and the Respondent liable for payment of, $1 million in connection with this claim. In granting this amount, the majority argues as follows:

> "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 counterclaims.
>
> "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, <u>though there is no specific evidence to support the amount now claimed</u>. 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 transfer, and award $1 million." (emphasis added)

Mr. Levitt's assertion that he did not have access to the financial records relating to ICC-Iran's expenses, and that he thus had no alternative but to avail himself of his memory and that of his staff in determining the expenses incurred, is an unfounded and specious allegation. ICC-Iran, which was one branch of ICC-Bahamas, must surely have submitted its financial statements to the mother company on a monthly, or at least quarterly, basis; for the latter would otherwise have been unable to file its records and prepare its profit-and- loss statement. The presumption that Mr. Levitt, the Claimant in this case, had no access to [ICC-] Iran's financial records and vouchers is totally unacceptable. The mother company could not conceivably have prepared its accounts and computed its income and expenditures, unless it was informed as to its branch's expenditures. Therefore, even supposing that Mr. Levitt lacked access to his financial records in Tehran, the

financial reports which reached the head office from Tehran are tantamount to those very records located in Tehran. There can thus be no doubt that Mr. Levitt acted willfully and intentionally in failing to produce those documents, and he should therefore not profit from his own omission. Unfortunately, however, the Tribunal has not only in large measure accepted this unjustified assertion, but also held that the figures appearing in the company's tax return (which the Claimant himself had submitted as the company's balance sheet) are of limited evidentiary value, on the excuse that they "were compiled on the basis of considerations unknown to the Tribunal." Apart from the fact that the Tribunal could have satisfied itself in this respect by referring to Iranian law, it should on principle have taken into account that where the Claimant has made a disclosure of his accounts on the basis of his own records, and where no evidence impugning their validity has been produced, this written submission by the Claimant himself should not be discredited through reliance on the Claimant's memory-- a memory, at that, which is naturally prone to lapses. The Tribunal has satisfied itself with respect to the claim for $1,775,342 that "there is no specific evidence to support the amount now claimed." It is thus unjust for the Tribunal to award the Claimant the sum of $1 million-- in light of the fact that it has established the amount represented by those accounts at $300,000-- on the pretext that this figure provided in the tax return was "compiled on the basis of considerations unknown to the Tribunal." It is, moreover, unjust to attach the same weight to the Claimant's memory as to this [written document].

The Hague,
Dated 4 May 1987



Sayyed Mohsen Mostafavi