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CASE NO. 967

CHAMBER TWO

DECISION NO. DEC 124-967-2

HAROLD BIRNBAUM,
Claimant,
and
THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان دآوری دعاوی ایران - ایالات متحدہ
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DECISION

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Introduction

1. On 6 July 1993, the Tribunal rendered Award No. 549-967-2 in this Case (the "Award"). The Award in its paragraph 149 (as corrected on 19 July 1993) decided that the Claimant, Harold Birnbaum, was entitled to 71,065,673 rials (U.S.\$1,008,381) as compensation for the deprivation of his 8.6 percent share in Abdolaziz Farmanfarman & Associates ("AFFA"), an Iranian engineering and architectural partnership.

2. The Tribunal resolved a claim brought by another AFFA partner, Fereydoon Ghaffari, who owned an identical 8.6 percent share in the firm, in Fereydoon Ghaffari and Islamic Republic of Iran, Award No. 565-968-2, on 7 July 1995.

Request by Iran

3. On 31 August 1995, the Agent of the Government of the Islamic Republic of Iran filed a request with the Tribunal for the reconsideration of the Award based on the "Tribunal's inherent power to [do so]" (the "request"). In support of the request, the Agent cites Ram International Industries Inc., et al. and Air Force of the Islamic Republic of Iran, Decision No. DEC 118-148-1 (28 December 1993) (hereinafter "Ram"). In his view, in that Case, the Tribunal, "while accepting, in principle, to review the award, provided a condition for such acceptance":

[F]or the purpose of a revision the new fact has to be decisive, in the sense that when placed alongside the other facts of the case, earlier assessed, it seriously upsets the balance, and consequently the conclusions drawn by the Tribunal. Ram, para. 20. (Footnote omitted.)

4. This request aims at the reconsideration of the Award with regard to 1) tax prepayment calculations for AFFA; and 2) taxable income for AFFA. The Tribunal will first deal with the latter part of the request.

Taxable Income

5. As to the taxable income calculated for AFFA, the Agent cites an excerpt from the Award in Ghaffari:

[I]n light of the practice of the tax authorities, it seems only fair to add the amount of the surcharge, 25 percent of 50 percent of AFFA's income tax or 2,787,840 rials, to AFFA's total tax liability.

Award No. 565-968-2, para. 98. The Agent argues that the above consideration should likewise be applied to the Award in this Case and, consequently, the Tribunal should decide that the appropriate portion of the amount awarded to the Claimant be returned to the Security Account or to Iran.

6. It is true that in Ghaffari, the Tribunal reached a conclusion on the issue of taxable income different from the one it had reached in Birnbaum. That different conclusion, however, was the result of new arguments and evidence submitted by the Respondent in those subsequent proceedings. These arguments and evidence, which had not been presented in Birnbaum, constitute a sufficient explanation as to why the relevant conclusion in Ghaffari is not identical to that reached earlier in Birnbaum. The Tribunal, therefore, need not consider, with regard to the issue of taxable income, the hypothesis of an error and the possibility of a revision of the Award on that basis. Consequently, the Tribunal concludes that the Respondent's request relating to AFFA's taxable income must be denied.

Tax Prepayment Calculations

7. With regard to the tax prepayment calculations, the Agent cites the following excerpt from the Tribunal's Award in Ghaffari:

Consequently, in calculating AFFA's tax reserve in this Case, the Tribunal includes 4 percent of AFFA's

receipts during the year 1358, which adds 3,051,204 rials to the tax liability of AFFA.

Award No. 565-968-2, para. 79. Based on this ruling, the Agent requests the Tribunal to make a similar adjustment to the Award in this Case and to provide for the return to the Security Account or to Iran of the appropriate portion of the amount awarded to the Claimant.

8. In Ghaffari, the Tribunal reached a different conclusion concerning the tax prepayment calculations although the facts were the same as in Birnbaum. It cannot be said that the conclusion in Ghaffari resulted from new evidence, although the Respondent's arguments in Ghaffari helped to clarify the issue. In other words, the Tribunal, in Ghaffari, did not modify its findings concerning AFFA's tax prepayment calculations because new evidence submitted in that Case caused it to do so. However, in considering the Respondent's arguments, the Tribunal came to the conclusion that the Respondent's demand for a different calculation was, in part, justified.

The Law

9. The Tribunal Rules provide only very limited possibilities for the Tribunal to make any changes to its awards.

10. The correction in an award of "any errors in computation, any clerical or typographical errors, or any errors of similar nature," provided for by Article 36 of the Tribunal Rules, does not constitute any revision of the award, in the sense of a change in a substantive holding. The correction under Article 36 is simply an elimination of what in law does not form part of the award; it is a restoration of the award's proper contents as adopted by the Tribunal. The deadlines are tight: thirty days after the receipt of the award for a correction request by a Party and, equally, thirty days after the communication of the

award for a correction of the award by the Tribunal on its own initiative.

11. By definition, the interpretation of an award pursuant to Article 35 of the Tribunal Rules or the making of "an additional award as to claims presented in the arbitral proceedings but omitted from the award" pursuant to Article 37 of the Tribunal Rules neither represent nor amount to a revision, although an additional award could be seen as an expansion of the original award.

12. Aside from these Articles 35-37 of the Tribunal Rules, neither the Algiers Declarations nor the Tribunal Rules provide for the possibility of any changes being made in "final and binding" awards, and neither provides for the "revision" of such awards. Accordingly, the Tribunal has consistently rejected efforts to reargue issues decided by the Tribunal. See, e.g., Collins Systems International, Inc. and Navy of the Islamic Republic of Iran, Decision No. DEC 104-431-2, para. 6 (16 June 1992), where the Tribunal said that ". . . insofar as the request constitutes an attempt to reargue certain aspects of the Case, to disagree with the conclusions of the Tribunal in its Award, or to request the Tribunal either to review its Award or further to explain its reasons for the Award, there is no basis in the Tribunal Rules or elsewhere for a request of this kind on such grounds."

13. As noted supra, in para. 3, the present request, which uses the terms "review," "revision," and "reconsideration," is not based on any of the provisions of the Tribunal Rules. The request, as the Tribunal understands it, invokes (1) the alleged "inherent power" of the Tribunal "to reconsider" its award and, more particularly, (2) the Tribunal's Decision in Ram.

Inherent Power of Revision

14. Turning first to the general question whether the Tribunal has the inherent power to revise its awards, it should be stated that their "final and binding" nature does not, by itself, necessarily preclude revision. Certainly it precludes any appeal. There are both national and international jurisdictions which, while recognizing the final and binding nature of judgments, do not exclude revision thereof.

15. Where revisions are permitted, they are normally provided for in an express rule of procedure. Decisions by international tribunals which, in the absence of such express provisions, admitted the existence of the inherent power of an international tribunal to revise, under extraordinary circumstances, its own awards,¹ are rather rare and exceptional. There is not much room for reading implied powers into a contemporary bilateral arrangement; for its authors are aware of past experience. It is to be expected that today, two States that intended to allow the revision of awards rendered by a tribunal established pursuant to a treaty between them, would do so by an unequivocal expression of their common will. Clearly Iran and the United States did not so provide in the Algiers Declarations.

16. The Tribunal has recognized that it has an inherent power to issue certain interim orders. See, e.g., E-Systems, Inc. and Islamic Republic of Iran, et al., Interim Award No. ITM 13-388-FT, at 10 (4 Feb. 1983), reprinted in 2 Iran-U.S. C.T.R. 51, 57;

¹ See, e.g., George Moore v. Mexico Case (26 July 1871) (U.S.-Mexican Mixed Claims Commission), reprinted in 2 J.B. Moore International Arbitrations 1357 (1898); Effect of Awards of Compensation made by the U.N. Administrative Tribunal (Advisory Opinion of 13 July 1954), 1954 I.C.J. Reports 47, 55; Opinion of Mr. Justice Roberts, Umpire, concerning the petition for rehearing on the ground of fraud and collusion in Lehigh Valley Railroad (United States) v. Germany ("The Sabotage Cases") (15 Dec. 1933) (U.S.-German Mixed Claims Commission), reprinted in 8 U.N. Reports of International Arbitral Awards 160.

QuesTech Inc. and Islamic Republic of Iran, et al., Interim Award No. ITM 15-59-1, at 4-5 (1 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 96, 98.² The revision of a final award, however, belongs to a different category.

17. In International Schools Services, Inc. and Islamic Republic of Iran, et al., Award No. 290-123-1, para. 17 (29 Jan. 1987), reprinted in 14 Iran-U.S. C.T.R. 65, 70, the Tribunal opined that

it is questionable whether, even in exceptional circumstances, the Tribunal would have authority to act outside those Rules [i.e., Articles 35-37 of the Tribunal Rules] to revise or correct an award.

In American Bell International Inc. and Islamic Republic of Iran, et al., Decision No. DEC 58-48-3, para. 5 (19 Mar. 1987), reprinted in 14 Iran-U.S. C.T.R. 173, 174, the Tribunal stated the following:

According to Article IV, paragraph 1, of the Claims Settlement Declaration, awards of the tribunal are "final and binding." Moreover, Article 32, paragraph 2, of the Tribunal Rules provides that an award "shall be final and binding on the parties." The Request contravenes these mandatory provisions since it is neither a request for interpretation nor a request for correction of computational errors within the meaning of Articles 35 and 36 of the Tribunal Rules, but rather a request for revision of the Tribunal's Award. As such, the Request is inadmissible.

As noted, the final and binding force of an award does not necessarily exclude the possibility of a revision thereof. But the existence of express rules providing that the award is "final and binding," coupled with the silence of the contracting Parties concerning the possibility of revision, makes it difficult to conclude that any inherent power to revise a final award exists.

² In these Cases, the Tribunal held that it had "an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective."

18. In some cases, and they all involved allegations of fraud, the Tribunal has suggested that it might have an inherent power to reopen a case outside of the Tribunal Rules of Procedure. See Ram, supra; Dames & Moore and Islamic Republic of Iran, et al., Decision No. DEC 36-54-3, at 18-21 (23 Apr. 1985), reprinted in 8 Iran-U.S. C.T.R. 107, 117-18; Gloria Jean Cherifat, et al. and Islamic Republic of Iran, Decision No. DEC 106-277-2, paras. 19-21 (25 June 1992). In these Cases the Tribunal reserved its position as to whether it had an inherent power to revise an award, since the parties did not even arguably make the showing necessary to invoke that power.

19. In the present Case, the Respondent, while invoking Ram, does not base its request on allegations of fraud or perjury. Rather, the Respondent states that in Ghaffari "the Tribunal upheld the Respondent's arguments as to the errors" in the Award in Birnbaum. The Tribunal does not exclude that, apart from fraud, a similar exceptional and serious ground or grounds might possibly constitute the basis for an application for the revision of its Awards. In the Decision in Mark Dallal and Islamic Republic of Iran, et al., Decision No. DEC 30-149-1, at 2 (12 Jan. 1984), reprinted in 5 Iran-U.S. C.T.R. 74, 75, the Tribunal mentioned "forged documents or perjury" by way of example, which method of reference implies the possibility of invoking other exceptional grounds. But mere errors do not constitute such grounds.

20. Although the Tribunal believes that, in the absence of exceptional circumstances, for example, allegations of fraud or perjury, it need not decide whether it has an inherent or implied power to revise its final and binding awards, it will nonetheless, for the sake of completeness, deal also with that part of the request which refers specifically to the Decision in Ram.

The Request and the Ram Case

21. The present request by the Respondent draws, from that Decision, the following conclusion:

[W]hen the Tribunal has based its earlier decisions upon particular facts, but in the course of the subsequent proceedings in a similar case, the same facts result in discovery of new findings and constitute the basis for a different award, the necessity arises for the review of the previous award.

However, the Tribunal is of the opinion that the foregoing conclusion does not find its justification in the Ram Decision. That Decision does not speak of any "necessity." The Decision admits that

it might possibly be concluded that a tribunal, like the present one . . . would by implication . . . have the authority to revise decisions induced by fraud.
(Footnote omitted.)

~~Ram, para. 20. The choice of words -- "might possibly" --~~
attests, rather, to a cautious approach to the issue of revision. The Decision goes on to conclude that

this question does not need to be fully pursued and decided for the purpose of the present Case.

Id.

Conclusion on Tax Prepayment Calculations

22. After having examined the matter, the Tribunal concludes that the alleged error in Birnbaum with regard to the tax prepayment calculations for AFFA is not of the sort that would satisfy the criteria set forth in Ram. Quite apart from the absence of any allegation of fraud or perjury, the alleged error is in no way "decisive" nor does it "seriously upset the balance"

of the Award in that Case. See Ram, supra, para. 20. Consequently, for the purpose of this Case, the Tribunal need not decide whether it has the authority to revise or correct an award.

Conclusion on the Request

23. In view of the foregoing considerations, the Tribunal finds that there is no legal basis for making the changes requested.

24. For these reasons:

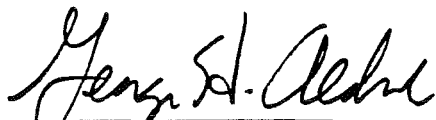
THE TRIBUNAL DECIDES AS FOLLOWS:

The request submitted on 31 August 1995 by the Agent of the Government of the Islamic Republic of Iran, on behalf of the Respondent, the Government of the Islamic Republic of Iran, is denied.

Dated, The Hague
14 December 1995

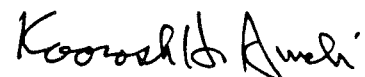


Krzysztof Skubiszewski
Chairman
Chamber Two



George H. Aldrich

In The Name of God



Koorosh H. Ameli
Concurring