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Case No. 423

Date of filing: 18 Feb '88

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of Mr. Anvari, to Award 343-423-3
- Date 18 Feb '88
7 pages in English _____ pages in Farsi

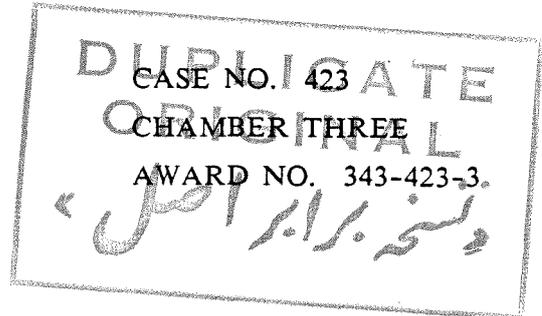
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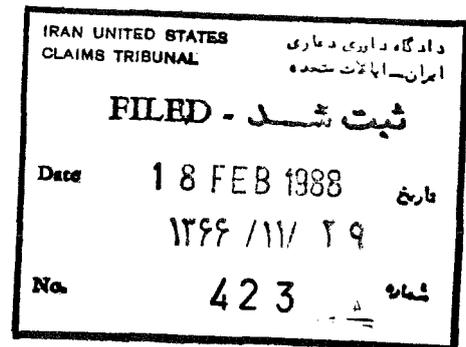
In the Name of God



MINNESOTA MINING AND
MANUFACTURING COMPANY,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
MINISTRY OF HOUSING AND
URBAN DEVELOPMENT,
ARME CONSTRUCTION COMPANY,
ABOL-HASSAN DIBA & CO. LTD.,
and POLYACRYL IRAN CORPORATION,
Respondents.



SEPARATE OPINION OF JUDGE PARVIZ ANSARI

I hereby set forth my dissenting and concurring views with respect to certain parts of the Award in the instant Case, as follows:

THE CLAIMANT'S OWNERSHIP OF THE CLAIM

- 1 - The Claimant asserts that it owns all 2400 shares issued by 3M Middle East, and that it indirectly owns 100% of that company's claim against the Respondent (Arme Construction Company). Initially, by its Memorial of 23 December 1985 (Doc. no. 161), the Claimant submitted two pieces of evidence as proof of its ownership. One was the Share Certificate dated 29 September 1969, which indicates that as at that date, 2100 out of the 2400

shares of 3M Middle East, numbered from 301 to 2400, were registered in the name of the Claimant. The other piece of evidence is the affidavit dated 27 September 1984 by Mr. Robert K. Waters, a partner in the accounting firm of Coopers & Lybrand. According to the said affidavit, based on the financial reports of 3M (the Claimant) and its subsidiaries for the years ending on 31 December 1975 and 31 December 1980, 3M Middle East had 2400 issued and outstanding voting shares as at 31 December 1975 and 31 December 1980, which shares were owned of record by the Claimant on those dates. As may be seen, the above-mentioned documents do not resolve the problem of the ownership of 300 of 3M Middle East's shares, because one would at least expect, under the circumstances, that the certificates relating to the 300 shares in question be submitted as well.

- 2 - Apparently in order to remove any doubt and ambiguity, as well as in answer to the Respondent's objections, the Claimant has presented the affidavit dated 13 February 1987 by Mr. Arlo D. Levi, the Claimant company's vice-president and secretary, in its Memorial dated 27 February 1987 (Doc. no. 194). This affidavit submits, in relevant part, that:

"3M [the Claimant] is the holder of record and beneficial owner of shares numbers 301 through 2400 of [3M Middle East]. Shares numbers 1 through 300 were issued in the names of three individuals who were directors of 3M Middle East. All of these shares were held by those directors as nominees of 3M [the Claimant], which remained the beneficial owner. 3M [the Claimant] believes that all of these share certificates have been cancelled but has not been able to verify this as all these certificates are now in Lebanon..."

As noted in the Award itself, the aforementioned evidence is contradictory. In my opinion, this contradiction is so pronounced that it cannot be disregarded. From the affidavit of Robert K. Waters, it can be concluded that on principle, at some unknown date, the 300 shares in question must have been reissued in the Claimant's name in the company's books, because that affidavit states that the ledgers show all 2400 shares as being in the Claimant's name as at 31 December 1975 and 31 December 1980. On the other hand, it can be concluded from the affidavit by Mr. Arlo D. Levi that these 300 shares had been cancelled; consequently, they cannot have been listed in the Claimant's name in the records on the dates mentioned by the

other witness, namely 31 December 1975 and 31 December 1980.

- 3 - In addition to the foregoing, the Claimant's refusal to produce sufficient information regarding the status of the shares and the identity of their owners, gives rise to certain doubts. The Claimant and its witnesses do not specify on what date (assuming that this allegation is true) the said 300 shares were issued in the names of the directors of the subsidiary company (3M Middle East); nor have the names of those directors been stated. Furthermore, it has not been specified on what date those shares were reregistered in the Claimant's name, as is to be inferred from the affidavit of Robert K. Waters, or when -- as stated by Arlo D. Levi, the other witness -- they were cancelled.
- 4 - While admitting that 300 of the shares were issued in the names of other persons, the Claimant at the same time asserts that it has remained the beneficial owner of those shares, yet has produced no evidence to this effect. The Claimant explicitly states that it is unable to verify the cancellation of the 300 shares but, even supposing that its assertion is true, it has not submitted any evidence in proof that it is unable, for compelling reasons, to produce evidence relating to the cancellation of the said 300 shares.
- 5 - In view of the foregoing, the Claimant's alleged ownership of the said 300 shares has not been established; consequently, to that extent it is not entitled to bring claim in this connection (1). A further important point which must be added here, is that the issue of ownership of the shares, and the rules governing such ownership or transfer thereof, depend upon the lex loci --the law of the place where the company was registered and the shares were issued. By way of example, Article 40 of the Stock Companies Act of Iran

(1) This statement should not lead one to suppose that I concur with the bringing of an indirect claim with respect to the remaining 2100 shares, because I have previously stated my position with respect to awards wherein such claims were permitted (See R.J. Reynolds Tobacco Company and The Government of the Islamic Republic of Iran and Iranian Tobacco Company, Award No. 145-35-3, at 28 (7 December 1984)), and also because I consider the taking of a decision in Case No. A22 to have a bearing upon this matter.

specifies the regulations and procedures concerning registration, ownership and transfer of registered stock; if a stock transaction is in violation of legal regulations and procedures, it will at the very least be invalid -- and cannot be relied upon -- vis-à-vis third persons and the company issuing the shares (2). See Ian L. McHarg et al. and The Islamic Republic of Iran, Award No. 282-10853/10854/10855/10856-1, para. 58 (17 December 1986).

Moreover, in the present Case, in view of the fact that as alleged by the Claimant the owners of the said shares were natural persons, and since the Claimant has never furnished the Tribunal with any evidence of authorization of its indirect ownership of the 300 shares in question in accordance with the lex loci of the company, namely the law of Lebanon, the claim brought with respect to the said 300 shares should be dismissed for this reason as well.

THE ARME CONTRACT

- 6 - The amount demanded by the Claimant, and awarded, under the contract for applying Scotchclad was for waterproofing an area of 40,000 square meters, whereas the actual quantity of work done, as asserted by the Respondent and not contested by the Claimant, was 31,469 square meters.

In view of Article 10 of the contract, which permitted an increase or decrease of up to 10% of the quantity stipulated in the contract, at the direction of the Respondent, there can be no doubt that the amount payable to the Claimant should be determined by subtracting the said 10% from the total contract price, which was predicated on the assumption that an area of 40,000 square

(2) Article 40 of the Stock Companies Act provides as follows:

"Transfers of registered stock shall be registered in the company's shares registration ledger, and either the transferor, his agent, or his legal representative shall sign the said ledger [in attestation] to the transfer.

Where the face value of the share has not been paid in full, the complete address of the transferee shall also be given in the company's shares registration ledger, and shall be attested to by the signature of either the transferee, his agent, or his legal representative, whereupon it shall be valid as to fulfillment of the obligations arising out of the transfer of the share. Any change of residence shall also be recorded and attested to by signature in the same way. Any transfer which fails to conform to the above-mentioned conditions shall be invalid with respect to the company and third persons." (emphasis added)

meters would be waterproofed. At the same time, in light of the provisions of the contract (3), accepting the Respondent's position to the effect that the amount payable to the Claimant should be determined on the basis of the quantity of work actually performed, is on the whole more justifiable. This opinion is also more in harmony with the logic of interpretation of synallagmatic contracts and the principles of equity and justice, and by finding to the contrary, the Award shall inevitably cause the Claimant to be unjustly enriched. See Anaconda-Iran, Inc. and The Government of the Islamic Republic of Iran and The National Iranian Copper Industries Company, Award No. ITL 65-167-3, Separate Opinion of Judge Parviz Ansari, para. 3 (a) (18 March 1986).

(3) For example, in Article 3A of the contract we read that the "[q]uantity of SCOTCHCLAD required at this time is to be for an area of approximately 40,000 sq. metres." Here, if reference is made to an area, it is for determining the approximate amount of Scotchclad material required; it does not definitively state the extent of area involved.

Moreover, Article 10 of the contract provides, in relevant part, as follows:

"Should the PURCHASER direct any modification or addition to the contracted work beyond that provided under Section 3A hereof, the contract price shall be increased or decreased as the case may be by an equivalent price per sq. metre to that contracted. This variation should not exceed 10% of the contracted quantities..."

The provisions of the abovementioned Article show that the parties agreed as to three points:

First, the quantity of work to be performed under the contract could be increased or decreased at the direction of the Respondent;

Second, in the event of an increase or decrease in the quantity of work, the contract price would be proportionately changed; that is, the contract price was contingent on the quantity of work performed;

Third, the maximum amount of modifications permitted at the Respondent's direction was 10% of the total work.

As may be seen, the potential modifications were limited to 10% for the purpose of delimiting the Respondent's prerogatives, and not to limit the amount of modifications as a whole. Therefore, if the quantity of work actually performed is in fact decreased, without the Respondent's having exceeded the stipulated ceiling (10%), there is no reason for us to suppose that the other provision set forth in Article 10 of the contract, that the contract price shall be contingent upon the quantity of work -- i.e., the amount of work actually performed -- has ceased to be valid. Therefore, the said provision should be taken as the criterion for calculating the contract price.

- 7 - Pursuant to Article 22 of the contract, the duration of the agreement was to be for one year from the date on which it was concluded. Thus, in view of the date on which the contract was executed (21 August 1976), the Claimant was obliged to deliver the work envisaged under the contract in August 1977, whereas the Claimant asserts, and the Award concludes, that the work was finally delivered in December 1979. Even if we accept that date, there was clearly a protracted delay (4). Moreover, in itself such an unwonted and unwarranted delay, even apart from its potential consequences involving injury to the Respondent, constitutes an ipso facto breach of contract and entails liability -- even were one to disregard the Respondent's objections that the work was not delivered in accordance with the conditions provided by the contract, and that the work delivered was defective. There would not seem to be any doubt that timely fulfillment of an obligation is among the requirements of good performance. On the basis of this criterion, it cannot be accepted that the Claimant has fulfilled its obligation under the contract entered into with Arme Construction Company in a satisfactory manner. Therefore, the majority's decision providing for restitution of the good performance guarantee to the Claimant, the amount of which had previously been rightfully called by the Respondent, is unjustifiable (5).

THE POLYACRYL CLAIM

- 8 - As to the claim brought against Polyacryl Iran Corporation, I concur in that part of the Award where it rejects 32 of the invoices demanded by the Claimant, by reason of its failure to produce shipping documents. The necessity of producing valid shipping documents is among the most essential requirements of proving any claim based upon delivery of goods. Failure to

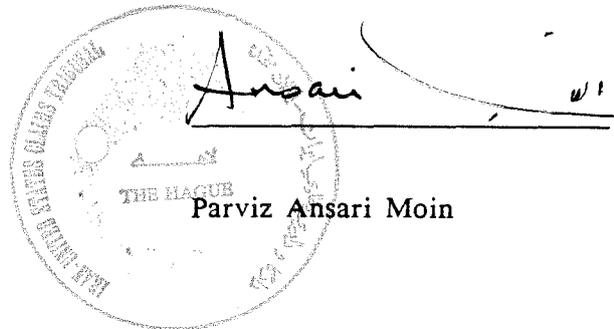
(4) Even accepting in arguendo the several months' delay which according to the Award was caused by the Respondent, the work envisaged under the contract was delivered nearly two years later than the date stipulated thereunder.

(5) The consulting engineer's recommendation to return the good performance guarantee to the contractor, which was made some years later, cannot negate the contractor's violation or deprive the employer of its entitlement to the amount called under the Guarantee.

produce such evidence, or any deviation from the conditions set by the parties as to shipping and the particulars of the shipping documents, will invalidate such a claim. See The Islamic Republic of Iran and The United States of America, Award No. ITL 60-B1-FT, paras. 31-33 (4 April 1986).

Dated, The Hague,

18 February 1988 / 29 Bahmanmah 1366

A circular stamp from the Permanent Court of Arbitration in The Hague is visible. The stamp contains the text 'PERMANENT COURT OF ARBITRATION' around the top edge and 'THE HAGUE' in the center. A handwritten signature 'Ansari' is written across the stamp. Below the signature, there is a horizontal line and the name 'Parviz Ansari Moin' printed.

Parviz Ansari Moin