IRAN-UNITED STATES CLAIMS TRIBUNAL

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280-109
۲۸۰-۱۰۹

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Case No. 280 Date of filing: 27 Dec 83

** AWARD - Type of Award Final
- Date of Award 27 Dec 83
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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of Mr George H. ALDRICH
- Date 27 Dec 83
2 pages in English 2 pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان متحد

280-104
۲۸۰-۱۰۴

Case No. 280

Chamber Two

Award No. 100-280-2

MORGAN EQUIPMENT CO.,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE MINISTRY OF ROADS AND
TRANSPORTATION; THE IRANIAN NAVY,
Respondents.

AWARD

Appearances

For Claimant:

Mr. Harold Morgan, President
Mr. Kevin Rodgers
Mr. Jules Kragen
Attorneys for Claimant

For Respondents:

Mr. Mohammad K. Eshragh,
Agent of the Islamic
Republic of Iran
Mr. Yahya Madani,
Legal Adviser to the Agent
Mr. Mohammed Ali Lotfalian
Mr. Ahmad Mosafer Rahmati
Attorneys for the Ministry
of Roads and
Transportation
Mr. Mohammed Ali Shamloo
Attorney for the Iranian
Navy
Mr. Mohammed Tajzade
Representative of the
Iranian Navy

Also present:

Mr. John Crook,
Agent of the United States
of America

I. The Claims

The Claimant, a California corporation, has joined in this case separate claims, several arising out of transactions with the Ministry of Roads and Transportation of the Islamic Republic of Iran (MORT) and one for payment for goods allegedly delivered to the Iranian Navy.

The claims relating to MORT are of two different types; one is a claim for U.S. $180,562 for losses allegedly incurred by virtue of delays in several payments under a sales contract between the Claimant and MORT, and the other is a claim for sales commissions in the total amount of U.S. $387,392 allegedly due the Claimant as a third party beneficiary under separate sales contracts between MORT and three other American equipment manufacturers. MORT has presented a counterclaim in excess of U.S. $9 million for damages allegedly incurred because of judicial attachments obtained by Morgan in 1979 of the equipment sold to MORT by Morgan which was awaiting shipment at the Port of Vancouver.

The claim relating to the Iranian Navy arises out of sales by the Claimant of spare parts to Brown and Root, S.A., as contractor to the Iranian Navy. The Claimant alleges that it delivered to Brown and Root parts for which it has not been paid, that delivery to Brown and Root constituted delivery to the Navy under the contract, and that an amount of U.S. $67,657.63 has been owing to it since mid 1979 for such delivered parts.

With respect to all claims, interest is requested, and all parties ask costs.

A hearing was held on 13 August 1983 at which all parties were represented.

II. Jurisdiction

No serious jurisdictional issues are presented in this case. The Claimant has been incorporated in the State of California since 1958 and is a closely-held corporation in which one individual, Mr. Harold Morgan, owned approximately 80 percent of the stock during the period relevant in this claim, that is from January 1979 to January 19, 1981. Copies were filed of Mr. Morgan's United States passport which states that he was born in Illinois, a fact confirmed by him at the Hearing. The information on shareholders was provided by means of an affidavit from the Treasurer of the company, as the company is privately held and its stock is not publicly traded. Thus, the Claimant is a national of the United States as defined in Article VII, paragraph 1 of the Claims Settlement Declaration. That the Respondent agencies are included within the definition of "Iran" in Article VII, paragraph 3 cannot be disputed.

III. The Merits

A. The Delayed Payment Claim

Pursuant to a contract, Purchase Order No. 87-2101-1, dated 2 August 1978, the Claimant undertook to deliver, FOB factory, five crushing plants, at a total price of U.S. $8,819,508, payable by means of an irrevocable letter of credit through Bank Markazi with Morgan Guaranty Trust Co. in New York. All deliveries under that Purchase Order were made, and the total of U.S. $8,819,508 was paid to the Claimant. Payment was made by means of 17 drafts. The first ten payments under the letter of credit were made within an average of 7 to 10 days after presentation of drafts and required documents, and the longest delay, other than the delays at issue in this claim, was 13 days. Delays in payments 11 and 12 are the basis for the claim under this Purchase Order. The Claimant alleges that it presented draft 11 in the amount of U.S. $1,338,625 on or about 30 January 1979 and draft 12 in the amount of U.S. $371,123 on or about 5 February 1979. A letter from Morgan Guaranty Trust Co. to Chase Manhattan Bank inquiring about the status of the two drafts refers to claims made against Chase on 5 and 7 February for those respective amounts. The evidence does not indicate the precise date on which these two drafts were paid, but the Claimant has said they were paid in March. In its post-hearing memorial the Claimant refers to a 19 day delay, which it asserted was not commercially reasonable.

As to the reasons for the delay, while the Claimant has alleged that either MORT or the Government of Iran directed that payments be stopped, the only evidence presented is the 9 February 1979 Morgan Guaranty letter to Chase Manhattan at the bottom of which is typed the following:

> "February 9, 1979
> Due to the lack of communication from Iran, we have not received verification of amendments effected to the subject Letter of Credit as to extension of the expiration date. Therefore, at this time we are unable to effect payments under the above mentioned Letter of Credit.
> The Chase Manhattan Bank, N.A.
> (signature)
> Arthur L. Spicer
> Second Vice President"

The letter of credit established with Morgan Guaranty had been extended on 19 October 1978 until 30 June 1979, and the first ten drafts had been paid during December 1978 and January 1979. The role of Chase Manhattan in this transaction has not been explained, although the Tribunal can assume that it was an intermediary between Bank Markazi and Morgan Guaranty, but the Claimant has given no explanation for the inconsistency between the reason given by Chase for delay in payment and the undisputed fact that ten previous payments were made on the same, already extended, letter of credit.

During February 1979 the Claimant, knowing of the non-payment of drafts 11 and 12 and of the failure of MORT to establish letters of credit pursuant to the purchase orders of three other companies (dealt with in the next section) and aware of the revolutionary change of government

in Iran, apparently stopped production temporarily and thereby incurred certain additional costs, which, together with other damages arising from non-payment, is estimated by the Claimant to be in the amount of U.S. $180,562.

While the events of February 1979, taken together, understandably could have caused the Claimant to be concerned that MORT might be considering stopping payment on its contract, there is no evidence that MORT ever conveyed any intention to do so. In the absence of evidence other than the Chase Manhattan note of 9 February, the Tribunal cannot hold that the Claimant has proved either the responsibility of any of the Respondents for the delay in payment under the letter of credit or that it was justified in stopping performance temporarily so as to be entitled to compensation for the additional costs it thereby incurred. Therefore, this claim is dismissed for lack of proof.

B. The Sales Commission Claim

The Claimant had participated in various ways in the discussions that led up to the issuance by MORT in 1978 of separate purchase orders to three unrelated American companies. These purchase orders were part of the same highway project as the purchase order issued to Morgan that was involved in the first claim. The three companies were Clark Construction Machinery Division (P.O. 87-2109-1, dated 20 August 1978), Harnischfeger Corp. (P.O. 87-2111-1, dated 20 August 1978), and Williams and Lane (P.O. 87-2302-1, dated

21 September 1978). It was understood by each of these three companies that the Claimant's efforts had entitled it to a commission and that each would pay that commission (18 percent by Clark, 2½ percent by Harnischfeger, and ½ of 1 percent by Williams and Lane) as payments were received by them from MORT. At least in the case of the Clark and Harnischfeger contracts, which, like Morgan's contract, were entered into through Morrison-Knudsen as agent for MORT, there is evidence that MORT's agent knew of the commission, but none of the contracts referred to the Claimant or to payment of any commission.

Although the Claimant has filed copies of the three purchase orders in question, it has not filed copies of the acceptances of these orders by any of the three American vendors. Affidavits have been submitted, however, to establish that the equipment covered by the Clark and Harnischfeger purchase orders was manufactured, but not delivered, and that the letters of credit under these two purchase orders were never established. The affidavit with respect to Williams and Lane indicates that part of the equipment was manufactured and that a letter of credit was never established for the full amount.

The Claimant seeks recovery as a third-party beneficiary under the purchase orders issued to Clark, Harnischfeger and Williams and Lane and to that end cites a number of American judicial decisions in proof of the law of

the State of Idaho, which is the law made applicable by the terms of each purchase order. The Tribunal, however, is not persuaded that those cited decisions demonstrate that a party who assists in some fashion in facilitating a sale can sue the purchaser for his lost commission which is not referred to in the contract of sale. Reliance upon a case dealing with real estate commissions where the commission is stipulated in the contract and the broker is authorized to use other brokers, Marshall Brothers, Inc. v. Geisler, 99 Idaho 734 (1978), is simply misplaced given the facts of the present case. Similarly subscribers to cable television systems, as in Bush v. Upper Valley Telecable Co., 96 Idaho 83 (1973), and businesses to be benefited by an urban renewal project, as in Justs, Inc. v. Arrington Construction Company, Inc., 99 Idaho 462 (1978). are much more clearly intended beneficiaries of the license and project contracts than was the Claimant here with respect to the three purchase orders at issue.

Moreover, it must be noted that both Clark and Harnischfeger have brought their contract claims to this Tribunal. Clark has brought claim No. 10480 and Harnischfeger, claim No. 180. The Claimant here acknowledges that its claim as a third-party beneficiary is derivative in that its interest must derive from the rights of the sellers to proceed against MORT, but it relies on the failure of MORT to allege non performance by the sellers rather than prove itself their entitlement to recovery. In

fact, MORT has alleged that no valid contracts existed between it and the three sellers and the Claimant has not filed copies of the letters from the sellers accepting the purchase orders, although it has given affidavits attesting to their conclusion. The fact remains, however, that the rights and obligations of the parties under those three purchase orders have not been proven or argued in a way that would permit the Tribunal responsibly to decide them in this proceeding. If the sellers ultimately recover against MORT, of course, then the Claimant can proceed elsewhere to claim its commission from the sellers if it can prove its entitlement.

For the above reasons the Tribunal holds that this claim against MORT for sales commissions must be dismissed on the merits.

C. MORT's Counterclaim

In February 1979 the Claimant sued MORT in a court of the State of Washington for breach of contract and was granted a writ of attachment. The equipment sold by the Claimant, which was stored at the Port of Vancouver, was attached pursuant to that writ in July 1979. MORT's motion in the Washington court to vacate the attachment was dismissed by order of the court dated 4 January 1980. Although the litigation in Washington was stayed as a result of the Algiers Declaration, the attachment continued in

effect until August 1983 when it was released upon motion of the Claimant. That release was an essential element in the settlement of case B-67 in which this Tribunal issued an Award on Agreed Terms (79-B-67-24, dated 12 September 1983).

The damages requested by MORT under this counterclaim include the U.S. $3,000,000 it agreed to pay the Port of Vancouver in the agreed settlement of Case B-67, plus substantial additional damages for loss of profit, deterioration of the stored equipment, and unspecified "moral and material" damages. The extent to which any of these damages, other than the U.S. $3,000,000 payment, were in fact incurred has not been proved, and the U.S. $3,000,000 payment was in settlement of a claim and covered not only storage charges, but also recrating and handling charges.

The Tribunal notes that under Washington law MORT could have secured release of the attachment at any time by posting a bond, although export of the goods might still have been impeded by liens of other creditors, such as the Port of Vancouver and the local tax authorities, and by United States Government restrictions during the period from November 1979 to 19 January 1981.

It is true that the attachment was obtained lawfully, but this Tribunal accepts the principle according to which an unjustified attachment may result in liability of the Claimant for compensation of damges resulting therefrom.

But, in the present case, MORT did not produce sufficient explanations and proof for these damages and the Claimant/-Counter-Respondent's responsibility for them. Therefore, this Counterclaim is dismissed for lack of proof.

D. The Navy Claim

On 25 August 1977 the Iranian Navy concluded a contract with Brown and Root, S.A., a Panamanian Corporation and Brown and Root International, Limited, a Canadian corporation, as contractor for harbor construction at Chahbahar Naval Base. Pursuant to that contract, Brown and Root, S.A. entered into a number of purchase orders with the Claimant for the supply of equipment and spare parts. Brown and Root was apparently not acting as agent for the Iranian Navy. The purchase orders do not refer to its acting as agent, and Appendix E, point (p) of its contract with the Navy requires special approval for it to act as agent. Any contractual remedy of Morgan, therefore, would lie only against Brown and Root.

The legal relationship between Brown and Root and the Iranian Navy is not before this Chamber. Brown and Root has brought a claim (No. 432) against the Iranian Navy, which includes a claim for payment by the Navy with respect to equipment supplied by Morgan. That claim is pending before another Chamber of this Tribunal. The legal relationship between Brown and Root and the Navy on the one hand, and the legal relationship between Morgan and Brown and Root on the

other hand, are insufficiently interconnected in law to admit a direct action for payment of Morgan against the Navy. Nor can this Chamber hold such payment due by the Navy to Morgan as a result of unjust enrichment of the Navy. Article 40, paragraph (c) of Brown and Root's contract with the Iranian Navy provided that "Title to all property purchased by the Contractor, for the cost of which the Contractor is entitled to be paid as a direct item of cost under this Contract, shall pass to and vest in the Government upon delivery of such property by the vendor," and schedule 1 to Appendix B of that contract states that all materials and machinery, including spare parts, purchased for the project are direct costs.

The Claimant has provded shipment to Brown and Root's terminal at Galena Park, Texas of various spare parts for which it has not been paid in a total amount of U.S. $67,657.63. But whether the Navy is enriched by the possession of the equipment delivered by Morgan to Brown and Root and whether such enrichment would be "unjust" depends entirely on the outcome of Case No. 432. The mere fact that the contract between Brown and Root and the Navy stipulates that title passes to the Navy cannot justify a claim for unjust enrichment since that contract and its performance are in dispute and there is in the present case between Morgan and the Navy no proof that the equipment in question in fact reached Iran.

Therefore, the Claim against the Iranian Navy is dismissed.

V. Costs

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

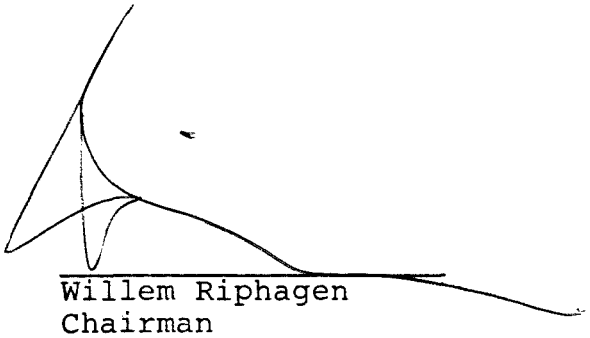
AWARD

THE TRIBUNAL AWARDS AS FOLLOWS:

The claims and the counterclaim are dismissed on the merits.

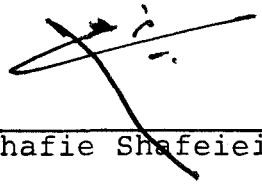
Each of the parties shall bear its own costs of arbitrating this claim.

Dated, The Hague
27 Dec..1983



Willem Riphagen
Chairman
Chamber Two

In the name of God,



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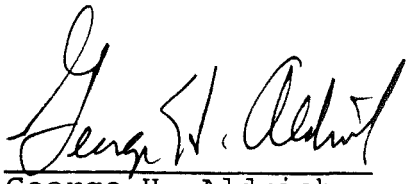

George H. Aldrich
Dissenting in part.