

ORIGINAL DOCUMENTS IN SAFECase No. 159Date of filing: 7 AUG 84

** 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

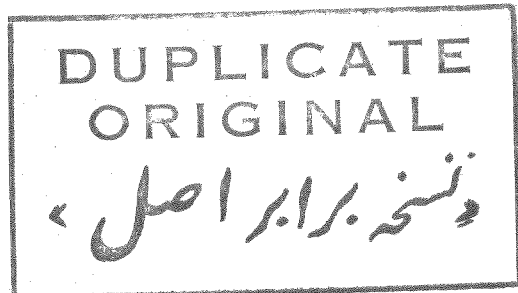
** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of MR. ANSARI
- Date 7 AUG 84
9 pages in English 7 pages in Farsi

** OTHER; Nature of document: _____

- Date _____
_____ pages in English _____ pages in Farsi

In the Name of God



CASE NO. 159

CHAMBER THREE

AWARD NO. ITM 39-159-3

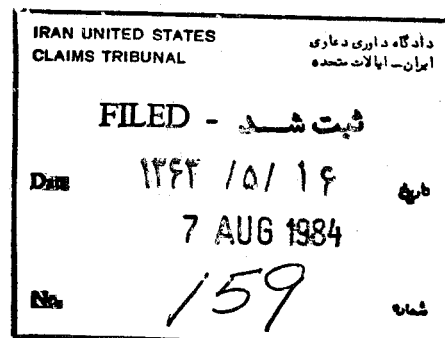
FORD AEROSPACE & COMMUNICATIONS
CORPORATION and AERONUTRONIC
OVERSEAS SERVICES, INC.,

Claimants,

and

THE AIR FORCE OF THE ISLAMIC
REPUBLIC OF IRAN, THE GROUND
FORCES OF THE ISLAMIC REPUBLIC
OF IRAN, THE MINISTRY OF DEFENCE
OF THE ISLAMIC REPUBLIC OF IRAN,
GOVERNMENT OF IRAN,

Respondents.



DISSENTING OPINION OF MR. PARVIZ ANSARI

I. INTRODUCTION AND GROUNDS

1. Article 9 of Contract No.103, which comprises a part of the Claimants' action, makes the following provision for the settlement of disputes between the parties:

" 9. Settlement of Differences

All disputes and differences between the two parties arising out of interpretation of the Contract or execution of the Works which can not be settled in a friendly way, shall be settled in accordance with the rules provided by the Iranian laws, via referring to the competent Iranian courts."

The issue of whether this Tribunal has jurisdiction over the said Contract was previously relinquished to the Full Tribunal by Chamber Three, and the present Case was one of the nine jurisdictional cases taken up by the Full Tribunal. The Full Tribunal majority decided as follows:

"Article II, Paragraph 1, of the Claims Settlement Declaration requires that, in order to exclude the Tribunal's jurisdiction, the contractual choice of Iranian courts must cover any claims arising under the contract. In the present case, the jurisdiction of the Iranian courts has been expressly limited to disputes arising from the interpretation of the contract and the execution of the works. Important aspects of the contract including some of the Claimants' obligations to be performed outside Iran and all the Respondents' obligations such as payment have been left outside the jurisdiction of the selected courts. Such limitation of the jurisdiction places Article 9 of the contract outside the requirement that the Iranian courts must be solely competent for any disputes

arising under the contract. Therefore, the Tribunal is not prevented by Article 9 of the Peace Sceptre Contract from asserting jurisdiction over all claims arising under this contract."

(See: Award No. ITL 6-159-FT, dated 5 November 1982 (English version), and 13 April 1983 (Farsi version))

2. On 7 February 1983, the Claimants stated in a submission to the Tribunal that on 9 December 1982, the Ministry of Defence (Respondent) had filed a statement of claim against them with the Tehran Public Court, alleging breach of Contract No.103 and seeking /damages/, and the Claimants thereupon requested that the Tribunal order that the claim brought before the Tehran court be dismissed or stayed.

On 20 October 1983, Chamber Three of the Tribunal issued an Interim Award wherein the Government of Iran was requested to take the necessary measures to have the proceedings before the Tehran Public Court stayed at least until 30 days after the Hearing which was scheduled for 3 May 1984, concerning the request for interim measures. I appended my Dissenting Opinion to the said Award (See: Award No. ITM 28-159-3).

3. Following the said Hearing, a further Interim Award was issued by Chamber Three, wherein the Government of the Islamic Republic of Iran (particularly the Ministry of Defence) was requested to take the necessary measures to have the proceedings before the Tehran Public Court stayed until further order of the Tribunal.

4. The reasoning of the majority in the said Interim Award rests upon its answer to the following two questions: "first, do 'the provisions invoked by the /Claimants/ appear, prima facie, to afford a basis on which the jurisdiction of the Tribunal might be founded,' * and second, is the claim asserted in the court in Tehran tantamount to 'such claim,' i.e. the counterclaim asserted here by Respondent /Ministry of National Defence/?" **

5. On the first point-- i.e. the claims settlement and forum selection clause contained in the Contract-- the majority is of the opinion that because the Full Tribunal has previously taken a decision on the issue, "hence the said Interlocutory Award on Jurisdiction in this case must be respected as binding law." ***

6. On the second point as well, the majority is of the opinion that because the claim brought before the Tehran Public Court is the same as the counterclaim lodged with the Tribunal, and because the Full Tribunal has ruled in E-Systems Inc. and The Islamic Republic of Iran and Bank Melli, Interim Award No. 13-388-FT, dated 4 February 1983, that "once a counterclaim has been initiated before the Tribunal such claim is excluded from the jurisdiction of any other court," it is therefore appropriate that the claim brought before the Tehran court be stayed.

* /As cited in the text of Award No. ITM 39-159-3, p.8./

** /Id., p.8/

*** /Id., p.10/

II. DISSENTING OPINION

7. I have written my Dissenting Opinion in compressed form at the end of Award No. ITM 28-159-3; I now present my Opinion in connection with both points (paragraphs 5 and 6 above) in detail.

8. Article 9 of the Contract at issue in this claim clearly falls under the provisions of Article II, paragraph 1 of the Claims Settlement Declaration with respect to jurisdiction of the Iranian courts. There is no validity to the opinion of the majority-- whether in the Full Tribunal or in the Chamber-- that the limitation of claims under Article 9 of the Contract to claims of interpretation or execution of the works, places the said Article outside the scope and coverage of Article II, paragraph 1 of the Claims Settlement Declaration and that it cannot, therefore, fall under the provisions of the latter. Article 9 of the said Contract must be interpreted in the light of all of its provisions, inter alia the purpose of the Contract. Article 1 of the said Contract expressly provides that "This Contract is concluded... for the purpose of execution of works mentioned in this Contract." Then, in Article 2, the general obligations and duties of the parties to the Contract are enumerated; Article 4.1 mentions the contract documents which constitute an integral part of the Contract. The said documents include an exact description of the parties' obligations and duties. These obligations and duties consist of the parties' works in execution of the Contract. The Seller's works consist, inter alia, of technical works, services, opening of certain /bank/ guarantees, etc.; and the Buyer's works consist, inter alia, of making payments and opening or recovering certain /bank/ guarantees.

The expression, "execution of the works," which is mentioned in both Article 1 and Article 9 of the Contract, cannot-- contrary to the statement by the majority-- cover only a portion of the Contract; rather, in a synallagmatic contract entailing consideration-- as in the case of the instant Contract-- the ordinary and conventional meaning of this term embraces all of the parties' obligations and duties, inter alia payments. The obligations and rights of the parties have been set forth in juxtaposition at each point in the Contract, and the contracting parties concluded the Contract for the purpose of executing the works therein, inter alia the making of payments.

The interpretation of the majority-- whether of the Full Tribunal or of the Chamber-- which is in reality an unsubstantiated interpretation, leads to the incorrect and far-fetched conclusion that the Seller (the contractor) is obligated only to execute the works, and the Buyer has no obligations at all. For as was stated above, Article 1 of the Contract treats the purpose in concluding the Contract as being "the execution of the works," while, in the majority's opinion, "execution of the works" does not include "the payments"; whereas, on the other hand, the articles of the Contract enumerate the parties' obligations and bind the parties to execute them. This blatant deficiency in the majority's Decision arises from the fact that the majority does not have in mind any logical method for interpreting contracts and for adhering to the joint purpose of the parties thereto. This sort of approach toward interpretation of contracts causes Decisions of this Tribunal to lack legal validity and jurisprudential value.

See: Dissenting Opinion of Parviz Ansari to Interlocutory Award No. ITL 36-410-3 in the case of Aeronutronic Overseas Services, Inc. and Telecommunications Company of Iran, dated 9 July 1984.

9. It can be concluded from the preceding that this Tribunal does not have jurisdiction over adjudication of the claims arising out of the said contract, or out of contracts like it, and that the Ministry of National Defence of the Islamic Republic of Iran has correctly brought suit before the competent forum.

10. The majority's reasoning on the second point--i.e. that, because a counterclaim has been lodged with this Tribunal it is therefore necessary to stay the proceedings in the Tehran court-- is also invalid. The majority invokes Award No. ITM 13-388-FT in the E-Systems case in order to justify its own decision, reaching the conclusion that, because in the said Decision, the Counterclaim was also subject to the provisions of Article VII, paragraph 2 of the Claims Settlement Declaration, wherein it is provided that "Claims referred to the arbitration tribunal shall...be considered excluded from the jurisdiction of the courts of Iran...", counterclaims which have been brought before the Tribunal and have also been filed as original claims with the Tehran courts, must therefore be stayed. Apart from discussing whether or not the term "claims" as employed in Article VII, paragraph 2 of the Claims Settlement Declaration includes both "claims" and "counterclaims," the E-Systems Award elaborates on the point that this Tribunal does not, on principle, have exclusive jurisdiction over counterclaims:

"The provision in Article VII, paragraph 2, of the Claims Settlement Declaration that claims referred to the Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court, is in accordance with its

wording applicable only to claims that are already before the Tribunal. Consequently, it follows from this provision that once a counterclaim has been initiated before the Tribunal such claim is excluded from the jurisdiction of any other court, but it cannot be deduced from this provision that the Tribunal's jurisdiction over any counterclaim is of an exclusive nature.

"Consequently, the wording of the Algiers Declarations does not support the argument that the Tribunal's jurisdiction over Iran's counterclaims is exclusive. No other evidence has been submitted to demonstrate that the two Governments intended to confer on the Tribunal exclusive jurisdiction over counterclaims.

* * *

"Consequently, the Tribunal concludes that the Algiers Declarations leave the Government of Iran free to initiate claims before Iranian courts even where the claims had been admissible as counterclaims before the Tribunal."
/emphasis added/

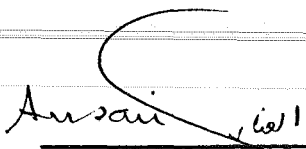
11. By declaring its own lack of exclusive jurisdiction over counterclaims on the one hand, and by making counterclaims fall subject to the provisions of Article VII, paragraph 2, in fine, of the Claims Settlement Declaration on the other hand, the Tribunal has engendered an amazing contradiction. For, the declaration of the Tribunal's lack of exclusive jurisdiction necessarily signifies that the Ministry of Defence shall be entitled to bring its claims before this Tribunal as counterclaims, or to file them with any other forum as original claims. See: the Opinion of the Iranian arbitrators dated 16 March 1983, in connection with the E-Systems case.

12. As the Iranian arbitrators and numerous respondents in similar cases have repeatedly stated, it is im-

possible to comply with a request by the Tribunal to have proceedings before the Tehran courts stayed, because such a request is incompatible with civil procedure regulations governing the Iranian courts, which embody imperative rules and regulations. For example, Articles 290 through 298 of the Iranian Civil Procedure Code, which makes provision for instances of staying or undertaking proceedings and with withdrawing claims, encompasses a limited variety of instances, and the courts cannot stay proceedings in instances other than those set forth in the above-mentioned Articles. Of course, it is possible for the parties to a claim to agree to postpone a hearing. For this reason, the Government of the Islamic Republic of Iran, or the Ministry of Defence, is faced with a legal prohibition blocking its compliance with the Tribunal's request, and there can be no doubt, even assuming that it agrees to the Tribunal's request, that it will be unable to comply with it.

III. CONCLUSION

13. Based on the foregoing, first, the Tribunal does not have jurisdiction over claims brought by claimants which relate to contracts containing clauses conferring jurisdiction upon the Iranian courts; second, the Tribunal has no authority to issue Interim Awards requesting that proceedings before the Iranian courts be stayed.

A handwritten signature in dark ink, appearing to read 'Ansari', with a large, sweeping flourish above it. The signature is written over a horizontal line.

Parviz Ansari