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MS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

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Case No. 834 Date of filing: 25 May 87

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

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of Mr Bahrami
- Date 25 May 87
8 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____
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- Date _____
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In the Name of God

CASE NO. 834
CHAMBER TWO
AWARD NO.295-834-2

SCHLEGEL CORPORATION on behalf of
SCHLEGEL LINING TECHNOLOGY GMBH,
Claimant,

and

NATIONAL IRANIAN COPPER INDUSTRIES COMPANY,
Respondent.

DISSENTING OPINION OF HAMID BAHRAMI-AHMADI
IN CASE NO.834

I dissent to the Award issued in the instant case, because it is inconsistent with the law which governs the claim (Iranian law), because it deviates from principles of international law, and because it even disregards decisions by this Tribunal itself -- as well as because of other reasons explained in the deliberative sessions, as shall be set forth hereinbelow.

I. THE ISSUE OF THE TRIBUNAL'S JURISDICTION

Although the Claimant has directed its claim against the National Iranian Copper Industries Company, on which basis it has been filed with the Registry of the Tribunal, this claim is actually based on a contract concluded in 1974 between Schlegel and Fassan, a private Iranian company which is not alleged to have been expropriated and is still in operation. Moreover, the claims involved in this case all relate to Fassan's failure to make payment on Schlegel's invoices. The Claimant itself does not believe that there are sound grounds for this Tribunal's jurisdiction; and for this reason, as the case file indicates, it has taken legal measures against Fassan both in Iran and abroad. For its part, the Respondent has also formally notified the Tribunal that this claim is pending before the Iranian courts.

The Tribunal states as follows, in finding for its jurisdiction:

> "Nor is there any dispute that this claim arises 'out of debts, contracts ... expropriations or other measures affecting property rights' within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. The Tribunal, consequently, has jurisdiction over this claim."

However -- since there is no contractual relationship between the Claimant and the Respondent, and since there has on principle been no allegation of expropriation or of any measures affecting property rights -- after having found in favor of jurisdiction, the majority invokes only the grounds of unjust enrichment, in taking up the merits. Therefore, based on the majority's own argument, this Tribunal should have been found to lack jurisdiction. The majority has offered no justification as against this fundamental objection, and it can thus be concluded that pursuant to the Claims Settlement Declaration, the Tribunal lacks jurisdiction over this claim, which constitutes a dispute between two private companies.

II. THE LAW GOVERNING THE CLAIM

Pursuant to Article V of the Claims Settlement Declaration, upon having found in favor of its jurisdiction, the Tribunal was required to determine the applicable law, and to render its Award in accordance with that law. According to basic rules of

conflict of laws, a contract which has been both concluded and performed on in Iran is subject to Iranian law. Moreover, in Iranian law (Articles 301 through 337 of the Civil Code), the discussion of istifa ("taking advantage" -- ie. unjust enrichment) deals with instances of noncontractual obligations. That is to say, where there exists a contract, the court cannot base its decision on unjust enrichment. In the claim at issue in the present case, application of the theory of unjust enrichment is confronted by a further legal difficulty -- namely, it might lead to double recovery by the Claimant. While the majority has taken this problem into account, it deals with this important difficulty in a facile manner in the footnote to paragraph 17 of its Award, where it states that

> "The Tribunal notes that proof of payment to Fassan would be a defense, but no such proof was offered, either prior to the Hearing in response to the Tribunal's Order of 12 March 1986 or even at the Hearing."

Yet, the fact is that the Respondent informed the Tribunal at the Hearing conference that it had paid Fassan rials 1.9 billion for a project amounting to rials 1.38 billion; moreover, on the basis of project calculations, the total amount earmarked for the subject matter of the claim was only rials 180 million. In this light, how could the majority expect the Respondent to separate the subcontractor's account from the amounts paid to the prime contractor, and produce it for the Tribunal? It is not clear why the Copper Company should have to provide documentation of Fassan's quittance from obligation, and thus be required to produce such documentation in response to the Tribunal's order.

Thereby, according to the governing law (Iranian law), there was no legal relationship between the Copper Company and Schlegel, such as would require the former to enter a defense on the merits. Moreover, the Copper Company states that it paid its debt to Fassan (the contractual obligee) in full, so that the party which might possibly have been unjustly enriched in this connection is Fassan, a private company, and not the Copper Company; wherefore the Tribunal has no grounds for resorting to the theory of unjust enrichment. In this case, considerations relating both to a party's right to mount a defence, and to [the need for] orderly proceedings, would have required that the Tribunal separate the issue of its jurisdiction from the merits, and

that it first render a decision as to jurisdiction, so that the Respondent might have an opportunity to mount a defence on the merits. It should not, therefore, surprise the Respondent by finding in favor of jurisdiction, and then expect the Respondent to have endeavored, prior to the Hearing conference, to obtain documentary evidence in the hands of third parties, on the assumption that the Tribunal would have jurisdiction over the case.

III. APPLICATION OF THE THEORY OF UNJUST ENRICHMENT

Without ruling explicitly as to the governing law, the majority apparently went ahead to apply public international law with respect to the relations between two private companies of different nationalities, and resorted to the theory of unjust enrichment in order to justify its position. In paragraph 13 of its decision, the majority sets forth the accepted rule regarding unjust enrichment, which the Tribunal propounded in Sea-Land [Award No.135-33-1], and states as follows:

> "there must be ... no contractual or other remedy available to the injured party whereby it might seek compensation from the party enriched."

Then, in order to solve this difficulty, and especially to get around the problem here, that for unjust enrichment to lie, it must be the Respondent who is enriched, to the injury of the other party -- the majority regards itself as bound by neither legal principles nor the Tribunal's own precedent. In paragraph 14 of its decision, it invokes another part of the arguments propounded in Sea-Land -- to wit, that:

> "the rule against unjust enrichment 'represents a principle based on justice and equity and therefore 'makes it necessary to take into account all the circumstances of each specific situation.'"

The majority's further arguments, some of which shall be referred to below, are by and large aimed at applying certain equitable considerations -- in manifest violation of both the Tribunal Rules and Article V of the Claims Settlement Declaration. I

appreciate that all legal rules are based on considerations of justice and equity -- and yet, legal provisions cannot be arbitrarily changed on this excuse. The rule of unjust enrichment is among those principles which are recognized in every legal system; and yet the application of this rule out of place, without regard for the rules and conditions applicable thereto, results in injury to a third party and thereby constitutes an injustice in itself.

In the instant claim, the majority: (firstly) has applied unjust enrichment even where contractual remedies presumably exist; (secondly) has not established whether or not Fassan has paid Schlegel between 1981 and the present -- and if not, why not; and (thirdly) has failed to consider how the Copper Company can possibly set off the money judgment by this Tribunal (especially if it is greater than the amount awarded by the Iranian court), should Fassan make recovery on its claims as a result of its actions currently pending against the Copper Company. Moreover, the majority has failed to appreciate that if Fassan is awarded against by the Iranian courts, there will be no way to prevent injury to the Respondent.

Fourthly, supposing that Fassan declares itself to be insolvent, or if its creditors file a bankruptcy petition against it, how can the Copper Company, in relying on the prerogative accorded it by Article 59 (2) of the General Conditions of the Contract -- a prerogative, incidentally, of which the Copper Company has not availed itself -- justify the preference thereby created in favor of Schlegel and to the detriment of the other creditors; and how can it set off the award by this Tribunal against an award issued by the Iranian court?

Fifthly, aside from Iranian provisions relating to bankruptcy, how can this Tribunal, which has set out to render its Award in accordance with the rules of equity, possibly invoke "equity" as a justification for giving priority to a foreign creditor of an Iranian company, vis-à-vis its other creditors?

In paragraphs 15 and 16 of the Award, the majority applies itself to stating the superfluous, in an effort to justify its application of the rule of unjust enrichment in this claim:

Firstly, the benefit which the Copper Company derived from the remedial work performed on the reservoir liner can in no way be regarded as constituting unjust enrichment. This is because under both commercial practice and judicial precedent, warranties made by a manufacturer are rights which attach to the property itself, wherefor the manufacturer can not refuse to perform remedial work during the period of the warranty, even though the goods have been transferred to a third party. In short, the manufacturer's warranty is unrelated to the contractual relationship between the buyer and the seller. Rather, it is an obligation undertaken by the manufacturer in favor of the possessor of the goods, and the cost of such possible remedial work is a part of the price of those goods. Of course, in the instant case the pertinent terms have been spelled out in the Main Contract, and the contractor has undertaken an obligation to the Copper Company, to have the warranties transferred to the latter company.

Secondly, the issue of the injury to Schlegel can be raised only where no legal remedies are [otherwise] available to it. In the instant case, Schlegel's claim for injury cannot be heard by this Tribunal, since Schlegel had a contractual relationship with Fassan, a third party who does not come under the jurisdiction of the Tribunal. In actuality, the Tribunal has no authority to issue an award, or to summon the principal obligor (Fassan). Moreover, since Fassan is the true and indispensable party in the case and cannot be summoned by this Tribunal, the Claimant's claim ought for this reason to be dismissed. Paragraph 17 of the majority's Award states that

> "The Tribunal also notes that the Copper Company does not run the risk of double liability. Article 59 (2) of the Main Contract provides for the deduction of sums paid directly to a sub-contractor from monies owed to Fassan by the Copper Company."

As indicated above, this argument simply cannot be sustained. In my opinion, there is a risk of double liability, because Fassan may possibly go bankrupt, and the

compensation paid to Schlegel in these proceedings might be regarded by Fassan's other creditors as a preferential payment, which could place the Copper Company in a position of double liability.

IV. RATE OF EXCHANGE

In paragraph 19, in calculating and converting the amount to be awarded, the majority has applied a rate which fails to conform to legal criteria, or even to the Tribunal's own precedent.

The rate of 26 rials to the German mark is that rate agreed to by the parties to the contract, one of whom is not subject to the Tribunal's jurisdiction; and it can have, on principle, no bearing upon a determination of the amount of the judgment sum. In this case, where the Tribunal has rendered its Award on the basis of the rule of unjust enrichment, it should have applied that rate of exchange between the mark and the dollar which was in effect on the date when Schlegel made claim for payment from the Copper Company, in which eventuality the amount to be awarded would have been roughly $170,000. The majority states that no evidence has been provided to show that the Claimant would have converted its proceeds to dollars at the end of 1978 and further, that "the Tribunal, therefore, finds that the rate to be applied is that in effect at the time of this Award." By chance, of course, the rate of exchange of the mark to the dollar in effect at the time of the Award happens to be close to the rate of 26 rials to the mark (by converting rials to marks and dollars) provided for under the contract. Nonetheless, by these expedients, the majority has clearly caused the Claimant to be unjustly enriched, to the detriment of the Respondent.

In paragraph 19 of the Award, two totally distinct criteria have been applied in determining the rate of exchange, in a way which clearly reveals, in the text of the Award itself, the contradiction between the grounds for the said Award. On the one hand, the majority holds in the first sentence of paragraph 19, that

> "The Tribunal notes that, pursuant to the contract, Schlegel was to be paid in Deutschmarks at the rate of 26 rials to the mark. Therefore, the Tribunal finds it reasonable to apply that exchange rate here."

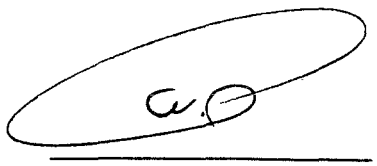
Then, however, it states in the final sentence of the same paragraph, that "the Tribunal, therefore, finds that the rate to be applied is that in effect at the time of this Award."

It is astonishing that, having rendered an Award against the Respondent on the basis of the theory of unjust enrichment, and having therein placed the entire risk on the Respondent, the majority goes on to add in part V of the Award, that "the Tribunal considers it fair to award simple interest at the rate of 10.5 percent from that date [8 February 1978]."

In view of the foregoing, I dissent to the Award issued in the instant case.

Dated, The Hague,

25 May 1987



Hamid Bahrami-Ahmadi