

198-114

191-112

ORIGINAL DOCUMENTS IN SAFE

114

Case No. 198Date of filing: 1-Sep86

** 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

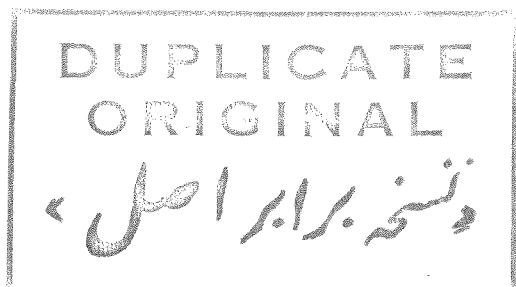
** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of Mohsen Moslafari
- Date _____
24 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

- Date _____
_____ pages in English _____ pages in Farsi

In His Exalted Name



Case No. 198

CHAMBER ONE

AWARD NO. 248-198-1

AMMANN & WHITNEY,

Claimant,

and

MINISTRY OF HOUSING AND URBAN
DEVELOPMENT (KHUZESTAN DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT),
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL		دادگاه دآوری دعاوی ایران - ایالات متحده	
ثبت شد - FILED			
Date	1 SEP 1986	تاریخ	
	۱۳۶۵ / ۶ / ۱۰		
No.	198	شماره	

DISSENTING OPINION OF MOHSEN MOSTAFAVI

I do not concur in the Award in Case No.198 on a number of points. These points are elaborated upon hereinbelow:

1. From the outset of the proceedings, the Respondent requested that owing to the interrelationship between this Case and Case No.940, the proceedings in the two cases be consolidated. The Respondent argues, in support of its request, that because the Claimant was involved as the consulting engineer, he therefore had the duty to carry out the following tasks, pursuant to the Contract:

"Task I. Review all area planning and engineering design and drawings; comprehensive design control of the houses and public buildings; and 'approval of materials, finishes, layouts,

plans, specifications and working drawings for conformity with good engineering practice, standards, bid requirements, applicable codes, design data and local conditions.'

"Task II. General overall supervision.

"Task III. General project management and quality control, approval of buildings, interpretation of contract documents, checking and recommendations for approval and disapproval of Contractors' claims, issuance and negotiation of all change orders and costs, review of Contractors' time and material schedules and preparation of progress-of-work reports..."
(Statement of Claim, pp.4-5)

On the other hand, based on the duties which the Claimant was obliged to carry out, the Respondent states that Hover-Naft, which was one of the contractors and had undertaken to build 500 houses, has filed a claim under No.940, even though it was negligent in performing its duties. As against this claim, the Respondent brought a counterclaim, on the grounds that

"Consulting Engineer Ammann & Whitney, which was chosen by the Employer to undertake supervision over the execution of the Project as well as the tasks of the contractors is not free from liability in relation to the losses inflicted by the contractors. Due to this very reason, Respondent requests the Honorable Tribunal, in view of the connection between the subject of Case Nos.940 and 198 to consolidate them, and investigate the two cases simultaneously."

The majority did not agree to the Respondent's request for consolidation of proceedings, on the argument that

"...At no stage of the proceedings in Case No.198 did sufficient reasons emerge which would have justified the Tribunal in granting the request for consolidation. Accordingly, it remains only to record the Tribunal's decision that Case 940 should proceed independently

before Chamber Two, and that the present Case can be disposed of by a separate Award." [page 8 of the Award]

The need for consolidation of the proceedings arises out of the connection between the subject-matter of the cases, whereby issuance of an award in one case depends upon an examination of the other, while their separate treatment would sever the nexus between their substantive issues. Both the claim brought in the present case and that raised in Case No.940 arise out of a single project; moreover, the Respondent has expressly stated that owing to the Claimant's responsibility to supervise the tasks and obligations [to be carried out by] Hover-Naft International which, it asserts, defaulted thereon, Hover-Naft caused the Respondent to incur losses which it would not have had to bear had the Claimant carried out its duties like a conscientious consultant. Therefore, this claim needs to be examined and the related issues taken up jointly. Therefore, in actuality the continuation of separate proceedings and the nonacceptance of the Respondent's request constitute in effect a prejudgment on the merits of the case, particularly inasmuch as the Tribunal not only regards the Respondent's reasons as insufficient but also categorically rejects the matter, whereas at any rate there can be no denying the link between the subject-matter [of the two cases].

2. The majority makes a hasty interpretation of the letters dated 28 June 1979 and 15 September 1979, based only upon a small part of those letters' contents. Unfortunately, no attention has been paid to the other portions thereof; nor have their contents been compared. Moreover, although the letters make express mention of other matters, they are taken up solely in the light of

the said small part. The contents of the letter of 28 June demonstrate that it constituted a final amendment and, apparently, a provisional invoice. The letter begins with the following words:

"We would like to confirm our understanding of the matters discussed during our meeting in Ahwaz on 27 June 79.

1. Our Contract with KUDO is being amended--solely due to the present policy of the Government of Iran concerning expatriate personnel-- to delete supervision, Task III, of our contract. On-site supervision will be performed directly by KUDO as of now. Ammann & Whitney are to be paid all outstanding amounts due for task III up to, and including, 15 January 1979." (emphasis added)

It is thus clear that the Parties expressly agreed to delete Task III of the contract and that payments owing up to 15 June 1979 were payable, and further, that no terms or conditions were provided for in this connection.

As for Task II, for which it was agreed that the sum of Rials 17,040,000 was to be paid, it was emphasized that acceptance of the fees "is conditional to receiving the agreed-upon initial payment of Rls. 17,040,000..." Therefore, contrary to the interpretation of the majority, which regards the entire agreement as being contingent upon payment of the said amount, the letter makes an explicit statement to the opposite effect. Furthermore, this condition categorically does not signify what the majority implies it to mean, because (first) the letter reiterates the phrases, "it was agreed," "we have agreed," and "we have also agreed"--expressions which are ipso facto clear indications that final agreement had been reached. Second, there was no date set for receipt of the sum of Rials 17,040,000, and so the Respondent would be released of its liability once

it paid this amount, while any delay in payment would cause the matter to come under the provisions of Article 13, paragraph 4 of the contract. Late payment would not entail that the agreements entered into at the meeting of 27 June would be repudiated on principle, since no deadline therefor was even set.

An examination of the substance of this letter together with that of the letter of 15 September, which was sent as a follow-up thereto, will still more clearly reveal the deficiencies in the majority's interpretation. It is true that it is stated in the body of the letter [of 15 September] that

"More than ten weeks have passed since our meeting at your offices in Ahwaz, and we are still awaiting your specific response, concerning some of the items discussed, as outlined in our letter to you, dated 28 June 1979..."
(emphasis added)

The majority, however, treats this portion of the letter in isolation from the rest, and interprets it to mean that the Claimant was seeking by these words to obtain the Respondent's confirmation so that the agreement could be finalized; whereas, firstly, this part of the letter refers only to "some of the items discussed," not to all of them. Therefore, there can remain no doubt that some of the items had been fully settled and did not need a "specific response"; thus, the majority should not have interpreted the request for a response as including all of the items. Secondly, in connection with the remaining issues, the wording of the letter does not indicate, as the majority supposes, that confirmation of this agreement was contingent upon receipt of a specific response, because paragraph 3 of the said letter expressly states that "You agreed that the above is the correct fee for our services, and [we] expect your formal

approval thereof." Therefore, it is definite that the agreement had been finalized and that its finalization did not depend upon payment of the said sum of Rials 17,040,000. Rather, since no payment was sent between 28 June and September, in sending the latter letter the Claimant was following up its demand for the said amount; and its statement that "We are still awaiting your specific response, concerning some of the items discussed... in our letter...dated 28 June 1979...", is not in actuality a request for approval of the agreement, as the majority imagines.

Mention of the phrase, "it was agreed" in a number of paragraphs of this letter demonstrates that this agreement had been finalized, rather than that finalization was contingent upon payment. Confirmation of this point comes from the phrasing used in the conclusion to this letter, to wit:

"We would like to again summarize the payments due us, as per our latest understanding..."

Then, following mention of the amount, it is finally concluded that:

"Thus the amount due us is... Rl. Please transfer this amount as soon as possible to our Bank Account or to our Tehran Office."

Moreover, in the letter dated 17 September by Mr. Brazinskas, which was sent after the above-mentioned letters, and wherein a report was given of the company's activities in connection with the project, mention is once more made of the agreement reached. This letter expressly states that:

"On 27 June 1979, an agreement was reached with KUDO, that due to restrictions imposed on work

by expatriate personnel in the country, on-site supervision by Ammann & Whitney, Task III, will be taken over by KUDO, with Ammann & Whitney continuing with the remaining Tasks under our present contract..." (Memorial No.93, Exhibit K-1)

There is thus no mention of any condition for reaching final agreement; therefore, this letter of agreement should constitute the basis for settling the dispute between the Parties.

3. The majority's recourse to Article 22 of the contract on the basis of the Claimant's letter dated 5 May 1981 in termination of the contract is inconsistent with the objective facts in the case. Furthermore, it is merely an interpretation deriving from the passive language of this Article, without consideration of the relations between the Parties. In actuality, the majority's interpretation rests upon the conclusion that the Claimant is entitled to receive fees for those works not performed, even though the Respondent has not breached the contract whereby the issue could be regarded as one of lost profits. The majority's argument is, that by its letter dated 5 May 1981 the Claimant terminated the contract in reliance on Article 22 of the contract, since the said Article provides that:

"In cases of Force Majeure which make impossible the execution of this Contract for one of the parties the concerned party can announce the termination of the Contract to the other party. In such case the Consulting Engineer shall, within one month after the declaring of the Contract's termination, submit to the Employer an invoice comprising the amounts which shall be paid to him by the Employer, and the latter shall verify the said invoice within 30 calendar days after the receipt of the invoice and pay to the Consulting Engineer all the amounts which shall be found belonging to the latter."

The majority then adds that based on the mechanism embodied in the contract,

"The Tribunal observes that, according to Article 10 of the letter of intent, which is stated to take precedence over the standard contract form, the basis of remunerations for Ammann & Whitney's services was that of fifteen monthly instalments, which were payable irrespective of the progress of the project achieved by the contractors and subcontractors. There is no evidence of any contemporaneous objection being raised by KUDO to the quality of Ammann & Whitney's performance such as might have relieved KUDO of its obligation to pay. In fact, KUDO Made no allegation of breach, nor did it invoke force majeure."

This argument leads to an untenable conclusion-- ie, that without having performed any works, the Claimant is entitled to receive monies which, according to the contract, he was to receive only in exchange for his performance of the works. In other words, although it has been presumed that the Respondent was not in breach of the contract (by which reason it would be liable for payment of damages), it has nonetheless been found liable on some other ground. In the opinion of the majority, this ground is, the Claimant's reliance on force majeure. However, because it perceives that force majeure cannot serve as a basis for payment of damages or as indemnification for works not performed, it attributes [KUDO's liability] to the consent of the Parties, since

"...KUDO raised no objection to the contents of the letter and did not protest the original invoices on which it was based. Thus KUDO must be taken to have acquiesced in the termination on the terms specified in the notice and invoice."

That is, the Respondent's silence signifies its admission that it is liable for payment of monies to the Claimant merely on receipt of the latter's monthly invoices and

without having obtained any consideration therefor. While this premise is incorrect-- since the Respondent did object and, as stated by the Claimant's witness, it totally disagreed with both this procedure and the invoices, as shall be explained below-- it is clear that an interpretation leading to such a conclusion as this, which is not the practice of any transacting party, is unacceptable. Apart from this, force majeure conditions as they existed in Iran, and which Interlocutory Award No. 24-49-2 terms "classic force majeure conditions," constituted an external, unforeseeable and inevitable event which forcibly prevented the parties from carrying out the contract. Therefore, upon occurrence of the revolutionary events in Iran, the contract ipso facto terminated, a matter of which both Parties were aware. Thus MEMCO, by its letter dated 6 December 1978 to KUDO, a copy of which was sent to Ammann & Whitney, wrote that

"We would like to confirm to you that we continue to consider the present situation as a Force Majeure Situation."

It also writes in its letter dated 31 January 1979, which it sent directly to Ammann & Whitney, that:

- "a) The entire country is on strike. There are no possibilities of transports [sic] either by air or train or even by car or truck.
- "b) Telephone and telex are most of the time out of order.
- "c) Inaccessibility to the site...
- "d) Impossible to buy local or arrange for imported material.
- "e) No representative of Ammann & Whitney either at the site nor in Tehran..."

This same point was explicitly mentioned in Ammann & Whitney's letter dated 28 June [1979], which stated that

"May we again emphasize, that we are agreeing to reduce our fees, due to delays of the Project beyond anyones [sic] control..."

Moreover, there subsequently occurred the November 14, 1979 incident, which signified a critical stage in the force majeure conditions and a date as from which, as stated by all United States claimants, it became impossible for them to carry out their obligations, since pursuant to the US Government's Order, not only were that Government's political and economic ties with Iran severed, but travel to Iran by US nationals was also forbidden. Therefore, upon occurrence of the force majeure conditions, it became de facto impossible to perform any kind of works for which payment ought to have been made. In fact, from that date on, it was impossible for the Parties to fulfill their contractual obligations, owing to frustration of contract, and no contract can be presumed to have existed from that time, such that recourse might be had to force majeure in order to terminate said contract. 5 May, 1981, the date on which the Claimant sent its letter in invocation of force majeure conditions, was approximately five months after the date the Algiers Declarations were signed, and prior thereto it had become impossible to carry out any contractual obligations whatsoever. Furthermore, this Tribunal was established for the purpose of adjudicating such disputes, whose underlying contracts had ceased to be viable. Therefore, no contract can be presumed to have continued to exist, such that it could be terminated by a notice invoking force majeure. The Tribunal should not permit the Claimant, who had long been aware of the existence of force majeure conditions and had even withdrawn its personnel from Iran, to abuse the situation

by submitting a notice of termination of contract after having ceased operations for a considerable time and, in enclosing an invoice, to claim monies without being entitled thereto. The Tribunal must not base its interpretation upon the superficial sense of words out of the context of the facts surrounding them. Recourse to Article 22 of the contract was not the only means by which it could be terminated. Under the conditions which occurred in connection with this project, and upon abandonment of work by the other contractors, force majeure was-- in view of the close interrelationship between the works-- a situation which inevitably dissolved the contract; and when the Claimant sought recourse to force majeure, there no longer existed any contract for whose termination Article 22 thereof had to be invoked.

4. In addition to the foregoing, the majority has founded its argument upon premises which are both incorrect and inconsistent with the facts in the case. Examples thereof shall be cited below:

- A. "The Tribunal observes that, according to Article 10 of the letter of intent, which is stated to take precedence over the standard contract form, the basis of remunerations for Ammann & Whitney's services was that of fifteen monthly instalments, which were payable irrespective of the progress of the project achieved by the contractors and subcontractors..."

Although Article 10 of the letter of intent did make provision for scheduled payments to the consulting engineer as from the time the letter of intent was entered into, this does not signify that the Parties intended the monthly instalment payments to be made irrespective of the progress of the works. Such an interpretation would not only be illogical, but it is

also inconsistent with the facts surrounding the contract and the case. The first paragraph of the letter of intent provides:

"The final contract shall be concluded in two months time, based on the Plan and Budget Organization rules and regulations."

The rules and regulations of the Plan and Budget Organization specifically provide for payment on the basis of progress of the works. Moreover, [the paragraph's] phrasing indicates that in this respect, the letter of intent did not take precedence over the standard contract form; on the contrary, it expressly stated that payments shall be based on the rules and regulations of the Plan and Budget Organization. Attachment 4, which comprises a part of the contract, explicitly bases the payment mechanism on progress of the work. Moreover, the Parties' understanding of the contract was not that payment would occur "irrespective of the progress of the project achieved by the contractors..." KUDO's letter to Ammann & Whitney in connection with the invoice for Azarmah 1357 [Nov.-Dec. 1978] expressly states that:

"....your attention is drawn to the fact that Hover-Naft and Memco, in disregard of their obligations, have in effect closed down the 1000-house site as a result of their disputes with local contractors and their own nonperformance of their obligations... you have previously been advised that such payments shall be in proportion to the output of work, as evidenced by the contractors' progress reports. At any rate, your attention is drawn to the following:

1- ...

2- Payment on Ammann & Whitney Consulting Engineers' invoices to be in proportion to output, as evidenced by their progress reports..." *

* [retranslated from the Farsi original; emphasis added]

Ammann & Whitney never objected to this letter, a fact which shows that the Parties had a mutual understanding that payments would be based upon the progress of the works. In any case, they had stipulated that the said payments would be made in fifteen monthly instalments, and not that these instalments were payable irrespective of the work progress achieved; for if such were the case, it would be necessary to presume that the Respondent had consented to carry out an irrational obligation.

B. As to the contents of the letters dated 27 June and 17 September, the majority holds that:

"...The Ministry argues that these letters operated as an agreement to reduce the contract price; Ammann & Whitney contends that they instead reflect attempts to reach a negotiated settlement which eventually was not approved by KUDO and which thus never took effect."

The Respondent, however, never stated that "these letters operated as an agreement to reduce the contract price." Rather, the Respondent states that the contents of the letters reflect contractual obligations of Ammann & Whitney:

"The Consulting Engineer's argument that the setting of fees on the basis of work completed, which thoroughly corresponds with the provisions of the contract, is tantamount to revision of the contract and requires an addendum to the contract, is without merit and in contravention of facts."

The proceeding demonstrates that, contrary to the majority's supposition, the Respondent did not believe that the agreements reached in the joint meeting of the Parties, whose proceedings are reflected in the letter dated 27 June, "operated as an agreement to reduce the contract price." On the contrary, the Claimant was attempting to obtain the sum of Rials 17,040,000 in mobilization costs

even though it had already been paid these monies previously. An examination of the figures relating to Task II makes this point manifestly clear. The letter of intent provided that the Respondent was to pay a total of Rials 87,862,500 as consideration for performance of the said Task. This amount was made up of fifteen monthly instalments of Rials 4,721,500 each (totalling Rials 70,822,500) and an advance payment of Rials 17,040,000 for costs of mobilization- in all, a sum of Rials 87,862,500 for Task II. It was subsequently agreed that the Rials 17,040,000 would be paid together with the initial monthly instalment. As a result, the sum of Rials 21,761,500, which was noticed and paid upon in accordance with Invoice No.1, included mobilization costs as well. It would thus appear that Ammann & Whitney is either laying claim to a further Rials 17,040,000, or attempting by its calculations to represent itself as being entitled to receive this amount, which it was entitled to receive once the works were carried out, as from the commencement of the works. That is, had Task II been completed as the Parties intended, Ammann & Whitney would have become entitled to receive 1.125% of the contract price plus 10% (ie, Rials 87,862,500), of which the Rials 17,040,000 would ultimately have been a part. Therefore, while Ammann & Whitney represents itself as being entitled to receive this amount even though the greater part of the work was not carried out, it is in actuality increasing-- rather than reducing-- the contract price.

C. The majority is of the belief that the Rials 162,671,880 reflected in the Attachment to the May 5 [1981] letter represents an "appropriate amount," one which can serve as the basis for the award. Yet, throughout its memorials the Claimant seeks indemnification for the Respondent's alleged breach of contract as

follows: deducting Rials 44,985,600 for works not performed from the total contract price of Rials 194,363,275, it demands Rials 149,378,675 as representing services performed plus lost profits on those works not carried out. This figure can be contrasted with that taken by the majority as the basis for its calculations, as follows:

the "appropriate amount," according to the majority	: Rials 162,671,880
the value of the works performed, according to the Claimant	: 149,378,675
The excess amount awarded in favor of the Claimant	13,293,205

The consequences of the majority's calculations do not stop here. The majority holds that:

"Taking the calculations in the letter of 5 May 1981 as representing the appropriate amount owing under the contract, the Tribunal concludes that the calculation takes account of Ammann & Whitney's alleged training fund obligations and liabilities for tax and social security premiums, insofar as they existed as contractual obligations between the Parties."

That is to say, the figure of Rials 162,671,880 represents the net amount. Thus, if the amounts for taxes, social security and training fund payments are added thereto, then on this basis the price of the works performed (the gross amount of which was, under the contract, to be submitted, and from which the obligations accruing thereto were to be deducted) will amount to approximately Rials 182 million. That is, the majority has regarded the gross amount of Rials 182 million as representing an "appropriate" basis [for the award], a figure amounting to 94% of the total work, whereas Mr.

Russo, a witness for the Claimant, in Paragraph 18 of his Affidavit estimated that the works performed amounted to Rials 120,644,550-- that is, approximately 60% of the total works. In this way, the majority (first) treats the submitted figure as taking into account [Ammann & Whitney's] tax, social security and training fund obligations, without offering any reasons therefor and thus in violation of the Tribunal Rules.¹ Secondly, the majority has selected a method whose effect is to justify the Claimant's acquisition of windfall payments.

An analysis of the figures set forth in the Attachment to the May 5 letter, which constitute the basis of the majority's Award, reveals that excessive and baseless amounts have been demanded, while by failing to examine those changes, the majority has by its Award simply ordered the Respondent to pay them:

Relief sought for Task I	:	Rials	19,752,600
Relief sought for Task II	:		78,698,000
Relief sought for Task III	:		56,652,680
Relief sought for Task IV	:		7,568,600
Total			Rials 162,671,880

If the majority believes that the contract provided for a lump sum payment for each separate Task, and that it must therefore take the amounts set forth in the

¹ Article 32, paragraph 3 of the Tribunal Rules provides that:

"The arbitral tribunal shall state the reasons upon which the Award is based, unless the parties have agreed that no reasons are to be given."

contract as the basis for its calculations, then how-- since the contract set the amount of Rials 14,952,600 and Rials 4,075,400 as the compensation for Tasks I and IV, respectively-- can the majority possibly accept the Claimant's invoice, wherein Rials 19,752,600 are demanded for Task I and Rials 7,568,600 for Task IV-- that is, a total of Rials 8,293,200 in excess?

Even if we are to accept the majority's argument that the Claimant relied on force majeure, in accordance with Article 22 of the contract, in submitting its claimed invoice on 5 May, this does not lead to the conclusion that the Claimant was permitted to demand whatever manner of unfounded amounts it could, in this invoice. However, the majority has regrettably taken this very approach, stating that:

"The Tribunal therefore considers the letter of 5 May 1981 must be applied as the definitive formulation of the parties' respective liabilities under the contract, by which they should now be bound."

In this way, the majority treats all the issues as having been resolved by its hasty decision, not deeming itself as being obligated to analyze these figures and to consider to what erroneous conclusions its pursuit of this decision leads.

E. In view of the fact that under the rule of "The loss must fall where it lies," the amount awarded for force majeure will always be less than that for breach of contract, the approach taken by the majority in the present case, wherein the amount awarded in damages even exceeds that for a claim of breach of contract, clearly demonstrates the weakness of the majority's argument. Even though the Claimant was not unaware of force majeure, it brought its claim on the grounds of breach of contract, for the reason that it was aware of the

problems involved in bringing a claim on the former grounds;² otherwise, it was not obliged to bring its claim on the basis of grounds which would result in a remedy yielding a smaller amount. The Claimant was itself so well aware of the deficiencies in, and problems of, this approach that it was not even prepared to base its claim on both force majeure and breach of contract as alternative causes of action.

The approach taken by the majority constitutes a fresh innovation vis-à-vis all accepted principles relating to force majeure. Although one of the consequences of force majeure is to exempt [the adverse party] from the obligation to pay profits, and although damages are assessed only within the limits of the expenses actually incurred, in the present case not only profits but lost profits are awarded as well. Moreover, in order

² In the Prehearing conference, counsel for the Claimant stated that:

"The cause of action and thus the claim had arisen in 1978 when the contract was breached by KUDO's failure to pay bills when due and causing numerous complications in Claimant's work. Claimant made the formal notification of force majeure on 5 May 1981; however, the claim is based on the breach of the contract, not on its subsequent termination due to force majeure."

(Procès-verbal of the Prehearing conference,
pp.3-4)

These remarks show that counsel for the Claimant had taken into account the point that if he represented the May 5 letter as the basis of the cause of action, the claim would not fall within the Tribunal's jurisdiction, by virtue of not having been outstanding as of 19 January 1981. However, the majority was unfortunately unaware of this point and has taken the said letter as constituting the basis on which the claim arose, as a result of which it has made a claim which was not outstanding on 19 January 1981 the basis for its Award.

to avoid these manifest difficulties, the majority has chosen an unfounded solution. It states that the amount set out in the letter of May 5

"...was the total amount then sought in settlement of the parties' contractual obligations pursuant to the termination for force majeure and that it was intended as the 'invoice' described in Article 22. KUDO raised no objection to the contents of the letter and did not protest the original invoices on which it was based. Thus KUDO must be taken to have acquiesced in the termination on the terms specified in the notice and invoice."

However, the contract made no provision whatsoever for any condition as to the manner or timing of an objection in connection with the kind of notice intended in Article 22 of the contract; nor did the letter of 5 May make any such proviso. Rather, in light of the fact that the said letter contained a request that a certain amount be credited to the Claimant's account with City-Bank of New York, the lack of action to this effect or the absence of any request for a time extension for the purpose of depositing the claimed amount naturally reveals the absence of agreement [on the part of the Respondent] to this invoice. It is particularly necessary to note the fact that the Claimant filed its claim with this Tribunal nearly seven months after sending this letter, and that the Respondent indicated its opposed position in the manner set forth in its memorials. In addition to the foregoing, it must be noted that in paragraph 21 of his first Affidavit, under the heading "Settlement Efforts," Mr. Russo mentions the steps taken in May of 1981 and the negotiations held in Vienna during September at the invitation of KUDO's representatives, although the negotiations were inconclusive. It is thus clear that the majority's initial premise, that "KUDO raised no objection to the contents of the letter and did not protest the original invoices on which it was based," is

totally contrary to the facts in the case. Therefore, its conclusion that "KUDO must be taken to have acquiesced in the termination," is consequently wrong as well. Thus, following upon the letter of May 5 and prior to submission of the Statement of Claim, negotiations were held between the Parties on two occasions, but they were unable to reach an agreement on either occasion. Their failure to come to an agreement is a clear indication of the Respondent's objection to this invoice.

Having chosen to base its argument on this premise, which is contrary to fact and which is negated by the obvious facts in the case, the majority argues that:

"The Tribunal considers that the amount specified in the invoice, which should be deemed to have been agreed, is an appropriate amount due to Ammann & Whitney under the contract in question. Because of these circumstances, this figure, in which the parties in effect acquiesced, is preferable to the computation currently advanced by Ammann & Whitney...

"The Tribunal is thus satisfied that the proper course is to implement the procedure and, in effect, adopt the figure agreed to by the parties themselves in bringing the contract to an end..." [emphasis added]

In this way, the majority has disregarded the Parties' lack of agreement, as expressly indicated in the Affidavit of the Claimant's own witness, and it has postulated a different premise and thus issued an Award based upon speculations and assumptions which are contrary to the facts in the case.

5. The majority's reasoning is self-contradictory and internally inconsistent. Several examples in this connection are set forth below:

A. According to the argument propounded by the majority, the present claim was not outstanding as of the date it was filed. Since the Tribunal has determined the Claimant's entitlement on the basis of its reliance on force majeure on 5 May 1981, and since it holds that this right materialized on that date, it does not, therefore, assume the Claimant to have had such a right prior to that date. Thus, according to the majority's reasoning, this claim was not outstanding before 19 January 1981, the Claimant's right to receive the disputed amounts having arisen only on 5 May 1981, when it invoked Article 22. Therefore, the majority's argument is logically flawed, in that the Claimant's suit could not be brought prior to 5 May 1981 but rather only after that date. By its argument, the majority has treated as admissible a claim which was not outstanding prior to 19 January 1981.

B. In order to get around the general principle that in case of reliance on force majeure, claims must be calculated on the basis of "the works actually performed," the majority ignores the principle by arguing that:

"The Tribunal observes that, according to Article 10 of the letter of intent, which is stated to take precedence over the standard contract form, the basis of remunerations for Ammann & Whitney's services was that of fifteen monthly instalments, which were payable irrespective of the progress of the project achieved by the contractors and subcontractors..."

Since the objections to which this argument is susceptible have already been set forth above, I shall here note only the drawbacks to which it is liable in practice. The calculations set forth in Mr. Russo's Affidavit show that approximately 60% of the works were completed. Thus, if the claim of breach of contract be sustained as the Claimant has propounded it, the Claimant will not be

entitled to receive more than this amount, because it must anyway be concluded, in view of Article 17 of the contract pursuant to which the employer is permitted to terminate the contract, that in case of breach of contract [by the employer], the Claimant will not be entitled to recover lost profits on the works not actually performed. In this way, where the Claimant founds its claim on a cause of action which will result in his recovering a smaller amount, the Tribunal must not alter his ground of action to his advantage, so that he may thereby receive a larger amount. If the Tribunal proceeded on the basis of the claim of breach of contract, as it has been advanced throughout the case file, it would arrive at an amount less than the judgment sum. An analysis of the pertinent figures will clarify the issue:

The contract price	\$2,760,856
60% of the works actually performed, according to the Claimant's assertion; ie, 60% of the total contract price	1,656,513
Payments pursuant to invoices Nos. 1 through 4, including the pre-payment	972,948
Set-off for the monies received from Atlantic	431,718
Taxes, and social security and training fund contributions pursuant to Article 14 and the practice of the Parties according to invoices nos. 1 through 4.	144,116
Respondent's net obligation:	<u>\$ 107,731</u>

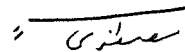
While the Respondent denies the claim of breach of contract, if the majority had adopted the above-mentioned approach, which would have been consistent with the Claimant's grounds of action, it would have arrived at conclusions which diverged less from justice.

Regrettably, however, the majority chose an anomalous approach. That is to say, it is not justifiable, after the events of 1978-79-- when the prime contractors ceased operations on the excuse of force majeure and when the Claimant itself ceased working and withdrew its staff from Iran-- for a contractor to refrain from invoking force majeure, not even characterizing the incident of 14 November 1979 as preventing him from performing his work, but then to resort to force majeure in mid-1981, 22 months after the termination date of contract and 19 months after the November 14, 1979 incident. It is this anomalous election of remedies that has misled the majority, drawn it to reach unjustified conclusions, and caused it to contradict itself in its reasoning as well. This is because, on the one hand, it regards the invocation of force majeure on the basis of the letter of 5 May 1981, and the ramifications thereof, as justified, while on the other hand, when it perceives that this approach leads to untenable conclusions, it attributes its selection of this approach to the acquiescence of the Parties, which is contrary to actual fact.

C. A further inconsistency resulting from this choice of approach, which the majority styles as a "fair" one (page 15 of the Award) appears in connection with the starting date for the assessment of interest. Pursuant to Article 22 of the contract, if force majeure is invoked, invoices shall be paid within 30 days after submission; and the majority has correctly determined the date [from which interest accrues] as being 5 June 1981-- that is, one month after the letter of 5 May 1981. This clearly shows that the claim became outstanding on 5 May 1981, because the [Claimant] can be presumed to have become entitled to interest by reason of [the Respondent's] nonpayment only after that date. Therefore, prior to the said date no claim existed, upon which it might be supposed that interest was due.

D. In adopting this approach, my colleagues also regard themselves as relieved of the need to take up the issue of the rate of conversion from Rials to Dollars. The price of the works was fixed by the contract in Rials, and the Claimant was therefore unauthorized to fix some Dollar amount at will and then claim it as by an invoice under Article 22 of the contract. Article 22 in no way permitted the Claimant to change the contract's provisions for Rial payments unilaterally in demanding Dollars in violation of the express language of the contract, even though payments were supposed to be effected in Rials. I can not fathom just how application of this approach relieves the Tribunal of the necessity to take up the issue of conversion from Rials to Dollars. But if it does yield such a conclusion, this too is an indication that the approach adopted is neither logical nor applicable, since it leads to results which are in conflict with the express terms of the contract.

In my opinion, and as set forth in paragraph 2 above, the Tribunal could have taken the Claimant's letters dated 28 June and 15 September 1979, wherein express reference was made to the Parties' having reached an agreement, as a basis for the settlement of their disputes. This approach would have led the Tribunal, which was seeking a "fair" solution, to that solution over which the Parties did at least at one time definitely agree, and whose conditions they themselves determined by mutual consent, on the basis of their knowledge of their reciprocal obligations, so that in relying on this approach the Tribunal would not have departed very far from the truth.



Mohsen Mostafavi