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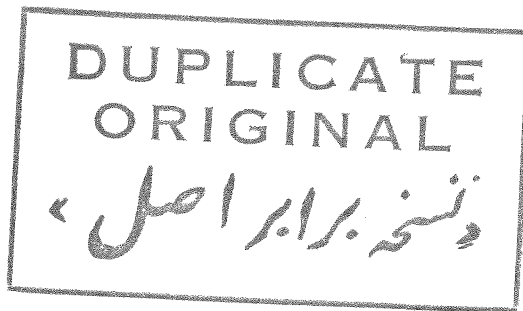
** CONCURRING OPINION of _____
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CASE NO. 275

CHAMBER ONE

AWARD NO. 482-275-1

VARO INTERNATIONAL CORPORATION,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN,
IRAN ELECTRONICS INDUSTRIES,
(A SUBSIDIARY OF THE MILITARY
INDUSTRIAL ORGANIZATION),
MINISTRY OF NATIONAL DEFENCE,
Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داری دعاوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	21 JUN 1990
	۱۳۶۹ / ۳ / ۳۱ تاریخ

AWARD

Appearances:

For the Claimant : Mr. Daniel J. Riley,
Attorney.

For the Respondents : Mr. Ali H. Nobari,
Agent of the Islamic Republic
of Iran,
Dr. Ali Akbar Riyazi,
Legal Adviser to the Agent,
Mr. Mohammad Hussein Zahedin-Labbaf,
Legal Assistant.

Also present : Ms. Lucy F. Reed,
Agent-Designate of the
Government of the United
States of America,
Mr. Michael F. Raboin,
Deputy Agent of the Government
of the United States of
America.

I. INTRODUCTION

1. The Claimant, VARO INTERNATIONAL CORPORATION (hereinafter "the Claimant" or "Varo"), a Texas Corporation, filed a Statement of Claim on 14 January 1982, seeking damages totalling U.S. \$1,931,039 plus interest and legal costs, from the Respondents, THE ISLAMIC REPUBLIC OF IRAN, IRAN ELECTRONICS INDUSTRIES ("IEI"), and THE IRANIAN MINISTRY OF NATIONAL DEFENCE. The Claim arises out of IEI's alleged breach of a contract under which the Claimant was to provide certain military equipment. The Respondents deny that IEI breached the contract, and assert that the Claimant was in breach, because it unjustifiably refrained from delivering the equipment. IEI also has brought counterclaims for damages and specific performance of the contract.

2. By Presidential Order No. 61 of 19 April 1988, this Case was transferred from Chamber One to Chamber Three. On 11 December 1989 it was retransferred to Chamber One. By Presidential Order No. 70 of the same date, Mr. Robert Briner was designated to act as Chairman of Chamber One for these proceedings, instead of Mr. Bengt Broms.

3. A Hearing was held on 1 February 1990.

II. PROCEDURAL ISSUES

4. There are two preliminary procedural matters which must be addressed. At the Hearing, the Claimant presented two written submissions, namely, a request for the issuance of an Award on Agreed Terms to record a settlement agreement allegedly entered into by the Claimant and IEI in 1985 ("First Request"), as well as a request for decision on an application made by the Claimant on 6 August 1987 to close the documentary record and schedule a Hearing in this Case ("Second Request").

First Request

5. The Claimant contends that on 27 September 1985, it entered into an agreement with IEI in complete and final settlement of all claims and counterclaims relating to the present Case. The Claimant alleges that this settlement agreement was subject to ratification by the Islamic Republic of Iran. On 27 July 1987 the Claimant received a telex, apparently sent by the legal office of the Military Industrial Organization, which informed it, inter alia, that "[the relevant authorities] have finally ratified the settlement agreement of Sep. 85 without any change" and, further, that "Dr. Mostafa Rafi will be at the Hague from 24 September to 30.87 for another assignment and is fully authorized to join your rep. for filing the settlement agreement." The Claimant acknowledges that, despite this telex, the Islamic Republic of Iran subsequently failed and refused to join with Varo in filing a joint request for an Arbitral Award on Agreed Terms.

6. When making Awards on Agreed Terms, the Tribunal has to apply Article 34 of its Rules of Procedure. This Article provides, in paragraph 1, inter alia, that the Tribunal may record a settlement in the form of an Award on Agreed Terms only upon a request by both Parties and if it accepts to do so. See also Islamic Republic of Iran and United States of America, Case No. A/1, Decision No. 8 of 17 May 1982, pp. 12-13. It is undisputed that in this Case no joint request by both Parties has been filed with the Tribunal. Thus, the Tribunal has before it only the request of the Claimant which, standing alone, does not fulfill the requirements of Article 34, paragraph 1, of the Tribunal Rules. Accordingly, the Tribunal must dismiss this request.

Second Request

7. On 6 August 1987 the Claimant submitted an application requesting the Tribunal to declare the documentary record in this Case closed and to schedule a Hearing. In the Claimant's view, the Respondents had failed to meet the deadline of 12 June 1987 for filing of documentary evidence established by Orders of the Tribunal. In its August 1987 submission, the Claimant stated that it was prepared to commence the Hearing based on the documentary evidence it had submitted on 3 February 1983 and 22 February 1983 in support of its Statement of Claim, and on 24 September 1984 with its Reply memorial.

8. The Counsel for the Claimant now argues that the Tribunal has never ruled on his 6 August 1987 application to close the documentary record as of that date. The Claimant therefore requests the Tribunal to grant that application and, accordingly, to exclude from the record the Rebuttal Evidence submitted by the Islamic Republic of Iran on 11 September 1987, and the Brief and Rebuttal Evidence submitted by IEI on 28 October 1987. In the alternative, the Claimant asks to be permitted to file additional evidence in rebuttal should these documents not be excluded from the record. In deciding this request, the Tribunal looks to the procedural history of this Case.

9. By its Order of 13 March 1986, the Tribunal had invited the Parties to file by 12 June 1986 copies of all written evidence on which they would seek to rely, and, if the Parties so wished, a Hearing Memorial. Although the Parties had sought and been granted extensions of time for these filings - the Claimant on one, and IEI on four, occasions - they subsequently chose not to submit either any written evidence, or a Hearing Memorial. The Claimant's time limit expired, unused, on 12 September 1986, IEI's on 12 June 1987.

10. By the same Order of 13 March 1986, the Tribunal had further invited each Party to

"[. . .] file by 12 September 1986 copies of any documentary evidence on which it will seek to rely in rebuttal of previously presented evidence together with a supplemental list of such rebuttal evidence and the location of each such document in the record".

The Tribunal subsequently granted Respondents four extensions of time for this submission, parallel with the extensions of time for the filing of the written evidence and the Hearing Memorial. On 11 September 1987 the Islamic Republic of Iran timely submitted its Rebuttal Evidence. Simultaneously, it requested the Tribunal to extend IEI's time limit for this filing. By Order of 21 September 1987, the Tribunal granted this request. On 28 October 1987, after having obtained two additional extensions of time, IEI filed its Brief and Rebuttal Evidence within the deadline set by the Tribunal.

11. This procedural history shows that the Claimant's request for a decision on its 6 August 1987 application to close the record is unfounded, as the Tribunal has already ruled on it by issuing its Order of 21 September 1987, extending the time limit for IEI to submit its Rebuttal Evidence. By so doing, the Tribunal manifested that the documentary record was not closed. Therefore, the Claimant's application obviously had been denied. If the Claimant had doubts whether the Tribunal had acted on its application, or on the admissibility of the Respondents' Rebuttal Evidence, it could have promptly informed the Tribunal of its doubts, or objected to these submissions. Article 30 of the Tribunal Rules requires that any objection to the conduct of the Arbitration be stated promptly, or else be deemed to have been waived. By failing promptly to react, in any way, to the Tribunal's grant of extensions or to the

Respondents' filings, the Claimant waived its right to object.

12. The record also shows that the Respondents timely submitted their Rebuttal Evidence, in accordance with the schedule set and amended by the Tribunal. Consequently, there is no reason why these submissions should now be excluded from the record. Nor is there any basis for allowing the Claimant to submit evidence to rebut the Respondents' submissions. The Claimant has had numerous opportunities to submit evidence in support of its Claim. However, rather than submitting evidence pursuant to the Tribunal's Order of 13 March 1986, the Claimant requested the Tribunal to close the documentary record. Nor did the Claimant seek to present any witnesses at the Hearing, which could have been done with thirty days notice prior to the Hearing under Article 25, paragraph 2, of the Tribunal Rules. At the Hearing, the Claimant argued that it refrained from submitting further documentary evidence, because it was confident that there would be no obstacles to the ratification and subsequent recording of the alleged settlement agreement with IEI of 27 September 1985 as an Award on Agreed Terms, and because it wished to avoid unnecessary legal expenses. Although this argument is irrelevant to the Tribunal's decision, the Tribunal notes that the conduct of both Parties after the date of the alleged settlement agreement indicates that neither Party considered the Case settled. Although the settlement agreement was allegedly reached on 27 September 1985, both Parties continued to file documents and otherwise proceed with the Case without mention of a pending settlement.¹ In light of these circumstances, the Tribunal finds the Claimant's argument to be groundless.

¹ On 20 February 1986 the Respondents submitted their Rejoinder; on 13 June 1986 the Claimant requested an extension of time for filing evidence in compliance with the
(Footnote Continued)

13. Based on the foregoing, the Claimant's Second Request also is dismissed.

III. FACTS AND CONTENTIONS

14. On 23 March 1978 Varo and IEI entered into a sales contract ("the Contract"), by which Varo agreed to manufacture and deliver to IEI 500 Crewserved AN/TVS-5 Night Vision Weaponsights ("the weaponsights" or "the equipment"), plus ancillary hardware. In turn, IEI agreed to pay Varo the purchase price of U.S.\$1,847,500. Payment was to be secured by an irrevocable letter of credit, issued by Bank Markazi Iran (hereinafter "Bank Markazi"), payable at Republic National Bank, Dallas, Texas.

15. On 10 July 1978 Bank Markazi opened an irrevocable, unconfirmed letter of credit in the amount of U.S.\$1,847,500. The letter of credit specified the documents which had to be presented for payment.² It also indicated, inter alia, that the shipment of the goods from the United States to Shiraz was to be effected by air. The expiry date of Bank Markazi's letter of credit was 18 July 1980.

(Footnote Continued)

Tribunal's Order of 13 March 1986, adducing that it required an additional three weeks to obtain the Farsi translation of its written evidence (which it never submitted); on 6 August 1987 the Claimant requested the scheduling of a Hearing and the closing of the evidentiary record; on 11 September 1987 the Islamic Republic of Iran submitted its Rebuttal Evidence and requested an extension of time for IEI to file this submission; on 28 October 1987 IEI submitted its Brief and Rebuttal Evidence.

2

Credit was available against

"INVOICE IN 3 COPIES [. . .]", "AIR WAY BILL MARKED FREIGHT COLLECT CONSIGNED IN [Bank Markazi's] NAME", "CERTIFICATE OF ORIGIN IN 2 COPIES [. . .]".

16. According to Section IV of the Contract, delivery of the 500 weaponsights was to be staggered over a period of six months, commencing six months after the effective date of the Contract. The partial shipments ("lots"), which varied in the number of units, were to take place on a monthly basis. The Claimant alleges that the effective date of the Contract was 7 August 1978, when the United States State Department issued the export license for the equipment.

17. The Contract provided that the equipment was to be delivered by Varo "to the IEI receiving dock at the IEI facilities in Shiraz, Iran, freight collect". The Contract also stated that "shipping instructions shall be provided to SELLER by IEI thirty (30) days prior to scheduled delivery of goods [. . .]".

18. In late 1978 Varo delivered to IEI the first two lots of weaponsights each comprised of 25 units. There is no dispute that the Claimant was paid for both shipments.

19. The Claimant states that on 20 December 1978 it requested from IEI inspection and shipping instructions with respect to lot no. 3, which was scheduled for delivery in January 1979. IEI, however, did not reply. The Claimant asserts that it subsequently repeated this request at least five times up to 30 January 1979, but IEI never answered Varo's telexes.

20. By letter of 14 February 1979, Varo Inc., Texas Division notified IEI that, "because of the civil and political unrest and upheaval currently prevailing in Iran and our inability to communicate with points inside that country, Varo Inc., deems itself insecure under [the

Contract]".³ Varo further informed IEI that it was exercising its rights to suspend performance by stopping any further deliveries, and to demand adequate assurances of Iran's future performance, pursuant to Section 2-609 of the Uniform Commercial Code ("UCC"). The Claimant contends that, notwithstanding this notification, it continued to manufacture the weaponsights. On 2 March 1979 Varo informed IEI that lots nos. 3 and 4 were completed and that lot no. 5 would be ready for final inspection on 19 March 1979.

21. By telex received by Varo apparently on 29 August 1979, IEI finally replied to Varo and informed it that the Contract had been "confirmed" by the Government of the Islamic Republic of Iran. IEI also advised Varo that arrangements for the next shipment could be made, and that the payment would be effected against delivery through the letter of credit as stated in the Contract.

22. On 7 September 1979 Varo sent IEI a telex in reply, advising it, inter alia, that the export license for the "original" equipment had expired, and that it had requested a new one from the United States Government. It further informed IEI that, due to the high rate of inflation in the United States, the unit price for the weaponsights had increased, and that Varo would have to produce the remaining 450 units, delivery of which was to be negotiated. Varo also indicated that, for this procurement, it would request a confirmed, irrevocable letter of credit on a United States bank. Varo invited IEI to advise it at the earliest time possible whether the above conditions met IEI's approval.

³ In light of the Tribunal's findings in this Case, and as a matter of convenience, Varo Inc., the Claimant's parent company (see para. 24, infra), and its Texas Division will likewise be referred to as "Varo".

23. Apparently, IEI did not reply to the above telex. On 30 June 1980 Varo sent IEI a letter in which it stated, inter alia, that "by our telex dated September 7, 1979, we made a new offer of sale of AN/TVS-5 units conditioned upon your agreement to payment through confirmed irrevocable letter of credit on a United States bank, negotiation of mutually acceptable delivery terms, and approval of a new export license by the United States Department of State". Varo advised IEI that, because the Department of State had not granted the export license, and further because IEI had not replied to Varo's telex of 7 September 1979, nor made any arrangements for the opening of a letter of credit on a United States bank, Varo had to "withdraw [the] offer of sale". In this letter Varo expressly referred to the original contract of sale of 23 March 1978 as "cancelled". Apparently, IEI did not reply to this letter either.

IV. JURISDICTION

The Claim

24. The Tribunal is satisfied on the basis of the evidence before it that the Claimant is incorporated in the United States, and that it is wholly-owned by Varo Inc. which is a Texas corporation the majority of whose stock is held by shareholders of record reporting addresses in the United States. The evidence includes copies of proxy statements of Varo Inc. issued during the relevant period and sworn certificates by this company's Vice-President and Chief Financial Officer. The Respondents have not seriously challenged this evidence. The Tribunal therefore finds that the Claimant is a national of the United States as defined in Article VII, paragraph 1, of the Claims Settlement Declaration.

25. The Claim arises out of an alleged breach of contract, clearly within the Tribunal's subject matter jurisdiction under Article II, paragraph 1, of the Claims Settlement Declaration. Moreover, it is undisputed that the Claim at issue was "continuously owned" by the Claimant from the date it allegedly arose until 19 January 1981, as required by Article VII, paragraph 2, of the Claims Settlement Declaration.

26. There is no doubt that the Respondents are included within the definition of "Iran" contained in Article VII, paragraph 3, of the Claims Settlement Declaration. In particular, the Tribunal has already found that Iran Electronics Industry is a corporation whose stock is owned by the Government of Iran. See Ultrasystems Incorporated and Islamic Republic of Iran, et al., Award No. 27-84-3, pp. 8-9 (4 March 1983), reprinted in 2 Iran-U.S. C.T.R. 100, 105.

27. The Tribunal determines that it has jurisdiction over the Claim.

The Counterclaims

28. IEI has brought four Counterclaims against Varo. The first Counterclaim seeks specific performance of the Contract, i.e., the delivery of the remaining 450 weaponsights that were the object of the sale ("Counterclaim One"). The second Counterclaim is for U.S.\$1,847,500, as compensation for damages allegedly incurred by IEI as a result of the Claimant's failure to deliver the weaponsights. As items of recovery, IEI indicates "expenses, costs of planning and manpower and the damages arising out of the Iraqi-imposed war" ("Counterclaim Two"). The third Counterclaim seeks interest, at a rate to be established by the Tribunal, on the amount of U.S.\$1,662,750, the unused balance of the letter of credit established by IEI in favour of the Claimant. Such

interest, which appears to represent the costs incurred by IEI for maintaining the letter of credit at Bank Markazi, is claimed from the date the third lot of weaponsights was due for delivery until 2 December 1981, when these monies were returned to IEI by the bank ("Counterclaim Three"). The fourth Counterclaim seeks delivery of "unfinished instruments, materials, prices, tools, moulds, designs, drawings, technical information, as stipulated in Section I, General Terms and Conditions (4) and V-24 of the Contract" ("Counterclaim Four").

29. The Tribunal finds that Counterclaim One, for specific performance of the Contract, satisfies the jurisdictional requirements of Article II, paragraph 1, of the Claims Settlement Declaration as a counterclaim arising "out of the same contract, transaction or occurrence that constitutes the subject matter" of the claim.

30. The jurisdictional issues that concern Counterclaims Two through Four will be discussed separately, to the extent required, in Subsection V.B., infra.

V. REASONS FOR AWARD

A. The Claim

31. The Claimant alleges that IEI had provided it with indispensable, contractually required shipping, inspection and testing information in connection with the first two deliveries of equipment in late 1978. The Claimant contends that IEI's failure to provide such information with respect to the subsequent deliveries, despite the Claimant's repeated requests, prevented the Claimant from completing performance under the Contract. The Claimant argues that IEI's failure to furnish this information, as well as its failure

to communicate with the Claimant between 20 December 1978 and 29 August 1979, represents a breach of contract.

32. The Claimant further argues that IEI's conduct gave rise to justifiable doubts as to its willingness or ability to perform, and, therefore, entitled the Claimant to suspend deliveries and demand from IEI adequate assurances of due performance, pursuant to Section 2-609 of the UCC. The Claimant contends that IEI's subsequent failure to provide such assurances constituted an anticipatory repudiation of the Contract.

33. The Claimant seeks damages amounting to U.S.\$1,931,039, encompassing various items of recovery such as, inter alia, the costs of materials acquired or manufactured in performance of the Contract, which it could not resell, associated overhead expenses, and lost profit. In addition, it seeks interest and legal costs.

34. The Respondents deny that IEI had any contractual obligation to provide the Claimant with inspection and shipping instructions. They contend that the Contract and the text of the letter of credit contained any and all necessary details concerning shipping, inspection and payments. The Respondents further argue that the final inspection, which in their view was to take place at IEI's facilities in Iran, was not an obligation, but rather a right of IEI's; therefore, IEI could not have breached the Contract by failing to give inspection instructions to the Claimant. The Respondents further contend that even if, arguendo, IEI had been contractually required to provide instructions to the Claimant, force majeure conditions prevailing at the time in Iran would have excused IEI from performing this obligation.

35. The Respondents allege that IEI fully performed its obligations under the Contract by establishing a letter of credit with Bank Markazi in favour of the Claimant.

36. The Respondents further argue that it was actually the Claimant who breached the Contract, both by suspending the deliveries and, subsequently, by unilaterally cancelling that Contract. They contend that neither the provisions of the Contract, nor Iranian Law, which governed the Contract in all respects, entitled the Claimant to take such actions.

37. The Tribunal notes that the Claimant has proffered no evidence as to the damages it allegedly sustained. Not only has the Claimant presented no proof that it made any effort to mitigate the damages, but it also failed to demonstrate that it actually manufactured lots nos. 3 through 5 of the Contract. For this reason, the Claim must be dismissed for lack of proof. In view of this finding and the Tribunal's findings on the Counterclaims, infra, the Tribunal need not address the other issues raised by the Parties, such as, inter alia, the question whether IEI breached the Contract by not providing the Claimant with inspection and shipping information, or whether the Claimant had the right to suspend deliveries and request assurance of performance from IEI.

B. The Counterclaims⁴

Counterclaim One

38. The Tribunal notes that the Respondents do not contend, and the evidentiary record does not show, that IEI ever objected to the Claimant's letter of 30 June 1980, in which the Claimant unequivocally made clear that it considered the Contract "cancelled", or that, after receipt of this letter, IEI ever requested the Claimant to perform, and, accordingly, to deliver the remaining weaponsights. Given this conduct of IEI, the Tribunal concludes that it tacitly agreed with the Claimant to the cancellation of the Contract. Therefore, as the Contract was rescinded and, moreover, the unused balance of the letter of credit was returned to IEI by Bank Markazi, IEI now cannot request specific performance of the Contract. Accordingly, IEI's Counterclaim for delivery of the remaining 450 weaponsights must be denied.

Counterclaim Two

39. IEI has presented no evidence in any form substantiating the damages allegedly suffered in connection with the undelivered weaponsights. Hence, this Counterclaim is dismissed for lack of proof.

Counterclaim Three

40. IEI's Counterclaim for costs allegedly incurred for maintaining the letter of credit at Bank Markazi was

⁴ IEI's Counterclaims, referred to as Counterclaims One through Four, have been set forth at para. 28, supra.

first brought on 11 September 1987, with the Rebuttal Evidence presented by the Islamic Republic of Iran. Although it is doubtful that this Counterclaim was timely submitted, and, therefore, admissible, the Tribunal need not decide this question, as IEI offered no evidence to prove these alleged damages. In particular, there is no proof that Bank Markazi actually charged IEI any costs. Consequently, the Counterclaim is denied for lack of proof.

Counterclaim Four

41. The Tribunal notes that IEI brought its Counterclaim for delivery of unfinished tools, instruments and several other items on 28 October 1987, with its Brief and Rebuttal Evidence. Pursuant to Article 19, paragraph 3, of the Tribunal Rules of Procedure, a counterclaim may be made in the Statement of Defence, or at a later stage in the proceedings if the Tribunal decides that the delay was justified under the circumstances. IEI has provided no justification for this delayed pleading. The Counterclaim therefore is dismissed as untimely submitted.

VI. COSTS

42. Each Party shall bear its own costs of arbitrating this Claim.

VII. AWARD

43. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

- (a) The Claim of VARO INTERNATIONAL CORPORATION is dismissed.
- (b) The Counterclaims of IRAN ELECTRONICS INDUSTRIES are dismissed.
- (c) Each Party shall bear its own costs of arbitration.

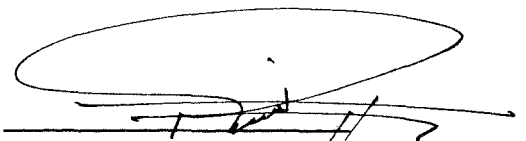
Dated, The Hague

21 June 1990


Robert Briner
Chairman
Chamber One


Howard M. Holtzmann

In the Name of God


Assadollah Noori