

324-55

۳۲۴-۵۵

ORIGINAL DOCUMENTS IN SAFE

55

Case No. 324Date of filing: 31 Oct 86

\*\* 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 Brower  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* OTHER; Nature of document: \_\_\_\_\_  
\_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

IRAN-UNITED STATES CLAIMS TRIBUNAL

DUPLICATE  
ORIGINAL

نسخه برابر اصل

CASE NO. 324

CHAMBER THREE

AWARD NO. 263- 324-3

FUTURA TRADING INCORPORATED,

Claimant,

and

THE NATIONAL IRANIAN OIL COMPANY,

Respondent.

|                                       |                                            |
|---------------------------------------|--------------------------------------------|
| IRAN UNITED STATES<br>CLAIMS TRIBUNAL | دادگاه داری و داری<br>ایران - ایالات متحده |
| فایل شد - FILED                       |                                            |
| ۱۳۶۵ / ۸ / ۹                          |                                            |
| 31 OCT 1986                           |                                            |
| 324                                   |                                            |

DISSENTING OPINION OF JUDGE BROWER

1. I dissent because I feel the ultimate liability for payment of the Respondent's contract debt to Claimant ("Futura") should have been placed on Respondent ("NIOC") itself rather than on the bank whose negligent performance as advising bank under the accompanying letter of credit earlier forestalled its timely payment.

2. The Tribunal undeniably has been confronted by a unique question in this case. Ordinarily a contract creditor would pursue a coincidental tortfeasor only after all hope of collecting from the actual debtor had been abandoned.<sup>1</sup> Thus

---

<sup>1</sup>A classic example is a suit in negligence by a creditor against an accountant on whose work the creditor relied in making a loan to the accountant's client which proves uncollectible. See, e.g., Rhode Island Hospital Trust National Bank v. Swartz, Brassenhoff, Yavner & Jacobs, 455 F.2d 847 (4th Cir. 1972); Rusch Factors, Inc. v. Elvin, 285 F.Supp. 85 (D.R.I. 1968); Shatterproof Glass Corp. v. James, 466 S.W.2d 873 (Tex. C.A. 1971); Ryan v. Canne, 170 N.W.2d 395 (Iowa 1969). See also Restatement of Torts §552.

blocking payment under Respondent's letter of credit. Nor does Respondent suffer a deprivation, for it was contractually bound to pay the amount in dispute, as the Award itself correctly holds. The fact noted by the Award, if true, that Bank of America has no independent right of recovery directly against Respondent or anyone else merely confirms its entitlement to reimbursement from Futura.

7. Finally the majority supports its decision by finding (paragraph 64) that Respondent is not unjustly enriched by being relieved of its contract obligation. This, I think, is plainly wrong. Certainly Respondent is enriched by not being required to pay its just debt. The fact, if true, that Respondent never actually used the materials it ordered and received is beside the point. If, as would seem common ground,<sup>4</sup> an enrichment occurs, giving rise to an equitable debt, once a party has accepted the risk of loss of property, that debt in equity should not be extinguished, nor the enrichment be vitiated, by subsequent realization of that risk. Be that as it may, the equitable result, it seems to me, is to allocate ultimate responsibility to the party who actually contracted to pay the debt in question, rather than to a stranger to the transaction who certainly derived no benefit from it but whose coincidental negligence forestalled timely payment of that debt.

8. Thus, however the Award is to be read, I must register my dissent: If it declines to apply principles of equity, which seems doubtful, the error is obvious; if, on the other hand, it considers it equitable, in the circumstances of this Case, that ultimate responsibility for non-payment of Respondent's adjudicated contract debt reside not with

---

<sup>4</sup>Compare Morgan Equipment Co. and Islamic Republic of Iran, Award No. 100-280-2 (27 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 272, 278, with Dissenting Opinion of George H. Aldrich, id. p. 279.

Respondent but rather with the coincidental tortfeasor whose intervening negligence unwittingly has enabled Respondent to evade its obligation, I think it misconstrues equity.

Charles N. Brower  
Charles N. Brower