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IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 220 Date of filing 27 July 1983

✓ AWARD. Date of Award 27 July 1983

17 pages in English. 14 pages in Farsi.

[redacted]

_____ DECISION. Date of Decision _____

_____ pages in English. _____ pages in Farsi.

_____ ORDER. Date of Order _____

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_____ CONCURRING OPINION of _____

Date _____ _____ pages in English. _____ pages in Farsi.

_____ DISSENTING OPINION of _____

Date _____ _____ pages in English. _____ pages in Farsi.

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 220

CHAMBER TWO

AWARD NO. 59-220-2

INTREND INTERNATIONAL, INC.,

Claimant,

and

THE IMPERIAL IRANIAN AIR FORCE, THE ISLAMIC REPUBLIC OF IRAN and THE PROVISIONARY REVOLUTIONARY GOVERNMENT OF IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date ۱۳۶۲ /۵/ ۵ تاریخ
27 JUL 1983
File 220 ۲۲۰ شماره

[redacted]

AWARD

Appearances:

For the Claimant: Mr. Albert Allen
Mr. Henry J. Clay, Jr.

For the Respondent: Mr. M.K. Eshragh,
Deputy Agent of the
Islamic Republic of Iran
Mr. J. Niaki,
Legal Advisor to the
Agent
Mr. Valiolah Ansari,
Attorney of the Air Force
Mr. Ali A. Dezfuli,
Air Force

Also Present: Mr. Arthur Rovine,
Agent of the United States
of America

I. The Proceedings

The Claimant filed its Statement of Claim on 11 January 1982 requesting an award of amounts allegedly due under a contract with the Iranian Air Force (Air Force). A Statement of Defense and Counterclaim was filed by the Air Force on 20 April 1982. The Claimant filed its Reply to Counterclaim on 22 June 1982. A pre-hearing conference was held on 30 September 1982. The Air Force on 12 October 1982 filed a Rejoinder which included an additional counterclaim for Social Security insurance premium payments. The addition of this counterclaim was protested by the Claimant in a letter filed 25 October 1982. The Claimant filed affidavits and evidence on 20 December 1982. Brief written submissions were filed by the Air Force on 27 December 1982 and 23 February 1983. On 18 April 1983 the Claimant filed a Pre-hearing Memorandum. On the same day the Air Force filed an affidavit which was not received by the arbitrators or the Claimant until after the Hearing, which was held on 19 April 1983 and at which the Claimant and the Air Force were represented. The Air Force filed a post-hearing brief on 24 June 1983.

II. The Facts

On 15 June 1977 the Claimant, a New Jersey corporation, and the Air Force entered into a contract pursuant to which the Claimant was to provide maintenance support for the Air Force's C-130 Digital Flight Simulator and C-130 Maintenance Training Units for the two-year period beginning 15 September 1976 and ending 14 September 1978. The total contract

price of U.S. $2,115,670 was payable half in U.S. dollars and half in rials so long as rials were freely convertible into U.S. dollars. The U.S. dollar payments were to be made in four equal installments, with the last installment payable on 1 March 1978; the rial payments, in eight quarterly installments over the term of the contract, with the last installment payable on 14 September 1978. The rial payments were to be made only upon submission to the Air Force of the Claimant's standard invoice supported by a "certificate of service" signed by an Air Force official, attesting to the satisfactory completion of service by the Claimant for the prior three-month period. Such certificates were submitted with each invoice.

The contract between the Claimant and the Air Force succeeded a contract for the same type of maintenance support services between the Air Force and the Singer Company (Singer), the manufacturer of the Simulator and Training Units. During the course of this prior Singer-Air Force contract, the Claimant had become Singer's sole and exclusive distributor in Iran.

The Air Force paid the Claimant the full amount payable in U.S. dollars and paid six of the eight payments payable in rials. However, the fourth quarterly payment of the rial equivalent of U.S. $132,229, covering the period 16 June 1977 through 15 September 1977, and the eighth quarterly payment of the rial equivalent of U.S. $132,232, covering the period 15 June 1978 through 14 September 1978, were not paid.

III. Contentions of the Parties

A. Intrend International maintains that it has performed all the services required by the contract and offers as evidence endorsed certificates of service for the two quarterly periods for which it has not received payment. The Claimant requests an award of U.S. $249,915.64, which represents the total amount due for the two quarterly periods (U.S. $264,461), less a 5.5% contract tax (U.S. $14,545.36) which the Claimant admitted at the Hearing was applicable to all payments under the contract payable in rials and would have been deducted by the Air Force from the rial invoices if they had been paid. The Claimant also seeks interest at the rate of 12% per annum calculated from the dates the payments should have been made and costs of U.S. $50,000.

B. The Air Force asks that Singer be made a party to this claim or that this claim be joined with other claims before the Tribunal involving Singer, denies that the Claimant has proven that it is a national of the United States, asserts that the courts of Iran have exclusive jurisdiction of this claim and denies liability to the Claimant on the ground that the Claimant breached the contract by failing to return spare parts sent to Singer for repair and by failing to work the hours and provide the services required by the contract.

The Air Force also counterclaims (1) U.S. $30,500 for failure to return the spare parts; (2) U.S. $326,400 for failure to work the hours and provide the services required by the contract; (3) U.S. $88,153.80 or provision of a maintenance individual for four months; (4) U.S. $58,180.93, representing the amount allegedly due to the Government of Iran under the 5.5% contract tax applicable to the U.S. dollar payments previously made to the Claimant and to the two unpaid rial payments; (5) U.S. $436,177.11, representing Social Security insurance premium payments for the Claimant's employees; and (6) costs.

IV. Joinder of Singer

The Air Force, alleging that the Claimant is a subsidiary of Singer and that this claim is related to other claims before the Tribunal involving Singer, requests the Tribunal to either join Singer or to hear this claim with the other Singer claims. The Air Force, however, has presented no evidence that the Claimant is a subsidiary of Singer. The letter introduced by the Air Force regarding the relationship between the Claimant and Singer states that the Claimant was Singer's distributor. Furthermore, under the Claims Settlement Declaration, a respondent cannot interplead others. Singer, therefore, cannot be made a party in the case.

Joinder of this claim with other claims before the Tribunal involving Singer is also not warranted. The Singer

claims involve contracts for simulators other than the C-130. Furthermore, the contract upon which this claim is based is clearly between the Air Force and the Claimant, not the Air Force and Singer.

V. Jurisdiction

A. Nationality of the Claimant

The Claimant submitted affidavits, a copy of its certificate of incorporation, copies of the passports and birth certificates of its shareholders and other evidence to prove that it met at all relevant times the nationality requirements of the Claims Settlement Declaration. This evidence was sufficient to satisfy the Tribunal that, during the relevant period from 15 September 1977 to 19 January 1981, the Claimant was a closely-held New Jersey corporation in which natural persons who were citizens of the United States owned interests equivalent to more than fifty per cent of its capital stock. Thus, the Claimant is a national of the United States within the meaning of Article VII, paragraph 1 of the Claims Settlement Declaration.

B. Forum Clause

Article 11 of the contract provides that any disputes between the parties are to be settled by arbitration in London, England and that the laws of Iran shall apply. As the Full Tribunal noted in its interlocutory award No. ITL 8-293-FT in the case Stone & Webster v. National Petrochemical Co. and Razi Chemical Co., (dated 5 November

1982), "...by providing for arbitration to be held in Paris, the articles in effect exclude the jurisdiction of the Iranian courts."

Since the forum selection clause contained in the contract does not provide for the "sole jurisdiction of the competent Iranian courts," the claim does not fall within the exception provided in Article II, paragraph 1 of the Claims Settlement Declaration.

Therefore, the Tribunal holds that this claim is within its jurisdiction.

VI. Merits

As evidence that it performed all the services required by the contract, the Claimant introduced a certificate of service issued pursuant to the contract and signed by an Air Force official for each of the two quarterly periods for which it did not receive payment. The Air Force on 18 April 1983 filed an affidavit in which the Air Force technical supervisor of simulators stated that the certificates had been erroneously signed before it was discovered that the Claimant had not fulfilled its contractual obligation regarding the amount of time to be worked. This affidavit was not filed until the day preceding the Hearing and was received by the arbitrators and the Claimant only after the Hearing.

The Air Force also introduced a letter dated 21 June 1978 from Singer to the Air Force in which Singer agreed to provide, at no cost to the Air Force, one Singer maintenance individual for a four-month period beginning 14 September 1978. This letter indicates that the additional maintenance services were offered because some absences during the quarterly period 16 June 1977 through 15 September 1977 might not have been consistent with the contract. In view of the fact that although the contract was between the Claimant and the Air Force, the services under it were performed by Singer personnel pursuant to a Technical Service Agreement between the Claimant and Singer, this letter from Singer is evidence of less than complete fulfillment by the Claimant of its contractual obligation regarding the amount of time to be worked during that quarterly period.

On the basis of all the evidence, the Tribunal concludes that some reduction in the amount owing to the Claimant is justified. It is the conclusion of the Tribunal that the amount payable for the quarterly period ending 15 September 1977 shall be reduced by one third.

Therefore, the Tribunal holds that the Claimant is entitled to receive U.S. $83,304.27, representing the amount of the invoice for the quarterly period ending 15 September 1977 (U.S. $132,229) less one third (U.S. $44,076.33) less the 5.5% contract tax (U.S. $4,848.40) which both parties agree would have been deducted from any payment in rials,

and U.S. $124,959.24, representing the amount of the invoice for the quarterly period ending 14 September 1978 (U.S.$132,232) less the 5.5% contract tax (U.S. $7,272.76).

VII. Counterclaims

A. Failure to Return Spare Parts

In addition to seeking damages for the Claimant's failure to work the hours required by the contract, the Air Force is also counterclaiming for the Claimant's failure to return certain spare parts sent by the Air Force to Singer for repair. As the only evidence introduced by the Air Force regarding the return of spare parts is a letter from Singer to the Air Force dated 14 February 1976, which predates the contract, this counterclaim must be dismissed for lack of proof.

B. 5.5 % Contract Tax

The Air Force also seeks recovery of the amount allegedly due the Government of Iran for a 5.5% contract tax but not deducted from the dollar payments. The Air Force relies upon Article 7 of the contract which provides: "With the exception of 5.5 per cent contract tax, Buyer [Air Force] shall also pay the amount of all taxes ... levied by the Imperial Government of Iran or by any local taxing authority against the Seller [Claimant]...."

While the Claimant and the Air Force agree that the 5.5% contract tax is applicable to the payments payable in rials, the parties disagree on the applicability of the tax to payments previously made in U.S. dollars. The Air Force claims that the tax is applicable and now counterclaims for the amount due on the U.S. dollar payments.

Not until after the Hearing has the Air Force provided the Tribunal with the relevant Iranian tax law and an explanation of the calculations made by the Iranian tax authorities. Neither the interpretation of that law nor the propriety of the calculations has been argued before the Tribunal. In these circumstances, elementary considerations of fairness would weigh against a finding of liability. The Tribunal concludes that the counterclaim for the amount of the 5.5% contract tax on the U.S. dollar payments in this case must be dismissed for lack of proof. Not only did the Air Force fail to present timely evidence of Iranian tax law and its interpretation, but the behavior of the Air Force in not deducting the tax on the U.S. dollar payments and in not demanding the amount of such tax prior to bringing this counterclaim casts doubt on its present assertion that the tax is applicable to the U.S. dollar payments.

It is acknowledged by both Parties that in the course of the performance of the contract, the Air Force continuously retained this 5.5% tax on payments made in rials and abstained from such retention with regard to the payments made in the U.S. currency. This implementation of the

provision of Article 7 of the contract never raised any dispute. Thus it was incumbent on the Air Force to prove that its own practice had been caused by an excusable error. But it has not done so.

The counterclaim for recovery of the 5.5% contract tax is thus to be dismissed.

Moreover, there are a number of questions the Tribunal has not yet resolved with respect to tax counterclaims which should be decided in a case or cases where they are squarely and timely raised and fully argued. These questions include the following:

(1) Is the counterclaim within the Tribunal's jurisdiction pursuant to Article II, paragraph 1 of the Claims Settlement Declaration in that it arises out of the same contract, transaction or occurrence as the claim? In this connection, the Tribunal notes that, in this case, Article 7 of the contract merely allocates the tax risk between the Air Force and the Claimant; the tax law, not the contract, determines whether the Claimant is obligated to pay such tax.

(2) Is the counterclaim within the Tribunal's jurisdiction pursuant to Article II, paragraph 1 of the Declaration in that it was outstanding on 19 January 1981? In this connection, the Tribunal notes that the tax in question appears to have been assessed only in 1983 and apparently has not been paid by the Air Force.

(3) Is a tax counterclaim properly raised by a respondent in the case? In this case, the Tribunal notes that the counterclaim is raised by the Air Force, although the Islamic Republic of Iran is also a named Respondent.

(4) If jurisdiction exists, should the Tribunal consider tax counterclaims (including counterclaims for penalties and interest) in view, inter alia, of the difficulties involved and of the practice of national courts in refusing to enforce foreign revenue laws?

C. Social Security Payments

Finally, in a Rejoinder filed 12 October 1982, the Air Force supplemented its Statement of Defense filed 20 April 1982 and added an additional counterclaim for Social Security insurance premium payments. The Tribunal notes that this counterclaim was filed six months after the Statement of Defense. Pursuant to Article 19 of its rules of procedure, the Tribunal can accept a late counterclaim if satisfied that the delay was justified under the circumstances, but in the present case the Tribunal finds no such justification and declines to accept the late counterclaim. Moreover, the Tribunal notes that the Air Force submitted evidence regarding the calculation of the social security payments only after the Hearing and that such evidence has not been subject to argument before the Tribunal. As the Claimant made use of Singer Corporation employees to carry out its contract with the Air Force, the propriety of these calculations is open to question. In addition, the first

three questions noted above with respect to taxes also arise with respect to social security payments, and the fourth question would arise if social security payments are considered in the nature of taxes.

Thus the counterclaims, other than the counterclaim based on the Claimant's failure to work the hours required by the contract, are rejected.

VIII. Interest

In order to compensate the Claimant for the damages it has suffered due to delayed payments, interest at the fair rate of 12% shall be awarded on the amount due under each unpaid invoice, calculated from the date each payment was due. Interest shall run until the date the Escrow Agent instructs the Depositary Bank to pay the award.

IX. Costs

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

AWARD

The Tribunal awards as follows:

The Respondent, THE IRANIAN AIR FORCE, is obligated to pay the Claimant, INTREND INTERNATIONAL, INC. the following amounts:

U.S. $ 83,304.27, plus interest at the rate of 12% from 15 September 1977 to the date on which the Escrow Agent instructs the Depository Bank to pay the Award; and

U.S. $124,959.24, plus interest at the rate of 12% from 14 September 1978 to the date on which the Escrow Agent instructs the Depositary Bank to pay the Award,

all of which obligations shall be satisfied by payment out of the Security Account established by Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria on 19 January 1981.

Each of the parties shall bear its own costs of arbitrating this claim.

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

Dated: The Hague
27 July 1983

Pierre Bellet
Chairman
Chamber Two

In the Name of God,

George H. Aldrich

Shafie Shafeiei

Deliberations in this case began soon after the Hearing on 19 April 1983. All three arbitrators participated fully in these deliberations, which continued until the end of May. Throughout the period from February to late June the three arbitrators had been in agreement that July would be fully dedicated to the final deliberations in this and the other pending cases, in view of the 1 August effective date of Chairman Bellet's resignation from the Tribunal.

On 23 June 1983, however, Mr. Shafeiei sent Chairman Bellet a note informing him that he intended to be absent from the Tribunal on vacation until the end of July. The Chairman responded by a note dated 29 June saying that, while a brief vacation was acceptable, Mr. Shafeiei was expected after 5 July. Nevertheless, after a further exchange of notes, Mr. Shafeiei has absented himself until the present and has given no address or telephone number where he could be reached. Only yesterday afternoon, too late to be of any use, did Mr. Shafeiei's legal assistant give the Tribunal a telephone number in another country where Mr. Shafeiei might be reached.

The Chairman has had all the successive drafts of this award since Mr. Shafeiei's departure deposited in his office in due time so that, if he had been present, he could have read and commented upon them, but no comments have been received. The Chairman also deposited in Mr. Shafeiei's

office on 20 July 1983 a letter informing him of the place and time of signature. Mr. Shafeiei failed to attend the signing. In these circumstances, an arbitral tribunal cannot permit its work to be frustrated. This statement is made pursuant to Article 32, paragraph 4 of the Tribunal Rules of Procedure.

Pierre Bellet
Chairman
Chamber Two

George H. Aldrich

Dated: The Hague
27 July 1983