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IRAN-UNITED STATES CLAIMS TRIBUNAL

[redacted] دیوان داوری

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 40

CHAMBER THREE

AWARD NO. 50-40-3

R.N. POMEROY, K.S. POMEROY and R.M. POMEROY,

Claimants,

and

GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL — دادگاه داوری دعاوی ایران ـ ایالات متحده

FILED - ثبت شد

Date ۱۳۶۲ /۳/ ۲۳ تاریخ

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File 40 ع.ت

CONCURRING OPINION OF RICHARD M. MOSK

In this case, the Pomeroy Corporation ("Pomeroy") and the Iranian Navy ("Navy") entered into a contract dated July 1, 1978 under which Pomeroy was to provide services for a two year period. Under the contract, the Navy was to pay Pomeroy an amount based on specified rates for persons supplied at the project sites and an annual "fee" for "the services of the corporation and corporate office operations." In Schedule II to the contract, the parties set forth the specific amount of the fee.

Despite the fact that Pomeroy continued to perform services, the Navy, in violation of its contract obligations, failed to pay certain of Pomeroy's monthly invoices. And despite the fact that Pomeroy was willing and available to continue rendering services, the Navy notified Pomeroy that the Navy was terminating the contract. At no time did the Navy suggest that the termination was for cause or was based on force majeure. Indeed, the contract appears to provide that had the Navy invoked force majeure, Pomeroy would have been entitled to its full fee guaranteed by the contract. The Navy later indicated that it cancelled the contract "for the Navy's convenience," but there was nothing in the contract giving the Navy such a right. Thus, the purported termination of the contract by the Navy constituted a breach of that contract.

It is a widely recognized and elementary principle of law that when there has been a breach of a contract, the claimant-obligee is entitled to a remedy which would put it in the economic position it would have occupied had the respondent-obligor performed its obligations. Ryan, An Introduction to the Civil Law 86-87 (1962); 5 Corbin on Contracts §992, at 5 (1964); 11 Williston on Contracts §1338, at 148 (3d ed. 1968); H. Afchar, "Iran", in Minnatur (ed.), Contractual Remedies In Asian Countries 100-01 (1975).

This remedy includes reasonably foreseeable and anticipated profits.[1] 3 M. Whiteman, Damages in International Law 1860 (1943); Afchar, supra, at 100; 11 Williston on Contracts, supra, §1338 at 202, § 1346A at 245; G. Treitel, "Remedies for Breach of Contract", in VII Int'l Ency. of Comp. Law, Ch. 16, Contracts in General, 27-29 (1976). In determining the amount of damages to be awarded a claimant, the cost of performance not incurred by the claimant because of the breach should be subtracted from that portion of the contract price to which the claimant would be entitled had the contract been fully performed. 11 Williston on Contracts, supra, §1363 at 342; 5 Corbin on Contracts, supra, §1038 at 236. Another principle of contract remedies is that a claimant is not entitled to damages for losses it could have avoided by reasonable efforts. Thus, if proven by the respondent, gains that a claimant could have made by

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[1] In the Shufeldt Claim (U.S. v. Guat.), 2 R. Int'l Arb. Awards 1083, 1099 (1930), the arbitrator stated as follows:

> I will now consider the question of damages and will, to begin with, quote the words of the Arbitrator in the claim of R.H. May vs. Guatemala and Guatemala vs. May, reported in Foreign Relations of the United States, 1900 (p. 673): "I can not pretend to lay down the law concerning damages in clearer words than those of the advocate of the Guatemala Government who uses the following language in the counter-claim: 'The law of Guatemala says Don Jorge Munoz (to which the claimant is subject in this case) establishes, like those of all civilized nations of the earth, that contracts produce reciprocal rights and obligations between the contracting parties; that whoever concludes a contract is bound not only to fulfil it but also to recoup or compensate (the other party) for damages and prejudice which result directly or indirectly from the nonfulfilment or infringement by default or fraud of the party concerned and that such compensation includes both damage suffered and profits lost: damnum emergens et lucrum cessans.'"

reasonable efforts as a result of opportunities that it would not have had but for the breach are deductible from the amount that would otherwise be receivable. Treitel, supra, at 75-77; Afchar, supra, at 103; 5 Corbin on Contracts, supra, § 1039 at 251.

The Tribunal properly decided that Pomeroy is entitled to the full amount of the unpaid invoices. The Tribunal also correctly determined that in connection with the wrongful breach of the contract by the Navy, Pomeroy is entitled to certain damages for amounts it would have earned but for the breach, which damages in this instance constitute lost profits. The Tribunal may have some justification for concluding that Pomeroy's lost profits would have been lower than those estimated by Claimants, although there is scant evidence from which to draw such a conclusion. I believe, however, that even if the Tribunal could make such a determination, the amount of Pomeroy's lost profits awarded by the Tribunal is less than that indicated by the evidence relied upon by the Tribunal.

Under a previous contract between the parties, Pomeroy was paid a specified sum per man-month for personnel actually supplied. This sum was to constitute compensation to Pomeroy for the costs related to such personnel, as well as for profits, general overhead and other expenses. Under the contract involved in the instant case, the Navy was to pay Pomeroy a reduced sum for personnel, which sum would cover the costs of the personnel, and a fixed fee for Pomeroy's

profits, overhead and other expenses. So long as Pomeroy did not breach the contract, that fixed fee was to be paid.

It is true that the fee was for furnishing the Navy a minimum of 20 and a maximum of 75 staff members and that as a result of the Revolution the staff was reduced below the level of 20. But the evidence shows that the Navy acquiesced in a temporary reduction of staff because of decreased project activity resulting from the Revolution. There is nothing to suggest that the reduction was intended to be permanent. Indeed, there are indications that the parties contemplated a full resumption of activities under the contract in the near future. The Navy, by terminating the contract, deprived Pomeroy of its opportunity to perform fully its obligations under the contract (including providing a staff of at least 20) after disruptions subsided. That the Government of Iran would not permit United States contractors to perform services in Iran does not legally justify the Iranian Government's termination of its contracts with such contractors without liability and does not constitute force majeure with regard to the obligations of that government under such contracts. See Treaty of Amity, Economic Relations, and Consular Rights, August 15, 1955, United States-Iran, art. IV, paragraph 1, 8 U.S.T. 900, T.I.A.S. No. 3853 (entered into force June 16, 1957); Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 12, 55 Am. J. Int'l Law 548, 566-67 (1961); Restatement (Second) of Foreign Relations Law of the United States §§193, 195 (1965).

That a staff reduction would not necessarily affect Pomeroy's fee is suggested by Pomeroy's written statement to the Navy that "collectively considering all prevailing circumstances, both directly and indirectly related to the project, we find that our staff in the interest of economy to [the Navy] could be reduced without affecting our support activities". (Emphasis added). It was the "support activities" that were covered by the fee.

Pomeroy proposed an increased billing rate for the staff remaining on the project, billed at such an increased rate in its late invoices and did not bill for the fee in those invoices. Nevertheless, there is not sufficient evidence before the Tribunal showing that there was any agreement modifying the fee obligation or even that Pomeroy had made any proposals to change the Navy's obligation to pay the fee. It should be noted that in its proposal to increase the man-month rate, Pomeroy specified that "[a]ll other terms and conditions of [the contract] shall be applicable to these revised commercial conditions." Moreover, in view of the force majeure article in the contract, it does not appear that Pomeroy would have had significant reasons to waive its fee or any portion thereof. This article provided as follows:

> [T]he prescribed period for performing the job should be extended for the same length of time that the work has been delayed because of Force Majeure . . . .In case of Force Majeure, in addition to the price written in the Contract, the Contractor [Pomeroy] is liable to receive all the expenses he has borne rationally or by obligation, during the period of Force Majeure but in no case shall the CED [Navy] obligation under this clause exceed the payment provisions of Schedule I and II.

Although not absolutely clear, this provision can reasonably be read to provide that in the event of force majeure conditions, Pomeroy is entitled to receive its fee provided for in Schedule II to the contract. Certainly Pomeroy was aware of the provision, for in one letter it "reserved" the matter of compensation under the force majeure clause "for further discussion."

The absence of a billing for the fee in the last two invoices might indicate the possibility of some arrangement concerning the fee. But any such arrangement might well have involved no more than a deferral or waiver of the fee for a limited period of time. Even if Pomeroy and the Navy had agreed that the increased man-month rate for personnel supplied was a substitute for the fee -- thereby re-establishing the format used in an earlier contract between them -- such an agreement would simply have shifted the profit reflected in the fee to the payments for personnel. By wrongfully terminating the contract, the Navy prevented Pomeroy from earning its fee in whatever manner it was to be paid. In any event, there is not sufficient evidence before the Tribunal establishing that Pomeroy agreed to a waiver of the fee. Had there been any such agreement, the Navy should have proven it. It is the Navy that has the burden of demonstrating that there was an agreement to reduce, delay or eliminate the fee. See Article 24, paragraph 1, of the Tribunal Rules. The Navy produced no witnesses and virtually no evidence or argument on the issue of damages.

Thus, based on the evidence, but for the breach of the contract, Pomeroy would have received the full amount of the fixed fee, even if somewhat later than originally contemplated. It was intended that approximately three-quarters of that fee was to consist of the profits to be earned under the contract. Although one of the Claimants wrote that the costs had been higher than anticipated in the contract price, there is no showing that such costs would have continued for the life of the contract. Indeed, expenses associated with the commencement of services often do not continue into the later stages of performance of a contract.

Based on the evidence, I would have awarded Claimants a greater portion of Pomeroy's fee than the amount reflected in the Award. The Tribunal did not have sufficient evidence to support its reduction of the indicated amount of damages for lost profits. Although perhaps unintentionally, the Tribunal appears to have arrived at its determination by, in effect, placing on Claimants the burden of proving the non-existence of facts assumed in the Award that Pomeroy would have incurred greater than expected expenses had the contract been performed and that Pomeroy, subsequent to the contract, entered into some type of arrangement with the Navy concerning the fee. The Navy should have the burden of establishing these supposed facts. The Tribunal leaves unexplained how Claimants could be expected to meet this burden when the Navy did not even allege such facts.

I also believe that Claimants should have received an amount of interest based on Pomeroy's actual borrowing rates or on actual commercial rates in effect from the date of the breach. Moreover, Claimants should have received an amount for costs which reflects the full amount of their reasonable attorneys' fees. See my Concurring Opinion in Award No. 18-30-3 (Granite State Machine Co. Inc. - Opinion filed January 25, 1983).

I have concurred in the award in order to form a majority for it. See Sanders, Commentary on UNCITRAL Arbitration Rules, II Yearbook Commercial Arbitration-1977, 172, 208. Had I not concurred in the Tribunal award, it is possible that no award would have been issued, at least not for another protracted period,[2] a result which would have compounded the injury to the Claimants arising from the breach of contract.

Therefore, I concur in the Tribunal award of U.S. $2,980,241.09 to Claimants and in the dismissal of the counterclaims.

The Hague

13 June 1983

Richard M. Mosk

[2] The length of the period from the Hearing to the Award in this and many other cases justifies my concern with the delays in the Tribunal's decision-making process.