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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of _____
- Date _____
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** DISSENTING OPINION of _____
- Date _____
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- Date _____
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CASE NO. 410
CHAMBER THREE
AWARD NO. ITL- 36-410-3

AERONUTRONIC OVERSEAS
SERVICES, INC., and
HENKELS AND McCOY, INC.,
Claimants,
and
TELECOMMUNICATIONS COMPANY
OF IRAN, BANK MARKAZI IRAN and
THE GOVERNMENT OF IRAN,
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	۱۳۶۲ / ۱۲ / ۲۶ 16 MAR 1984
No.	410

INTERLOCUTORY AWARD

Appearances:

For the Claimants:

Mr. John W. Dickey,
Mr. Mark McCall,
Attorneys,
Mr. Karl Wolf,
General Counsel,
Ford Aerospace.

For the Respondents:

Mr. Mohammad K. Eshragh,
Agent of the Government of the Islamic
Republic of Iran,
Mr. Khalil Khalilian,
Legal Adviser to the Agent,

DUPLICATE
ORIGINAL
نسخه برابر اصل

Mr. Behrooz Akhlaghi,
Mr. Ahmad Reza Sherafat,
Attorneys, T.C.I
Mr. Mohammad Ashtari,
Mr. Mohammad Bagher Moeeni,
Representatives of T.C.I.,
Ms. Shirin Ershadi,
Mr. Hossein Khodakhah,
Representatives of Bank Markazi Iran.

Also present:

Mr. John B. Reynolds,
Legal Adviser to the Agent of the
Government of the United States of
America.

I. Statement of proceedings

On 18 January 1982, the Claimants, AERONUTRONIC OVERSEAS SERVICES, INC. and HENKELS and McCOY, INC., filed with the Tribunal a claim against the Respondents TELECOMMUNICATIONS COMPANY OF IRAN ("TCI"), BANK MARKAZI IRAN and THE GOVERNMENT OF IRAN, seeking, inter alia, payment of the amounts of \$40,332,793.05 in respect of services, materials and equipment, and \$4,339,014.97 in respect of termination costs allegedly due under Contract No. TDP-038, an agreement for the supply and installation of cable and wire plant entered into between the Claimants and TCI on 8 November 1977. The Claimants further requested the release of certain bank guarantees and letters of credit issued pursuant to the contract.

On 29 December 1982 TCI filed a Statement of Defence, and at the same time asserted a counterclaim for damages arising

out of the Claimants' alleged failure to perform their obligations under the contract. The Claimants filed a Reply to the counterclaim on 24 February 1983.

The issue of whether the present claim is excluded from the Tribunal's jurisdiction has been addressed by the Claimants in a Memorandum filed on 24 February 1983, and by TCI in a Response filed on 12 August 1983. Both Parties having requested an opportunity to present oral argument on this issue, a hearing was held before the Tribunal on 1 December 1983.

II. Contentions of the Parties

In its Statement of Defence TCI contended, inter alia, that the contract contained forum selection provisions, the effect of which was to exclude the claim from the jurisdiction of the Tribunal by virtue of Article II, paragraph 1, of the Claims Settlement Declaration, which excludes,

"claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position."

The dispute revolves around the provisions of Articles 12.1, 12.2, 12.3, 12.4 and 12.5; 13.16 and 13.20 of the contract in question. These Articles provide as follows:

ARTICLE XII - SETTLEMENT OF DISPUTES

12.1 All disputes or differences arising out of or resulting from this Agreement, its application or interpretation, which cannot be settled amicably, will be referred to a three-man Committee composed of one representative of TCI, one representative of Contractor and one representative to be nominated by the General Assembly of TCI. All members of the Committee shall be nominated within a period of fifteen (15) days from the date of notification that a request for a Committee

hearing has been filed by TCI or Contractor. The Committee shall meet in Tehran, Iran.

12.2 If the dispute is not settled by the Committee or if a party refuses to accept the decision of the Committee, the dispute shall be referred to the competent courts of Iran.

12.3 The decision of the Committee, if accepted by the parties, or the decision of the courts of Iran, shall be final; judgement thereon may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the decision and an order of enforcement, as the case may be.

12.4 Pending settlement of a dispute, the parties hereto shall continue to perform all of their obligations under this Agreement.

12.5 If the Government of Iran, acting through any central authority, agency or other body, approves, as a matter of general application, the use of arbitration for the settlement of disputes and differences between Governmental authorities and foreign contractors, and no restriction on such approval would bar Contractor from seeking relief under such arbitration procedure were Contractor to be entering into this Agreement on such future date as the approval is given, then the parties hereto shall sign a memorandum of understanding and shall execute such other documents between them as are necessary to make such arbitration procedure applicable to this Agreement in lieu of Paragraphs 12.1, 12.2, 12.3, and 12.4 hereof.

ARTICLE XIII - GENERAL PROVISIONS

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13.16 Governing Law

This Agreement shall be governed by the Laws of Iran. The Laws of Iran shall include all statutes, decrees, regulations, administrative decisions and jurisprudence of the Imperial Government of Iran and of its political subdivisions, including any subsequent additions, modifications or amendments thereof.

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13.20 Jurisdiction; Service of Process

Contractor agrees that any legal action or proceeding arising out of or relating to this Agreement may be instituted in any competent Iranian court.

Contractor irrevocably submits to the jurisdiction of each such court in any such action or proceeding. Contractor hereby irrevocably designates, appoints and empowers its Project General Manager to receive for it, and on its behalf, service of process in Iran in any action or proceeding with respect to this Agreement. Any failure of Contractor's Project General Manager to give notice to Contractor of such service of process shall not impair or affect the validity of such service or of any judgement rendered in any action or proceeding based thereon. Contractor further irrevocably consents to service of process upon it in any action or proceeding by the delivery in accordance with Paragraph 13.21 hereof with the exception of Item C thereof of certified copies of such process to Contractor at the address provided for notices to Contractor under this Agreement. The foregoing, however, shall not limit the right of TCI to bring any legal action or proceeding or to obtain execution of judgement in any appropriate jurisdiction.

In their written and oral submissions, the Claimants contend that in order for the requirements of the exclusion provision in Article II paragraph 1 of the Claims Settlement Declaration to be satisfied, the contract in question must contain an unambiguous and mandatory requirement that all disputes arising out of the contract be referred to the sole jurisdiction of the competent Iranian courts. They maintain that the present disputes settlement provisions fail to fulfil these requirements.

The Claimants first contend that the use of the words "any legal action may be instituted" in Article 13.20 deprives the provisions of any mandatory character. It is a permissive provision which operates to preserve the right of TCI to bring an action elsewhere than in the courts of Iran. The final sentence expressly states that TCI shall not be limited in its right "to bring any legal action or proceeding in any appropriate jurisdiction ." This alone, in the Claimants' view, is sufficient to remove the clause from

the scope of the exclusion provisions in the Claims Settlement Declaration and is thus dispositive of the issue.

In addition, the Claimants argue that the use of the words, "its application and interpretation" in Article 12.1 limits the scope of the proceedings which might ultimately be brought before the Iranian courts; otherwise, they argue, the words would be redundant.

Further, the reference in that Article to a three-man Committee constitutes, in the Claimants' submission, a formal proceeding capable of yielding a final decision and an enforceable judgment without recourse to the Iranian courts, and is thus an alternative to the jurisdiction of the Iranian courts.

The Claimants contend that in any event, there is no provision in the contract which, in the words of the Full Tribunal in the case of Gibbs and Hill Inc. and Tavanir et al. (Award No. ITL 1-6-FT), "unambiguously restricts jurisdiction to the courts of Iran", and that the requirements of the exclusion provision are thus not fulfilled with sufficient clarity.

TCI contends that the proper interpretation of Article 12.1 is that the phrase, "arising out of or resulting from this Agreement, its application or interpretation" encompasses all disputes capable of arising out of the contract. As of this time the three man committee cannot realistically be invoked and thus, under Article 12.1, by necessity the matter would be referred to Iranian Courts. The decision of any such committee was expressly subject to the right of either Party to refer the matter to the courts of Iran. Only if their decision were accepted by both parties would reference to the Iranian courts be avoided.

The significance of Article 13.20, in TCI's view, lies in the agreement of the Claimants to submit to the jurisdiction of the Iranian courts. The purpose of the remainder of the Article was to ensure that process could be served on the Claimants and that any judgment obtained against them could be enforced.

TCI further argues that the filing by the Claimants of a claim in the United States District Court for the Northern District of California for damages for breach of the same contract shortly after the Full Tribunal's decisions were rendered in the nine test forum-selection clause cases, constitutes an admission that the Tribunal lacks jurisdiction. The Claimants maintain that the action was commenced to preserve their rights in the event of such a finding by the Tribunal, but that it does not in any way constitute an admission on the issue.

IV. Reasons for Award

It would appear that Article 12, taken on its own, would, following the standards set by the Full Tribunal in the nine forum selection cases, be the type of forum selection clause covered by the exclusion provisions of the Claims Settlement Declaration. See T.C.S.B. and Iran (Award No. ITL-5-140-FT, Part II). But Article 13.20 provides that disputes "arising out of or relating to" the contract "may be" instituted in Iranian Courts. While that clause does admittedly provide that the Claimants agree to submit to the jurisdiction of the Iranian courts, it adds, significantly, "the foregoing, however, shall not limit the right of TCI to bring any legal action or proceeding or to obtain execution of judgement in any appropriate jurisdiction."

A possible, and not unreasonable, interpretation of Article 13.20 is that the contract provisions were intended to ensure that TCI could obtain jurisdiction over the Claimants in Iranian courts, but, equally importantly, to preserve

TCI's option to bring an action against the Claimants in any other jurisdiction it considered appropriate.

Such a situation is similar to the one arising in the Halliburton Case (Award No. ITL 2-51-FT, Part II) in which the Full Tribunal concluded:

"The Tribunal notes that Article II, Paragraph I, of the Claims Settlement Declaration excludes from the jurisdiction of the Tribunal claims arising under contracts which specifically provide for the sole jurisdiction of the competent Iranian courts. The text of the instant clause in the promissory notes makes it clear that it is only the maker of the note which subject to the jurisdiction of the Iranian courts. Thus, the borrower has agreed to waive the objections against the jurisdiction of these courts that it otherwise might have invoked, but the clause should not be understood so as to deprive the lender of its right to sue the maker of the note before any competent court outside Iran. Therefore the clause does not meet the requirements in Article II of the Claims Settlement Declaration."

Article 13.20, in effect, gives rise to a situation indistinguishable from that presented in the Halliburton case. It appears that Article 13.20 and Article 12 are mutually inconsistent, and that the Contract is thus ambiguous. The Full Tribunal has held that a Contract must "unambiguously" restrict jurisdiction to the courts of Iran for there to be no jurisdiction for the Tribunal. See Gibbs and Hill (Award No. ITL 1-6-FT); and the Zokor case (Award No. ITL 7-254-FT). Indeed, in Gibbs and Hill the Tribunal upheld its jurisdiction because the contract in question did not "with sufficient clarity fulfill the requirements laid down in the exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration". The degree of precision required in the language of the contract is derived from Article II, paragraph 1, itself, which stipulates that the Contract must "specifically" provide that disputes be within the sole jurisdiction of competent Iranian courts.

The Tribunal is thus compelled, consistently with its previous decisions, to determine that the contract in question does not contain the type of forum selection clause that would divest the Tribunal of jurisdiction under Article II, paragraph 1, of the Claims Settlement Declaration.

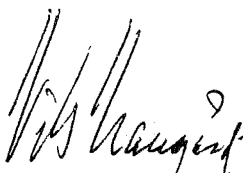
Since the presence of Article 13.20 is dispositive of the issue, it is unnecessary to consider arguments based upon the interpretation of Article 12.

For the foregoing reasons,

The Tribunal decides that the Tribunal is not deprived of jurisdiction over the claim of AERONUTRONIC OVERSEAS SERVICES, INC. and HENKELS & MCCOY, INC. by virtue of the forum selection provision of Article II, paragraph 1, of the Claims Settlement Declaration.


Dated, The Hague

16 March 1984


Nils Mangard
Chairman
Chamber Three

In the Name of God


Richard M. Mosk


Parviz Ansari Mo'in
Dissenting Opinion