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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

213 – 216

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Case No. 213/215 Date of filing: 8, 12, 1995

** AWARD - Type of Award _____

- Date of Award _____

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

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** DISSENTING OPINION of _____

- Date _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

IN THE NAME OF GOD

CASES NOS. 213 and 215
CHAMBER THREE
AWARD NO. 567-213/215-3

DADRAS INTERNATIONAL, and
PER-AM CONSTRUCTION CORPORATION,
Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN, and
TEHRAN REDEVELOPMENT COMPANY,
Respondents.

CORRECTION TO THE DISSENTING OPINION OF
MOHSEN AGHAHOSSEINI

The following corrections are hereby made to the English version of the Dissenting Opinion of Mohsen Aghahosseini to the Award filed in these Cases on 7 November 1995.

1. Page 40, line 10, the word "**place**" should be added after the word "taken".

2. Page 58, line 4, "a" should be replaced by "**an**".

3. Page 63, line 2, the word "**of**" should be added after the word "support".

4. Page 64, footntoe 38, last line, the word: <u>evidence</u> should read: <u>Evidence</u>

5. Page 72, second paragraph, line 12, "an" should be replaced by **"a"**.

6. Page 85, line 6, "Mr. Dadras" should read: **"Mr. Golzar"**

7. Page 95, line 11 from below, the word: "sole" should read: **"soul"**

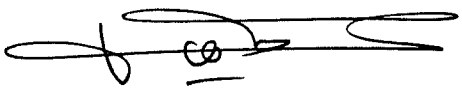
8. Page 100, last paragraph, first line, the phrase: "on Order" should read: **"an Order"**

9. Page 101, footnote 92, the word "was" should be omitted.

10. Page 103, last paragraph, line 2, the word: "next" should read: **"Next"**

A copy of the corrected pages are attached hereto.

Dated, The Hague
8 December, 1995



Mohsen Aghahosseini

Dadras says the only thing left to be said: that the date of the letter is a mistaken date. As the celebrated saying goes, "he would, wouldn't he?"

In support of this, he seeks to resort to flimsy excuses about the difficulties he had at the time in converting dates in three calendars: Imperial, Iranian, and Gregorian calendars.[18] What he apparently overlooks is that this was not a date in the past, so as to require conversion, but the date of writing the letter. If he wanted to tell Mr. Golzar, for instance, on what date in the past a given event had taken place, he probably had to consult a converting calendar, or convert the date by other methods.[19] But here, sitting in an office in Iran, all he needed was the correct date of the writing. For that, one does not begin by first thinking of a date in Gregorian calendar and then converting it into its equivalent in the Iranian calendar. Instead, one looks at the calendar on the desk, or simply asks the next person in the office what the date is.

Besides, Mr. Dadras has alluded to the typing of the letter, not by himself, but by a typist. Would the typist, then, not have told him what the date was, or, if Mr. Dadras had already given in the handwritten version of the letter the date of "20/6/1357" (11 September 1978) instead of "30/5/1357" (21 August 1978)[20],

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[18] In fact, the Imperial and Iranian solar calendars do not differ as far as the days and months are concerned. And here, the alleged mistakes are made in relation to the days and months only. Besides, the so-called Imperial calendar, inaugurated in 1976, was abandoned promptly after 27 August 1978 in Iran. Indeed, the fact that Mr. Dadras uses in the letter the Iranian solar year "1357", and not the Imperial year "2537", is itself a strong indication that the correct date of the letter could not have been 21 August, but 11 September 1978, i.e., after the date of the Country's reversion to the solar calendar.

[19] In fact, he did not need to. All the past events in the letter, with one exception, are referred to in their Gregorian dates.

[20] The date now alleged by Mr. Dadras to have been the correct date.

question, the real one, was how committedly the task of ascertaining the truth was being approached.

Still, at the Hearing Mr. Golzar testified, in essence, that as an industrialist in charge of an economic "empire" in Iran, he would not remember details of less significant events, including the holding of negotiations or signing of cost-free documents with hundreds of entities and individuals who daily dealt with his corporation. He would, however, have definitely remembered the signing of a $63,000,000 contract, had this in fact occurred. He was absolutely sure, he testified, that TRC did not conclude any contract for the construction of North Shahyad Project with Mr. Dadras, or with any other individual or entity for that matter. The political and social conditions of the country were such, at the time, that no businessman in his right mind would venture a Project of that size. He had, he further explained, by then taken steps to terminate the employment contracts of all his foreign, including his American, staff due to the same prevailing circumstances. It would have been sheer madness to nevertheless invite, at the same time, a United States' corporation to construct a long-term, five hundred million dollar Project.

PART TWO: THE AWARD'S TREATMENT OF THE CASE

Such was the evidence before the Tribunal on the asserted authenticity of the two documents, for the alleged breach of which remedy is sought in the present proceedings; evidence which, in whatever light is considered, does at once reveal the inauthenticity of the said documents. The question will then naturally arise as to how the Majority in the within Cases could conceivably arrive at a different conclusion.

The answer is not difficult to detect. As will be seen in the pages that follow, that different conclusion is arrived at --and could only be arrived at-- by depriving the Respondents of their primary defense, by misapplying certain elementary rules

party must bear the burden of proving the facts on which he relies in support of his claim or defense, the Award first sets to examine the Claimants' challenged documents. Without bothering at this stage with the pertinent Respondents' evidence, it concludes that the documents appear to be "facially valid". It then turns to the Respondents' evidence to see if this sufficiently proves a forgery contention. This is an utterly wrong application of the rule.

The Award does not explain what it precisely means by the appearance of "facial validity"; there is elsewhere in the Award a reference to the alleged contract constituting a binding agreement "on the face of it". It may, however, be safely assumed that the phrase is intended to refer to what is known in the law as a prima facie case.

Now, the term prima facie case, as used by both municipal and international courts, refers to either of the following two distinct situations.

First, where the "evidential burden" is discharged.[34] The proponent's first duty is to take the allegation "out of the realm of conjecture into that of permissible inference"[35]:

> One often gets cases where the facts proved in evidence --the primary facts-- are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately, refuse to draw any inference at all.[36]

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[34] Alternatively referred to as the "burden of adducing evidence", "burden of production", "burden of passing the judge", or "burden of going forward with the argument".

[35] See the English case of Caswell v. Powell Duffryn Associated Collieries, Ltd., [1940], A.C. 152, at p. 169.

[36] Per Denning, L.J. in Smithwick v. National Coal Board, [1950] 2 K.B. 335, at p. 352.

When this much is offered, the evidence is said to constitute a "prima facie" case.[37]

The evidential burden --the duty of a proponent to demonstrate that there is evidence sufficient to raise an issue with respect to the existence or non-existence of the contended fact-- is more peculiar to the jury system of the common law, where such evidence is required, in the first place, "to induce a judge to leave an issue to the jury". Yet it is a sense in which the term "prima facie" is used by international tribunals as well:

> Before declaring a State to be bound to submit a dispute to the decision of an international tribunal, the Permanent Court and the present Court have always considered it necessary to establish positively, and not merely on prima facie or provisional grounds, that the State in question had in some form given its consent to this procedure.[38]

The most distinctive feature of the prima facie case, in the sense of discharged evidential burden, is that it does not prove anything[39], and, because of that, the opponent is not called upon to rebut the case; he does not run the risk of conviction,

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[37] On this and many other points referred to hereinafter, I have the authority of formerly my long-time tutor, the late Sir Rupert Cross, commonly regarded as the foremost authority on evidence at the common law. See especially his discussion on the two senses of prime facie evidence in Cross on Evidence (5th ed., 1979) at 28-29.

[38] See Sandifer, Evidence Before International Tribunals 171 (1975), quoting with approval Judges McNair, Basdevant, Klaestad, and Reed in their Dissenting Opinion in the Ambatielos Case, [1953] I.C.J. at 29. The American law is identical: "When the party [required to meet the burden of production] introduces such evidence as to each element of the claim for relief, he is said to have presented a prima facie case." Graham, Federal Rules of Evidence 44 (1987).

[39] "[T]he discharge of... the evidential burden proves nothing." Cross, supra, at 87.

> presented, "reasonable doubts remain"). The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as "clear and convincing evidence," although the Tribunal deems that precise terminology less important than the enhanced proof requirement that it expresses.[55]

Now all this is wrong. First, as to the Case invoked by the Award. In there, as it is correctly noted, the Tribunal refers to an "allegation of bribery" --though this was not a major issue in that Case-- and, in a single sentence, to the failure of a proponent to prove his case, should "reasonable doubts remain". In the absence of any discussion, however cursory, of the issue in the Award in that Case, this passing remark may not be invoked as the Tribunal's precedent on this important point of law. More so because the reference by the Tribunal to the failure of a proponent to prove his assertion where "reasonable doubts remain", indicates, quite clearly, how innocent the Tribunal in that Case must have been of the issue. This is a standard peculiar to a criminal case, and no one, not even the present Award, has gone as far as to require it in a civil case.

As to the common law, it is now settled, in England for instance, that:

> An allegation of criminal conduct, even of murder, need only be established on a preponderance of probability in a civil action.[56]

The "clear and convincing proof", which the Award categorically attributes to the American law, is rather required in that jurisdiction in what is there termed "civil equitable cases":

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[55] Award at para. 124.

[56] Cross, supra, at 116. The author refers to a number of cases in which the rule has been accepted by the courts of Australia, Canada, and New Zealand.

employees were being asked to leave the Country. This, he suggests, would have been sheer madness.

Instead of concentrating on these material points, to see whether they stand to reason or not, the Award devotes its attention exclusively to minor points which are of no relevance to the issues before the Tribunal. Mr. Golzar is at length criticized in the Award for not remembering, or being inconsistent as to, whether he had, in 1994, made one trip to Iran or two; whether the first approach by the Respondents to solicit his testimony had been made at a meeting or through a telephone conversation; whether he had known Mr. Dadras prior to the Hearing; whether he had in fact signed certain obligation-free pre-contract documents with Mr. Dadras; whether the decision not to offer the construction of the Project to Mr. Dadras was based on the inquiries he made personally or through his staff; and whether at the time of the alleged contract, TRC had any other offers for the construction of the Project. It is on these points --which are either absolutely irrelevant or too insignificant to expect Mr. Golzar to remember them after the lapse of some sixteen years-- that the Award proposes to reject Mr. Golzar's testimony for lack of credibility. Not a word about the real points at issue.

In total and striking contrast, the Award seeks to either ignore, or to explain away with the shakiest of excuses, Mr. Dadras's outrageously contradictory testimony not only on irrelevant points, but on every point absolutely vital to Mr. Dadras's claims. First, just one example on the former.

Mr. Dadras is repeatedly praised in the Award for being consistent and sincere regarding his preliminary negotiations with TRC. It must not be forgotten, of course, that what is before the Tribunal in the present Cases is not whether the Parties had or had not conducted certain pre-contract negotiations, but whether these had led to the conclusion of a contract. As the Award correctly notes:

which would make the writing of the letter meaningful should be rejected.

The Award's partial treatment of the Parties is by no means confined to its assessment of the credibility of Messrs. Dadras and Golzar. It permeates through the entire body of the evidence submitted by the Parties:

On the fact, for instance, that by signing the alleged contract, TRC would have illogically made itself liable to the payment of two fees to two contractors --Mr. Dadras and Per-Am-- for the single service of "supervising the construction of the superstructure", the Award suggests:

> To the extent, if any, that his [Mr. Dadras's] supervisory services may have been duplicative with those of Per-Am, or HAUS, such duplication resulted from the different functions being performed....[83]

How can "different functions" result in duplicative services is of course anybody's guess!

On the fact, again, that not a single soul --not even Mr. Duvé whose corporation, PKDR, did in fact perform the preliminary work and was therefore entitled to the asserted fee-- has testified to the authenticity of the letter of 27 August 1978, or of the contract of 9 September 1978, the Award chooses not to say a word. It does, however, say that:

> [The Contract's] facial validity is further supported by credible testimony and evidence. Such testimony includes that of... Mr. Duvé from PKDR, who corroborated Prof. Dadras's contentions in crucial respects. [84]

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[83] Award at para. 221.

[84] Award at para. 132.

determinant role, of that issue in the present proceedings. Unless otherwise specifically stated, therefore, the absence of any reference in this Dissent to any other point addressed in the Award should not be taken as an indication of acceptance.

Second, on 31 July 1986, two members of the New York Bar, who thenceforward acted as counsel for the Claimants in these proceedings, wrote to inform the Tribunal that they had been appointed "as attorneys-at-law and legal representatives... for... Per-Am Construction Corporation."

And yet the evidence subsequently submitted to the Tribunal shows that well over four years prior to that date, on 29 December 1982, Per-Am had been dissolved, and its charter forfeited, by a proclamation of the New York Secretary of State. It has been later suggested by the Claimants that this dissolution was, pursuant to the steps taken under the laws of New York, annulled on 21 January 1987.

Assuming this to be true, the fact remains that at the time the counsel asserted to have been retained by Per-Am, that corporation had ceased to exist for at least four years, and was not to be revived for some six months later. Such misrepresentation before an international Tribunal, to which the Award not surprisingly makes no reference, is to be regretted; particularly where it comes, as it does here, from men of law who, by virtue of their profession, owe a special duty to the courts of law.

Third, on 22 July 1994, this Chamber issued an Order in which the Parties were informed, as previously explained, of its decision to reopen the Hearing for the sole purpose of orally examining the testimony of Messrs. Golzar and Dadras. The Order further refused to allow the presentation of evidence by any other witness. With this Order, in so far as it decided to reopen

the Hearing, I concurred[89], while the third member of the Chamber disagreed.[90]

The present Award now proposes to "explain the underlying reasons for [that] decision."[91] Having devoted page after page to a lengthy discussion of the issue, it concludes, with a view apparently to assure certain claimants, that this was "an unprecedented situation, and one unlikely to recur."[92] This is all very odd indeed. The underlying reasons for the said decision ought to have been explained at the time when it was made, and not sixteen months later, long after it was subjected to detailed concurring and dissenting views of other members.

That, however, is not my main point. I write here, rather, to record the fact that all the observations made in this respect in the Award are merely indicative of the thoughts of a single member and, as such, carry no force of precedent. That is because I, who, together with another member, formed the Majority for the decision to reopen the Hearing, do not share any of the explanations now given as the "underlying reasons" for that decision.

Section III: A Much Shortened Account of the Case

The case before the Tribunal may now be summarized. There is a Claimant, a Mr. Dadras, who relates that sometime in 1978, the Respondent TRC becomes interested, for the building of the superstructure of its gigantic housing project, in a system of

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[89] See Concurring Opinion of Mohsen Aghahosseini to the Order of 22 July 1994.

[90] See Dissenting Opinion of Richard C. Allison to the Order of 22 July 1994 Reopening Hearing.

[91] Award at para. 49.

8 [92] Award at para. 53. In fact, it recurred barely a month ago. See the Order of 20 September 1995 in Cases Nos. 842, 843, and 844 issued by Chamber One of this Tribunal.

to invite an American firm to construct a massive Project despite the prevailing conditions-- Mr. Dadras has no explanation to offer, except to say that this "happily shocked" him.

In less than 48 hours, he wishes to make believe, he is invited to a meeting at TRC to be told that all his drawings --drawings which the TRC's manager had just refused to look at-- have been formally approved of. As to how this extensive task could be performed in such a short time, he has, again, no explanation to offer.

At this last-mentioned meeting --and this is in the morning of 21 August 1978-- he is told to prepare the text of a contract by the afternoon of that same day; and he does so, he says. As to why a corporation with the stature of TRC, with presumably a large and sophisticated legal department, should ask an architect with rather poor knowledge of English to prepare the text in English of a legal instrument --a legal instrument which is expected to determine with sufficient precision the rights and duties of the parties under a complex, multi-million dollar transaction-- Mr. Dadras has, once again, no explanation to offer. Nor does he explain just how he in fact managed to prepare such a text with only a few hours at his disposal.

The rest, he says, was plain sailing. Few days into his subsequent negotiations with TRC, he asks for and receives a letter dated 27 August 1978, and some fortnight later, on 9 September 1978, the main construction contract is signed; the two documents on which the present claims are exclusively based.

So much for Mr. Dadras's version of the background events. Next, there are the texts of the two documents. In the former, TRC acknowledges that for certain services rendered or to be rendered by Mr. Dadras, he is due some three million dollars. In the latter, the construction of the superstructure of the Project, worth some sixty three million dollars, is awarded to Per-Am, with Mr. Dadras and his partner in Iran, Kan Consulting,