

DUPLICATE
ORIGINAL

نسخہ برابر اصل

In the Name of God

Case No. 89

Chamber Three

Award No: 225-89-3

MCCOLLOUGH & COMPANY, INC.,

Claimant,

and

THE MINISTRY OF POST, TELEGRAPH AND
TELEPHONE, THE NATIONAL IRANIAN OIL
COMPANY and BANK MARKAZI,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاری ایران - ایالات متحدہ
ثبت شد - FILED	
Date	20 MAY 1986
	۱۳۶۵ / ۲ / ۲۰
No.	۸۹

SEPARATE OPINION OF JUDGE PARVIZ ANSARI

I respectfully express my concurring and dissenting opinion with regard to the fundamental issues of the award, as follows:

I. Claimant's claim against the Ministry of Post, Telegraph & Telephone

1. In my view, the interpretation of the contract which is the subject matter of the claim does not conform to the mutual intent of the Parties or the terms of the contract, so far as the forum selection clause is concerned. The Tribunal deserves credit, of course, for not having ruled in favor of its jurisdiction on the sole pretext of "ambiguity in the contract," as has been the Tribunal's past practice. However, the interpretation which does form on the basis for its ruling in favor of

jurisdiction negates the existence of the provisions of the contract:

To expound further, it will perhaps not be amiss to recall the provisions of the contract once more. According to Article 16 of the contract, the English and Farsi texts have the same validity; and pursuant to Article 12 of both versions of the contract, disputes shall be settled in accordance with Iranian law. Article 12 stops here in the English text; however, the Farsi text of the said article has an extra phrase which provides [that disputes] "shall be settled by the competent courts of Iran."

For the purpose of interpreting the contract and comparison and reconciliation of two valid but apparently irreconcilable texts, the Tribunal has made reference to the history of the negotiations, the circumstances governing the drafting of the contract, and its preparatory works as supplementary means of interpretation. Vienna Convention on the Law of Treaties, Article 32 & 33. Recourse to supplementary means of interpretation in order to discover the parties' mutual intent is justifiable and admissible when simple interpretation of a text leads to ambiguity in, or disregard of, the terms of the contract. However, the conclusion reached by the Tribunal, to the effect that it was not the parties' mutual intent to refer disputes to the courts of Iran, does not conform, in the present case, to the facts encompassed by the supplementary means of interpretation:

A. The initial draft of the contract (September 1970), of which there was no Farsi version, provided in its article on the settlement of disputes that they be settled in accordance with the laws of Iran, either through arbitration or by the competent tribunal if necessary.

Although the said draft was superseded through conclusion of the underlying contract, it is nevertheless indicative of the fact that in any event, the parties had in mind a forum for the resolution of their possible disputes.

B. The course of the negotiations - even if they were carried out in English - does not reveal why the forum selection clause, even as reflected in the draft text, was deleted. Nor has the Claimant ever alleged that it had disagreed with insertion of the forum selection clause, whatever its form.

C. The Tribunal has unnecessarily imposed upon the Iranian negotiator the task of indicating the discrepancies between the two texts; because when each of the two texts is valid according to the contract, it is ordinarily the task of each Party to examine the consistency between the two texts himself. As a contractor in a foreign country with a language different from his own, the Claimant in particular has a heavier and more sensitive duty in this regard.

D. In view of Article 12, which provides for the settlement of disputes in accordance with the laws of Iran, it will on principle not be logical to imagine that the Claimant had any other forum than Iranian judicial fora in mind when the contract was drawn up; nor, as stated in paragraph B supra, has the Claimant made any such allegation.

2. In view of the foregoing,

Firstly, there existed a general understanding and agreement between the Parties regarding the insertion of the forum selection clause in the contract, and this

mutual understanding and general intent are explicitly reflected in the Farsi text.

Secondly, the Tribunal's interpretation leads to the omission of an existing and explicit phrase of the contract.

Thirdly, the jurisdiction granted to the Tribunal is exclusive and restrictive; therefore, in those cases of interpretation where there is an explicit text, that jurisdiction cannot be extended, and the disputed issue must be found to be subject to the general jurisdiction of the Iranian judicial fora. See: Full Tribunal Decision in Case No. A/2, dated Dec. 21, 1981; Award No. 25-71-1, dated Feb. 22, 1981; Lilian B. Grimm vs. Government of the Islamic Republic of Iran; Dissenting Opinion of Judge Parviz Ansari, ITL No. 36-410-3.

3. In view of the foregoing, I hold that the Tribunal does not have jurisdiction to proceed with the Claimant's case pending against the Ministry of Post, Telegraph & Telephone.

4. As to the merits of the Claimant's case, while I do not wish to enter into the details of the case or a discussion of each individual invoice at issue in the claim, I do deem it necessary to mention certain points:

A. The Tribunal has correctly refrained from awarding on four post-contract invoices, because the Respondent was under no contractual obligation to pay them; nor is there any proof that the Claimant rendered the alleged services at the request of the Respondent. Moreover, the procès verbal dated Feb. 4, 1979 does not support the Claimant's position.

B. On the other hand, invoice No. MAC-PTT-4-83, which as alleged by the Claimant apparently relates to contractual expenses, was not submitted to the Respondent prior to July 1984. Therefore, admission of such an invoice, which is not accompanied by any supporting documentation, does not seem justifiable from a procedural point of view even if it relates to 1979 contractual expenses, and in my opinion, it must be rejected. It would have been proper had the Tribunal dealt with this matter just as it treated invoices nos. 14 and 15, directed to NIOC. This matter shall be elaborated upon below.

C. Regarding the invoices awarded upon in favor of the Claimant, the Tribunal should have taken into consideration the Respondent's situation due to the GNPS consortium claim pending before the International Chamber of Commerce, and the fact that the Respondent's statements in the present case might be used to prejudice its positions taken in the ICC case. That is to say, due to this very situation, the Respondent presented its basic pleadings in connection with each individual invoice in an orderly and meticulous manner during the last stages of the present proceedings, and only after the settlement of the GNPS consortium claim. Therefore, it does not seem justifiable to reject the Respondent's pleadings and evidence with respect to the disputed figures in the original or revised invoices, on the grounds that they were submitted late.

D. The Tribunal has correctly dismissed the Claimant's claim in demand of consequential damages, because nonpayment of debts entitles the creditor to demand only those monies which the debtor has refused to pay, and the consequential effects of

nonpayment-- even if the creditor has incurred other losses owing to nonpayment of the debt-- do not give rise to any actionable right thereto. In jure, non remota causa, sed proxima spectatur. See: Mazeaud, Droit civil (les Obligations), T.II, Pt.1, 1978, §568,569,570; Alex Weill and François Terré, Droit civil (les Obligations), 3rd ed., 1980, §416; and Whiteman, Damages in International Law, 1943, vol.3, p.1873.

II. The Claimant's Claim against NIOC, and the Counterclaim Relating Thereto

5. In connection with the Claimant's claim in demand of payment on six invoices, and recovery of monies retained as security for good performance, and also in connection with NIOC's counterclaim for damages arising from nonperformance on the part of the Claimant, it is necessary to note several points:

A. Invoice No. 46, with respect to which the Respondent has in its defence submitted to the Tribunal evidence that it was paid upon-- and the Tribunal has also dismissed the claim on that invoice-- engenders doubt and misgivings with regard to the Claimant's invoices and affidavits in general. The claim for two other invoices, Nos. 14 and 15, which the Respondent never received, and which the Tribunal has justly dismissed, reinforces these misgivings. What would have been correct, is for the Tribunal to have taken a similar decision on the doubtful invoice No. MAC-PTT-4-83, as well.

B. In connection with the other three invoices (Nos. 47,48 and 49), it would have been better had the Tribunal taken a decision in the light of the circumstances surrounding the Respondent's

counterclaim, together with the relationship between the issue of nonperformance by the Claimant and the issue of its entitlement or nonentitlement to demand payment on the said three invoices, rather than taking up those invoices separately.

C. In connection with the Respondent's counterclaim, which the Tribunal has correctly accepted, it is necessary to discuss certain points, in order further to clarify the issue with respect to the Claimant's liability and the damages arising from its nonperformance:

First, the Claimant, which in the present matter had served NIOC as a consultant in relation, inter alia, to the construction of a road to Repeater Station No. 5, was required under Clause 19 of the Special Conditions of the Contract, which replaced Article 19 of the General Conditions of the Contract, to "exercise utmost skill, care and diligence" in the performance of its duties. Furthermore, if any losses undergone by the Employer were "directly attributable to negligence on the part of the Inspector (in fulfilling his obligations), or making recommendations to the Employer, he (the Consultant) would be held responsible for all compensation." (emphasis added)

Second, liability on the part of the professional consultants can ipso facto be investigated and proved, regardless of whether or not there exists any article in the contract providing a basis for their liability, and regardless of whether or not other factors intervened in causing the Employer to incur losses.

The Tribunal has also had in mind the existence of other factors in connection with the Employer's incurring of losses, and in this respect it has adjudged against the Claimant for payment of damages which can conventionally be regarded as having arisen from its failure to adhere to professional standards. See: Dugdale and Stanton, Professional Negligence, 1982, Chapter 34.

Third, the Tribunal has also correctly determined that the affidavit submitted by the Claimant, to the effect that it properly fulfilled its contractual obligations, cannot relieve it of its liability as established by the evidence submitted by the Respondent, inter alia the technical report by SANO Consulting Engineers.

6. In view of the foregoing, the Claimant is not entitled to recover on the monies retained as security for good performance; and the deduction of such amounts at the time of payment of consultant's fees constitutes the minimal security with respect to the Employer's losses owing to the consultant's breach of his contractual obligations.

III. The Currency Specified in the Award

7. First of all, I must indicate my welcome of the new and correct policy, one which conforms to the provisions of the contract and to the terms of the Algiers Declarations with regard to adherence to the currency specified by contract (in the present instance, Iranian rials), an approach to which the Tribunal has not up to now accorded any consideration. For no logic confirms that the currency agreed to, one that was also applied by the Parties at all times during the life of the contract, should in the course of an adjudication be converted to

another unit of currency and the award made in the latter currency as a result of misinterpretation of circumstances-- and at that, at the rate of exchange prevailing when the claim arose. Just as the Parties respected and carried out all of the provisions of the contract, and since the Tribunal has also based its decision on the terms of the contract (Article V of the Claims Settlement Declaration), there are no legal grounds for violating the contractual article relating to the currency of payment. Rather, that would amount to rewriting the contract, something to which the Parties have not agreed. In this connection, rather than enter into a discussion of all the ramifications of this issue, I regard it necessary to mention only a few basic points:

A. The practice of municipal courts, and international judicial practice, support the issuance of awards in the currency specified in the contract. See, generally: Legal Aspect of Money, F. A. Mann, 4th ed. Oxford, 1983. Also, case law including: *Sirie v. Godfrey*, (1921, 196 App.Div. 529, 188 N.Y. Supp. 52); *Metcalf v. Mayer*, (1925, 213 App.Div. 607, 211 N.Y. Supp. 53); *Buxboeden v. Estonian State Bank* (1951, 106 N.Y.S. (2d) 287); *Miliangos v. George Frank (Textiles) Ltd.*, (1976) A.C. 443; *Schorch Meier G.m.b.H v. Heinnin*, (1975) Q.B. 416 at p.427; *Services Europe Atlantique Sud v. Stockholm Rederi Aktiebolag Sven*, (1979) A.C. 699; *Jean Kraut A.G. v. Albany Fabrics Ltd.*, (1977) Q.B. 182; *B.P. Exploration Co. (Libya) Ltd. v. Hunt* (1979) 1 W.L.R. 783; *Jugoslavska Oceanska Plovidba v. Castle Investment Co. Inc.* (1974) Q.B. 292.

B. The addition of a certain percentage, as an adjustment to the amount awarded, constitutes the weak point in this logical policy. Regrettably, therefore, I cannot concur in this portion of the

Award, because the fluctuations and changes in the exchange rate over the relevant years (1979 to the present) have not been so unusual as to call for such a decision-- one which, in my opinion, has no legal basis. Information and statistics as to exchange rate fluctuations reveal that there have been far more extreme changes in the rate of exchange between the US dollar and the major European currencies and the Japanese yen during the years in question. Thus, a mere change in the exchange rate vis-à-vis the currency of payment, something which is not an exceptional matter but rather something continual, ongoing and indeed the current policy of the money market, cannot be taken as constituting an argument and authorization for the adjustment provided for in the Award. In particular, it must be noted that in a contract wherein the parties have not agreed to any specific exchange rate, those parties have in reality accepted the risk that the exchange rate might change, since this is in the ordinary course of things. It is therefore not equitable to impose payment of an adjustment-- even if it does relate to a percentage of the change in the exchange rate, as is the case in the present Award-- upon the paying party.

It is my hope that this deficiency will also be eliminated in future rial awards by the Tribunal.

IV. Taxes and Social Security Contributions

8. The fact that the respected Chairman of this Chamber has not adhered to the unsubstantiated and inequitable precedents set by this Tribunal with respect to the issue of taxes and Social Security Organization contributions,

is cause for hope. Because the Tribunal has misinterpreted the nature, means of calculation and/or basis of these financial dues and obligations, which should be deducted in favor of Iranian Respondents prior to any payment of monies to claimants, claimants in cases before this Tribunal have been enriched by sizable sums to the prejudice of the Iranian respondents, without any legal cause or basis-- and at that doubly enriched, because on the one hand such claimants had taken the relevant taxes and social security contributions into account when they entered into their contracts and had determined the contract price on that basis; and on the other hand, if they had continued working in Iran they would have had to satisfy those financial duties and obligations. However, now that the disputes between them have been referred to arbitration, rather than striving to carry out justice between the parties and at least taking into account the previously existing situation with respect to their entitlements and obligations, this Tribunal has enabled claimants to recover on their claims even though they were aware of the existence of their tax and social security obligations, and without satisfying their debts, which comprise a part of those same claims.

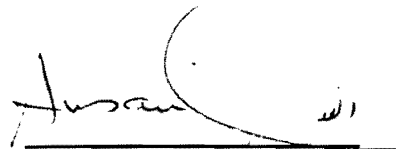
This Tribunal's assertion in its earlier practice, that it lacks jurisdiction over counterclaims for taxes and social security contributions, is the flimsiest and weakest of arguments. Case law and decisions by municipal and international fora are clearly opposed to such a theory. See, for example, The Government of Kuwait v. Aminoil (1982); LIAMCO v. Government of the Arab Republic of Libya (1981); Whiteman, op cit, vol. 1, p.268.

V. Interest and Costs of Arbitration

9. On these two issues, it is gladdening that this Chamber has not blindly followed Tribunal precedent,

inter alia the Sylvania decision (Award No. 180-64-1). In particular it is worth noting Part VII of the Award, where the issue of interest is examined from the point of view of applicable law according to various legal systems, municipal and international precedents, the diverse interest rates and dates from which interest is calculated, the various circumstances of claims, and other factors having a bearing upon the matter; it will also be of use to parties in other cases. Unfortunately, however, in my opinion this one-sided effort, which fails to take into account the overall legal positions of the Iranian respondents as set forth in detail in the Answer of the Government of the Islamic Republic of Iran to the Reply of the United States of America in Case No. A/19, dated 12 March 1986, does not ultimately arrive at any logical or equitable conclusion. For this reason, I do not concur in the award of payment of interest.

With respect to costs of arbitration, inasmuch as I have stated my opinion on this issue on a number of occasions I consider it unnecessary to set forth those past matters, in order to avoid repetition and further discussion of my dissent to payment of such costs. See: H.A. Spalding, Incorporated v. Ministry of Roads and Transport of the Islamic Republic of Iran, Award No. 212-437-3, Concurring Opinion of Judge Parviz Ansari.

A handwritten signature in dark ink, appearing to read 'Parviz Ansari', is written over a horizontal line.

Parviz Ansari