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Case No. 245

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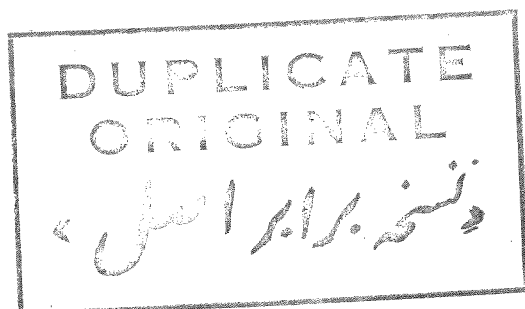
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IRAN-UNITED STATES CLAIMS TRIBUNAL



CMI INTERNATIONAL, INC.,

Claimant,

and

MINISTRY OF ROADS AND TRANSPORTATION
and THE ISLAMIC REPUBLIC OF IRAN,

Respondents.

Case No. 245

Chamber Two

AWARD NO. 99-245-2

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دایره داری ایران - ایالات متحده
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AWARD

Appearances

For Claimant:

Mr. Edmund Pitcher,
Vice President
Mr. Ken L. Kenworthy,
Vice President
Mr. Anthony G. Petrello
Mr. John T. Hardin
Mr. William Conger
Attorneys for Claimant

For Respondent:

Mr. Akbar Shirazi, Representa-
tive of the Agent of the
Islamic Republic of Iran
Mr. Yahya Madani, Legal
Advisor to the Agent
Mr. Arsalan Hojjati Tavasoli,
Financial Advisor to the
Agent
Mr. Ghalam Reza Jaafari
Gafari, Attorney for MORT
Mr. Yadollah Ghosayri, Repre-
sentative of MORT

Also Present:

Ms. Jamison Selby
Deputy Agent of the United
States of America
Mr. John Reynolds, Assistant
to the Agent

I. The Claim

The Claimant, an Oklahoma corporation, has brought this claim against the Ministry of Roads and Transportation of the Islamic Republic of Iran (MORT) and the Islamic Republic of Iran, alleging breach of two purchase orders concluded in September 1978. These two purchase orders arose out of a highway construction project in Iran. One was for the purchase of 8 Trimmer-spreaders for an aggregate purchase price of U.S. \$3,182,240; the other was for the purchase of 6 Clarco windrow elevators for an aggregate purchase price of U.S. \$218,850. The Claimant alleges that MORT was in breach of both purchase orders by failing to establish the necessary letters of credit to pay for the purchased equipment. The Claimant seeks damages in the total amount of U.S. \$2,718,346, plus interest and costs, which it calculated as of 21 February 1983 to amount to U.S. \$3,847,260.92.

MORT denies that the two purchase orders were binding contracts, alleging that the opening of letters of credit was a condition precedent to any binding agreement. In the event the Tribunal should find a breach of contract, MORT denies that any damages were suffered by the Claimant.

A hearing was held in this case on 30 September 1983.

II. Jurisdiction

No serious jurisdictional issues are presented in this case. The Claimant is an Oklahoma corporation which is wholly owned by another Oklahoma corporation, the CMI

Corporation (the parent). Although the stock of the parent corporation is publicly traded, evidence was presented that a majority of the shares were owned during the relevant period (September 1978-19 January 1981) by its President, Mr. Bill Swisher, and his children, all of whom are nationals of the United States. Thus, the Claimant is clearly a national of the United States as defined in Article VII, paragraph 1 of the Claims Settlement Declaration. That the Respondent, MORT, is included within the definition of "Iran" in Article VII, paragraph 3 of the Declaration cannot be disputed.

III. The Merits

A. Breach of Contract. The two purchase orders at issue in this case were issued as a result of contacts that began in 1977 between the Claimant and an international consortium composed of Morrison-Knudsen Pacific, Limited, a Nevada corporation, and Compagnie Francaise de Realisations Autoroutieres en Iran, S.A.R.L., a French company. After a lengthy process of submitting and revising tenders, the consortium, acting as agent for MORT, issued the purchase orders in September 1978. Each purchase order shows three signatures, a Mr. Walter as procurement manager for the agent, a Mr. Smithem for the consulting engineer, and Mr. Masoud Ostovar, Deputy Minister, for MORT. On both orders the last signature, that of Mr. Ostovar, is dated 20 September 1978, and both orders state 20 September as the date issued. The two orders were accepted by the Claimant, acting through its vice president, Mr. Edmund Pitcher, who signed the acceptances in London on 22 September 1978.

The purchase orders contained the following among their terms and conditions:

(1) They provide that "[t]ime is the essence of this order" and specify as delivery dates: (a) for the trimmer-spreaders, three on 15 November 1978, three on 15 February 1979 and two on 15 March 1979; and (b) for the Clarco elevators, two on 30 November 1978 and four on 30 December 1978.

(2) With respect to payment, the following is stated:

Irrevocable, transferrable, and divisible Letters of Credit will be (have been) opened by the Ministry of Roads and Transportation through Bank Markazi Iran with Morgan Guaranty Trust Company, New York, U.S.A., and Credit Lyonnais, Neuilly-sur-Seine, France, to provide funds for the purchase orders. It shall be expressly understood that Cofraran, S.A.R.L., and Morrison-Knudsen Pacific, Limited, and any consortium member of their parent or affiliated companies shall not be responsible, liable, or the guarantor for payment to the seller for any goods or services provided under the terms of the purchase order except to the extent of funds provided in said Letters of Credit from which to make such payment.

Despite the "will be (have been)" phrase, the evidence shows that the Claimant had been informed that no letters of credit would be established until after the purchase orders were accepted by the Claimant. No deadline is stated in the orders for establishment of the letters of credit.

(3) With respect to governing law, the following is stated:

This purchase order, if written to a Seller whose principal address and business facility is in the U.S.A. or who is supplying any equipment/materials of U.S.A. origin shall then be governed by the Laws of the State of Idaho, U.S.A.

(4) The cancellation clause provides:

If for reasons beyond his control the Agent finds it necessary to request cancellation of this order in part or in total, then the Seller shall agree to negotiate reasonable cancellation charges based upon actual costs and expenses incurred by the Seller as the result of the cancellation. In any event, the Seller shall have no right to recover profit on the unperformed work and cancellation charges shall never exceed the value of the undelivered portion of the order. The Buyer-Agent shall not be responsible for any production undertaken by the Seller unless the Seller has received and accepted the Purchase Order and all conditions therein.

To support its defense that the purchase orders did not become effective contracts until the letters of credit were established, MORT submitted in evidence a memorandum dated 11 October 1978 from the consortium to the consulting engineer on the highway project which drew attention to the need to amend delivery dates because of delays in opening letters of credit. That memorandum stated that "As a result of delays in providing funds to increase Letters of Credit, delivery schedules for various purchase orders will not be met since the vendors absolutely refuse to commence manufacturing the particular item until a Letter of Credit is transferred in their favor." The memorandum requested authority to amend purchase order shipping dates and said: "The urgency of this matter cannot be emphasized enough as vendors are refusing to accept Purchase Orders which are now issued until they receive a Letter of Credit with the amendment referred to above."

The Tribunal cannot agree with MORT's argument that accepted purchase orders were not binding contracts unless and until letters of credit were established. In a purchase order where time is stated to be the essence and where an early, firm delivery schedule is set forth, it is highly improbable that the parties intended that no legal consequences would flow from acceptance and that nothing would happen unless and until a letter of credit was established. In its context and on its face, this purchase order, once accepted by the seller, obligated the buyer to establish an irrevocable letter of credit to pay for the goods. That no deadline was fixed for its establishment does not change that conclusion, as the purchase orders implicitly required establishment of the letters of credit within a reasonable time, in no event later than the time set for first delivery.

The 11 October 1978 consortium memorandum cited by MORT certainly indicates that many other sellers were not so trusting as the Claimant and either refused to accept their purchase orders until the letters of credit were established or, if they did accept, then refused to manufacture or deliver goods until assured that the necessary funds would be available. In view of the provision of the orders exempting the consortium as Agent from any liability except to the extent of established letters of credit, such refusals by sellers were understandable, but that does not mean that the Claimant was unjustified in proceeding in the

absence of letters of credit. The Tribunal notes that on 27 October 1978 the consortium telexed the Claimant to inform it that it did not know how soon it would be able to establish letters of credit. That telex stated: "We consider that you have a valid order in hand and hope to be able to proceed soon." In a further telex received by the Claimant on 29 November 1978 the consortium wrote: "The Ministry of Roads and Transportation has stated that they intend to honor all purchase orders and change orders signed by them."

For the above reasons, the Tribunal holds that the two purchase orders at issue in this case were binding contracts from 22 September 1978, the date of their acceptance by the Claimant, and that MORT's failure to establish the required letters of credit at the latest by the first delivery dates, 15 November under one order and 30 November under the other, were breaches of contract. The evidence indicates that the Claimant would have been able to make the contractually required deliveries on those dates.¹ Therefore, the Claimant is entitled to damages for breach of contract. It should be noted that the Claimant apparently slowed production after November 1978 and might not have been able thereafter to meet the 15 February and 15 March delivery dates, but, in view of the November breach by the Respondent, that is relevant only to the calculation of damages, not liability for breach.

¹ The purchase orders provided for delivery FOB the factory.

B. Damages

1. Choice of Law. The Claimant argued the damage questions in terms of the statutory law of Idaho, which in this case is essentially the Uniform Commercial Code. As noted above, the purchase orders provided that they were governed by the laws of Idaho. The Tribunal does not believe, however, that it is rigidly tied to the law of the contract, at least insofar as the assessment of damages is concerned. Article V of the Claims Settlement Declaration provides:

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

It is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining case by case the law relevant to the issues before it. Such freedom is consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal, which include not only claims of a commercial nature, such as the one involved in the present case, but also claims involving alleged expropriations or other public acts, claims between the two Governments, certain claims between banking institutions, and issues of interpretation and implementation of the Algiers Declarations. Thus, the Tribunal may often find it necessary to interpret and apply treaties, customary international law, general principles of law and national laws, "taking into account relevant usages of the trade, contract provisions and changed circumstances", as Article V directs.

With respect to the assessment of damages, the Tribunal considers its main task to be determining what are the losses suffered by the Claimant and to award compensation therefor. Our search is for justice and equity, even in cases where arguably relevant national laws might be designed to further other and doubtless quite legitimate goals. In the present case, while application of the Uniform Commercial Code may not lead to substantially different conclusions from those adopted by the Tribunal (except with respect to accounting for profits on resales, which will be discussed below), the Tribunal prefers to analyze the damage questions in accordance with general principles of law, rather than by reference to the Code as incorporated in the statutory law of Idaho.

2. Lost Profits. The Claimant asserts that it is entitled to its lost profits in the amount of U.S. \$1,427,608 on the two sales at issue in this case under the theory that it is a "lost volume" seller, that is, a seller whose capacity to sell exceeded the available market and who would have sold other, identical machines to the buyers who eventually bought the machines produced under the purchase orders breached by MORT. The argument is that such a seller would not be made whole merely by being compensated for any losses on resale and for incidental expenses or other damages, because its profits for the year would have been diminished by the profits on the one sale it had lost.

While the Tribunal understands that argument, its application to the Claimant's case raises some difficult problems, including those of proof, and the burden of proving entitlement to lost profits as a lost-volume seller is on the Claimant. See, Article 24, paragraph 1 of the Tribunal Rules; J. White & R. Summers, Uniform Commercial Code §7-13 (2d ed. 1980); Harris, "A Radical Restatement of the Law of Seller's Damages", 18 Stan. L. Rev. 66, 81 (1965).

It appears that the Claimant, CMI International, was not the manufacturer of the equipment it sold; the equipment was manufactured by the parent corporation, CMI. To prove that it is a lost volume seller, the Claimant has presented statistics concerning production capacity and sales volume. These statistics, however, are incomplete and misleading. The figures given for production capacity are for the production capacity of the parent, CMI, while the figures for sales volume relate only to the Claimant. If the Tribunal does not know the sales volume of the parent and all its subsidiaries, it cannot ascertain whether that production capacity exceeded the available demand. Further difficulties arise from the description of production capacity. The Claimant asserts that the space available for assembly is the constraining factor in production capacity, and it says the areas of the two bays utilized in the plant for assembly of trimmer-spreaders and windrow elevators during the period in question were adequate to permit production far in excess of sales; but it does not tell us

how many of these items were manufactured and sold during that period or whether the space in question was used only for the assembly of those items or for other types of equipment as well. The facts that two shifts per day were working during the construction of the equipment in question and that considerable overtime was used, at least until November 1978, suggest that plant capacity may not have been in excess of sales. Also, the need, which the Claimant acknowledged, to procure certain long lead time items must have had a restraining effect on production capacity, but the Claimant has not clarified it.

With respect to sales, the relevance of sales by the parent corporation directly or through other subsidiaries is obvious, and the Tribunal is left uninformed. Moreover, with respect to the question whether the Claimant would have sold other trimmer-spreaders to the same purchasers who bought those manufactured for MORT, there is a troublesome inconsistency of evidence concerning the practices of the Claimant. In an affidavit, Mr. Pitcher, a Vice President, said that dealers selling for commissions were often utilized by the Claimant, whereas at the hearing, another Vice President, Mr. Kenworthy, said, in answer to a question, that commission agents were not normally used. Since the resale of four of the trimmer-spreaders and five of the Clarco elevators involved payment of commissions, the answer to the question of whether the buyers involved would have bought other CMI equipment from the Claimant if these items

had not been available through the dealers is cast further in doubt. In this connection the Tribunal notes that, from the sales invoices placed in evidence by the Claimant, five of the the six Clarco elevators were resold, not by the Claimant, but by the parent, CMI Corporation.

The Tribunal notes that many of these questions and difficulties were not readily apparent in the documents and affidavits submitted by the Claimant and were only revealed through careful analysis of the evidence after the hearing. It is regrettable that the presentation of evidence blurred the distinction between the parent corporation and the Claimant, as some of these matters might have been clarified by questions during the hearing had the Tribunal been aware of them at that time. On the basis of the evidence presented, however, the Tribunal is compelled to hold that the Claimant has failed to prove that it is entitled as a lost volume seller to lost profits on the two contracts at issue.

3. Other Damages. The Claimant, like any seller whose buyer has breached the contract of sale, is entitled to compensation for the actual damages that can be proved. Obviously that includes any losses on resale and, in the present case, it includes the cost of resales, such as commissions, and other costs caused by the breach, such as carrying and administrative costs (including insurance premiums, property taxes, and custodial costs), and most significantly the financial costs of the delays in payment from the dates due until the dates of resale.

The Claimant asserts that it suffered losses on resale despite the fact that its total resale prices substantially exceeded the prices in the contracts at issue here. Two arguments are critical to that assertion. The first is that, under the law of Idaho, it does not have to account for any profits on resale, so it can disregard the profits made on resale of certain items of equipment while demanding payment of compensation for losses incurred on resale of other items of equipment. The second is that it should be compensated for inflation in the United States by adjusting MORT's contract price by application of changes in the United States Producer's Price Index during the period from breach to resale.

Concerning the first point, the Tribunal, as noted above, does not consider its assessment of damages controlled by the law of Idaho. Under general principles of law, compensation normally requires accounting for profits made on resales, and the Tribunal believes they should be taken into account here by being deducted from the damages for which compensation is awarded. See, Treitel, "Remedies for Breach of Contract", chap. 16, VII International Encyclopedia of Comparative Law, 1, 78, 80 (1976), I Mazeaud, Lecons de Droit Civil 706 (6th ed.).

Concerning the second point, the Tribunal finds no legal basis for providing compensation for inflation, except to the extent that some compensation is provided through the

awarding of interest. Therefore, in the present case, the Tribunal holds that the Claimant made an overall profit on its resales in the amount of U.S. \$160,703, which should be deducted from the damages to which it is entitled.

In calculating damages the Tribunal must determine as of what date or dates payment would have been due under the contract. In its discussion of liability for breach in section A above, the Tribunal held that the Claimant could have met the first delivery dates under both contracts but noted that it might not have been able to meet the later delivery dates, 15 February and 15 March 1979. Among the evidence submitted by the Claimant are extensive computer print-outs of its cost accounts for each piece of machinery. Those print-outs show the great bulk of attributable costs as logged prior to 1 April 1979.² In matters of this type estimates are necessary, and the Tribunal is satisfied that an estimate of 1 April 1979 as the date on which payment was due on the remaining items of equipment would be justifiable.

On the basis of these considerations and in light of all the evidence, the Tribunal holds that the Claimant is entitled to compensation in the total net amount of U.S. \$675,000, which amount includes interest until the present.

² The Respondent argues that many charges were posted to these accounts at much later dates, but the Tribunal notes that modifications of the items for resale and preparation costs would explain such late charges.

IV. Costs

Each party shall be left to bear its own costs of arbitration.

AWARD

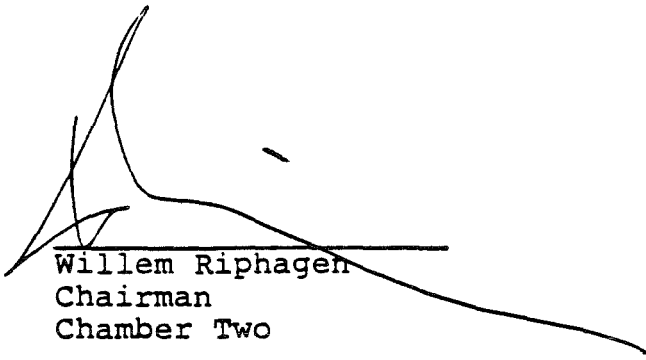
THE TRIBUNAL AWARDS AS FOLLOWS:

The Respondent Ministry of Roads and Transportation is obligated to pay the Claimant, CMI International, Inc., U.S. \$675,000. This obligation shall be satisfied by payment out of the Security Account established by paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981.

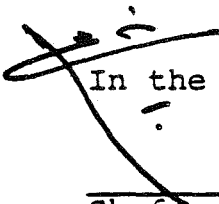
Each of the parties shall bear its own costs of arbitrating this claim.

This Award is hereby submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated, The Hague
27 Dec. 1983

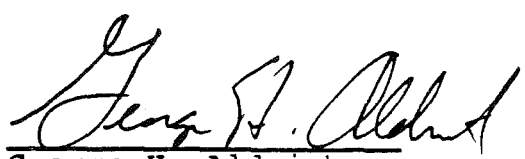


Willem Riphagen
Chairman
Chamber Two



In the Name of God

Shafie Shafeiei
Concurring in part
Dissenting in part



George H. Aldrich