

210-235

ORIGINAL DOCUMENTS IN SAFE

Case No. 210

Date of filing: 3/9/91

\*\* AWARD - Type of Award \_\_\_\_\_  
- Date of Award \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

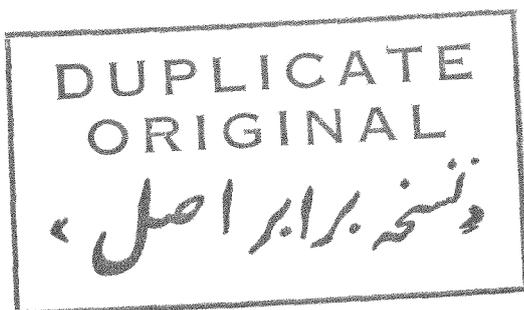
\*\* DECISION - Date of Decision \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* CONCURRING OPINION of and Do of Mr Allison  
- Date 3 Sep 1991  
11 pages in English \_\_\_\_\_ pages in Farsi

\*\* SEPARATE OPINION of \_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* DISSENTING OPINION of \_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

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CASE NO. 210  
CHAMBER THREE  
AWARD NO.520-210-3

WILLIAM J. LEVITT,  
Claimant,

and

ISLAMIC REPUBLIC OF IRAN,  
MINISTRY OF AGRICULTURE AND  
NATURAL RESOURCES OF THE  
ISLAMIC REPUBLIC OF IRAN,  
MOGHAN AGRO-INDUSTRIAL AND  
LIVESTOCK DEVELOPMENT CORP.,  
AND BANK MELLI IRAN,  
Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داوری دعاوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	3 SEP 1991
	تاریخ ۱۲ / ۱۶ / ۱۳۷۰

CONCURRING AND DISSENTING OPINION  
OF RICHARD C. ALLISON

1. I concur generally in the Award's findings regarding jurisdiction and the obligation of Moghan Agro-Industrial and Livestock Development Corp. ("Moghan") to compensate Claimant for the equipment retained by Moghan as set forth in paragraph 124 of the Award. I also agree with the award of costs of this proceeding as determined in paragraph 126 of the Award, the dismissal of the Respondents' counterclaims, and the finding that Respondents must take any and all actions to release the letters of credit opened by International Construction Co. ("ICC") to secure guarantees under its contract dated 15 September 1977 with Moghan (the "Contract") and to cancel the corresponding performance bonds. Accordingly, in order to ensure formation of the necessary majority as to the foregoing

determinations, I concur in the present Award. I write separately to dissent from the Award's failure to award additional sums to which Claimant, in my view, is entitled.

2. My disagreement with the Award relates to its failure to compensate Claimant for any of the extra work done by ICC under the Contract for the construction of an irrigation project in Iran. The Tribunal attributes its refusal to recognize these excess costs to (i) deficiencies in Claimant's proof and (ii) its view that ICC's performance under the Contract was marred by various shortcomings. Neither of these points is wholly incorrect. I differ, however, with regard to the effect that they should have upon the Award in this Case.

3. The record reveals a troubled contract, with the contractor seeking to complete a project under conditions that had undergone radical changes after the initial invitation for bids. When this Case came before the Tribunal for adjudication, each Party formulated claims against the other that depended in large measure upon documentation generated in Iran during the term of the Contract. Accordingly, the Tribunal issued Orders calling for the production of a number of documents. Respondents' compliance with these Orders was notably deficient. Where a party has willfully failed to comply with Tribunal orders for the production of documents<sup>1</sup> highly relevant to the issues in a case, it is a matter of judgment as to how the Tribunal should react. Most would agree, however, that a party's deliberate non-compliance with Tribunal orders gives rise to an inference that the production of the requested

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<sup>1</sup>There can be no doubt that Respondents here purposefully elected not to furnish material called for by the Tribunal. At the Hearing they excused this conduct on the ground, among others, that they did not wish to "burden" the Tribunal by submitting a large volume of documentation.

documents would not have supported that party's arguments. This inference in turn tends to enhance the credibility of the allegations of the other party that may not be fully documented but are consistent with the factual pattern established by the evidence in the case. Likewise, it tends to diminish the credibility of the non-complying party's own allegations of fact.

4. Under somewhat similar circumstances the Tribunal stated in INA Corporation and The Government of the Islamic Republic of Iran, Award No. 184-161-1 (13 August 1985), reprinted in 8 Iran-U.S. C.T.R. 373, 382:

The report's numerous references to special rules and directives of CII also make it impossible for the Tribunal to judge the validity of the valuation techniques used. The Respondent has furnished neither the texts of such rules and directives nor the underlying documents, although it was ordered to do so. The Respondent's attempt to excuse its non-compliance with the Tribunal's Order by merely stating that the documents were "voluminous" is not convincing. The Respondent did not raise this asserted excuse until the hearing, long after the date for submission of these materials had passed; even then, the Respondent gave no indication of the actual amounts of material involved or any description of the alleged problems involved which prevented submission of the materials by the Respondent or their inspection by INA. In assessing the evidentiary weight of the Amin report, the Tribunal must draw negative inferences from the Respondent's failure to submit the documents which it was ordered to produce. In sum, the Amin report is so qualified and limited, and so influenced by unexplained, specially adopted (and not generally accepted) accounting techniques, that it cannot be considered to reflect the value of Shargh at the time of nationalisation.  
(Emphasis added, citation omitted)

5. While Respondents here have declined to deliver evidence requested by the Tribunal, they have also adopted an equally egregious technique of selective submissions. For example, in producing a series of correspondence between

the Parties, Respondent Moghan provided only the letters written by it and suitable for its own purposes while failing to make available to the Tribunal the Claimant's side of the same correspondence, including letters that are specifically referenced in the documents offered in evidence by Moghan.

6. It must be recognized that the record in this Case is further obscured by Claimant's alleged inability himself to supply documents supporting his version of the facts. The failure to maintain virtually any records outside Iran is rather inexplicable in a corporation with experienced and sophisticated management. Also, the failure to produce as a witness a key former employee who had been in charge of the irrigation project in Iran left an important gap in Claimant's proof.

7. It is axiomatic that Claimant bears the burden of proving his own case. On balance, however, the Tribunal in my view should have taken a more skeptical view of Respondents' submissions in light of their cavalier, and seemingly calculated, attitude toward the Tribunal's production Orders.

8. Despite the evidentiary problems alluded to above, certain key facts can be taken as proven, and the Award does so. These include:

- a) The initial Contract period was extended and work beyond that originally contemplated was done by ICC on the project. ICC did not receive payment for at least some of this work.
- b) Although Moghan claimed in this proceeding that ICC's performance under the Contract had been seriously deficient, Moghan itself contributed to the problems experienced by ICC.

- c) Moghan never invoked provisions of the Contract that would have entitled Moghan to terminate it for cause and to demand the payment of penalties by ICC.<sup>2</sup>
- d) By November or December 1978, over 82 percent of the irrigation project had been completed by ICC.
- e) ICC attempted to make provisional delivery of the project from March through May 1979, but Moghan declined to cooperate.
- f) Despite disturbances due to revolutionary conditions and the disruption attendant upon the change of governments, ICC continued to fund its Iranian operation by transferring U.S.\$770,400 to Iran on 18 October 1978 and U.S.\$49,705 in April 1979.
- g) The irrigation project had been completed and was in operation at the time of the Hearing in this Case (February 1990).

9. Claimant maintains that ICC's expenditures in connection with the irrigation project exceeded its receipts by some Rls. 90,182,514. The Tribunal has awarded nothing in respect of this alleged shortfall. Although the Award notes that ICC performed work under the Contract for which it was not paid, it ultimately concludes that the amounts

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<sup>2</sup>Likewise, Article 29 of the Contract contemplated change orders, as would be normal in a project of this kind. In view of ICC's continuation of the work and its efforts to overcome various obstacles and problems (some of which were caused by Moghan or were chargeable to it under the Contract), there is a strong inference that employer and contractor were in agreement upon the additional work that admittedly was done.

owing to ICC for such work have been fully offset by "damages and credits due to Moghan." In my view, the Award resolves too many doubts in favor of Respondents in light of their defiance of Tribunal Orders and manipulation of evidence.<sup>3</sup>

10. In calculating the amount of ICC's expenditures upon work performed and not paid for by Moghan, the Award uses figures which are unduly conservative. Specifically, the Award adopts as a premise an approximate total for ICC's

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<sup>3</sup>As the Award observes at paragraph 64, ". . . the Respondents have failed to submit the majority of the documents requested . . . . Their often contradictory and evasive explanations suggest deliberate non-compliance rather than an inability to produce."

Under these circumstances, the Tribunal may already be demonstrating greater tolerance than is warranted. As a leading authority observes,

[l]acking, in general, power to compel the attendance of witnesses or the production of documentary evidence by witnesses, international tribunals are peculiarly dependent upon the industry and integrity of the parties to proceedings before them for the production of available evidence . . . . With respect to the parties themselves, such tribunals have considerable power to compel a reluctant litigant to disclose facts in its possession, such as the power, in effect, to give judgment by default against a Government that withholds decisive evidence. But . . . tribunals have no marshals who can bring in unwilling Government officials and compel them to divulge desired evidence. For these reasons, and because of the importance of having international controversies resolved on the basis of the facts of the situation as nearly as they may be determined, parties to international judicial proceedings have a more extensive obligation to produce all evidence within their control than that normally imposed upon litigants in municipal proceedings. D. Sandifer, Evidence Before International Tribunals (Charlottesville: 1975) at p. 112. (Emphasis added.)

costs of only Rls. 271,000,000, thus rejecting any of the approximately Rls. 80,000,000 of administrative and indirect costs reflected in ICC's tax returns and supporting financial documents. Claimant has indicated that, in setting forth ICC's total costs under the Contract, he has reduced this category of costs by fifty percent, to approximately Rls. 40,000,000, in order to state conservatively the amount of such costs corresponding to the Moghan irrigation project. Claimant's adjustment, in my view, should be sufficient to correct for the possibility that some of these expenses are attributable to a different project. Therefore, in determining ICC's unreimbursed costs I would have included Rls. 40,000,000 in indirect and administrative costs, resulting in costs totalling Rls. 311,000,000. ICC received payments of approximately Rls. 221,000,000 from Moghan. Accordingly, the difference between these two figures (Rls. 90,000,000) is the approximate amount of the shortfall, not Rls. 50,000,000 as suggested by the Award.

11. While the factors giving rise to potential offsets favoring Moghan do not appear to be wholly fanciful, they cannot justify disregarding entirely these unpaid amounts. The apparent grounds upon which the Award completely dismisses these losses are two: 1) ICC's performance under the Contract, and 2) certain entries found in the balance sheets appended to the ICC tax returns submitted by Claimant.

12. It would seem that ICC's performance under the Contract was not flawless. Unfortunately, because of the fragmentary and selective nature of the documentation provided by Respondents in support of this assertion we cannot acquire a clear picture of the extent to which it holds true. On the other hand, we know that Respondents have been provided with a functioning irrigation system, that many of the delays suffered by the project were directly attributable to

Moghan, and that events leading up to and following the Revolution seriously complicated ICC's task. If ICC is to be penalized for any alleged staffing or other inadequacies, the deduction of that portion of ICC's administrative and indirect costs sought by Claimant in this proceeding (approximately Rls. 40,000,000 after a reduction by Claimant of 50%) would seem to be entirely sufficient for this purpose. Under such an approach, Claimant would remain entitled to Rls. 50,000,000 for work performed.

13. In finding that Claimant is entitled to nothing for a portion of the work performed under the Contract, the Award relies upon two entries from the balance sheet filed by ICC with its 1979 Iranian income tax return. The Award treats these entries in effect as ICC admissions against interest. The first is a receivable amounting to Rls. 31,750,138, which the Award equates with the amount that ICC expended under the Contract and failed to recover from Moghan. The Award seems to conclude that ICC's shortfall has not been fully corroborated in its own portrayal of the Contract for tax purposes. The second entry is an item under the heading "Advance Receipts" (a current liability) of Rls. 32,955,822. The Award also seems to suggest that this item indicates that Moghan had not fully recouped the amounts it had advanced to ICC under Article 36 of the Contract. In my view, the Award places too much emphasis on these entries.

14. In William J. Levitt and The Government of the Islamic Republic of Iran, et al., Award No. 297-209-1 (22 Apr. 1987), reprinted in 14 Iran-U.S. C.T.R. 191 (hereinafter "Levitt I"), the Tribunal identified the cardinal factor militating against placing heavy reliance on these same balance sheets. The Tribunal observed: "The figures appearing in the tax returns were compiled on the basis of considerations unknown to the Tribunal, and its [sic] evidentiary value for this purpose is somewhat limited . . .

.<sup>4</sup> The same figures referred to in Levitt I should not in this Case be greatly elevated in importance simply because they were introduced by Claimant instead of by Respondent.<sup>5</sup> The lack of illuminating detail is evident from the entries that the Award relies upon. The entry which the Award calls "accounts receivable" is in fact listed as "Debtors" and appears with a parenthetical reference to a certain "Table No. 18." Because the referenced table does nothing more than break down the account into "current debtors" and "other debtors" the Tribunal can only speculate about the composition of the Rls. 31,750,138, relied upon in the Award.<sup>6</sup>

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<sup>4</sup>Levitt I, Award No. 297-209-1 (22 Apr. 1987), reprinted in 14 Iran-U.S. C.T.R. 191, 209. The Tribunal in Levitt I dealt with the tax returns in a more balanced way than the present Award. After questioning the evidentiary value of the returns, the Tribunal reasoned:

[t]he Tribunal is satisfied that an appreciable amount of work was done . . . and that considerable incidental expense 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 work performed in Iran is to give equal weight to the tax return figures and the total transferred.

14 Iran-U.S. C.T.R. 191, 209 (Emphasis added).

This approach prevailed even though "in the absence of any of ICC's locally maintained records [Mr. Levitt] and his staff provided a reconstruction from memory as an estimate of how the funds were applied" and even though "[t]he only contemporaneous document which might [have been] relevant in this respect is [the] tax return filed by Mr. Azar-Pey . . . ." Id. at 208.

<sup>5</sup>As noted in the Award in the present Case, the balance sheets submitted by Claimant in this Case were originally supplied by the Government of Iran in Levitt I in support of a tax counterclaim. Through that submission Claimant obtained the returns, which he has made part of this record.

<sup>6</sup>It may be that this amount reflects the crediting of  
(Footnote Continued)

15. The notion that the entry for "Advance Receipts" (Rls. 32,955,822) represents an amount owing to Moghan is similarly built upon speculation. The credibility of this entry for these purposes is undercut by the evidence. Article 36 of the Contract required Moghan to advance 25 percent of the initial contract price to ICC. Under that article recoupment of 10 percent of the initial Contract price was automatic, through a 12 percent standard deduction from each invoice paid. Given the amount paid under the Contract (approximately Rls. 221,000,000), it can be assumed that this 10 percent reimbursement was fully accomplished. The additional fifteen percent deduction was subject only to Moghan's discretion, and the Contract envisioned that such discretionary recoupment could commence before the ten percent advance had been fully recouped. The approximate difference between the amount advanced (approximately Rls. 56,000,000), and the amount of automatic withholding (Rls. 22,481,663)<sup>7</sup> is only 33,518,337. Therefore, to suggest, as the Award seems to, that Rls. 32,955,822 is an accurate statement of unrecouped amounts is to suggest that Moghan abstained almost completely from exercising its undisputed right to make discretionary withholdings. Given the strained relations between the Parties during the Contract

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(Footnote Continued)

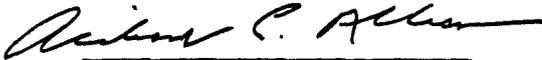
Moghan with the cost of materials provided by Moghan to ICC, or possibly, as also suggested by the Award, that Moghan made a payment in early 1979 related to repairs. On the other hand, largely as a result of Respondents' failure to cooperate in providing comprehensible payment documentation, the Tribunal cannot be certain of what financial state this entry records and how if at all it relates to the Contract. It seems inappropriate under the circumstances to treat this entry as a form of admission. It is not clear that "Debtors" even refers to Moghan. Moreover, if it does, it is not certain that all invoices issued by ICC to Moghan were posted to that account.

<sup>7</sup>The initial contract price was Rls. 224,816,630. Therefore, the total amount of automatic withholding was Rls. 22,481,663.

period, it is difficult to believe that Moghan would have failed to take full advantage of its contractual rights.

16. In my view the Tribunal would have achieved a more accurate and equitable result in this Case if it had been willing to apply the rule of negative inference in the face of Respondents' failure to comply with Tribunal Orders calling for production of evidence that was available to them and necessary to support Respondents' own allegations. A firm stance by the Tribunal would have sent a clear message to parties before this body that its orders are to be taken seriously. The Award's assessment of costs against Respondents is a salutary, but inadequate, response to conduct that should not be tolerated.

Dated, The Hague  
3 September 1991

  
Richard C. Allison