SYLVANIA TECHNICAL SYSTEMS, INC., Claimant v. THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, Respondent

(Case No. 64)

Chamber One: Böckstiegel, Chairman; Mostafavi,¹ Holtzmann,² Members

Signed 27 June 1985³

AWARD NO. 180-64-1

The following is the text as issued by the Tribunal:

APPEARANCES

[...]

AWARD

The claim in this case asserts breaches of a Contract to train Iranian Air Force personnel to operate and maintain an electronic intelligence gathering system. Under the Contract, the Claimant, Sylvania Technical Systems, Inc., (“Sylvania”), was to provide training in the United States and in Iran, and eventually establish a training institute in Iran to be operated by the Air Force. Sylvania alleges that the Respondent, The Government of the Islamic Republic of Iran (“the Iranian Government”), breached and repudiated the Contract in January and February 1979. The Iranian Government alleges that the Claimant breached and cancelled the Contract, and it has interposed a counterclaim.

[...]
II. FACTS AND CONTENTIONS

Sylvania's claim arises out of a Contract that was part of the so-called "IBEX" project. This project consisted of a program of the Iranian Air Force in the mid-1970's to modernize and expand its existing electronic intelligence gathering system with a new high technology system called IBEX. The IBEX project encompassed the provision of electronic equipment, training of personnel to operate and maintain the equipment, construction of facilities for training, collection of data and data analysis, and expansion of logistic services. The completed system would collect data using two types of aircraft, fixed ground facilities at a number of military sites near Iranian borders, and transportable vans. A central complex to house the data analysis computers, a permanent Training Institute, and a central logistics depot would be situated at Dohsen Tappeh Air Force Base in Tehran. The analysis centre would analyze data and produce intelligence reports.

The Imperial Government of Iran contracted with a number of United States companies to furnish the equipment, supply the services, supervise the work under the project and assist the Iranian Government in the implementation of the program. Contract No. 116 ("the Contract") was concluded with the Claimant on 8 June 1977 and amended on 20 November 1977. The Contract, which is the basis of this claim, provided for Sylvania to train Iranian Air Force personnel independently to manage, operate and maintain the IBEX system, as well as to plan and set up a training institute for that purpose.

In view of the number of different contractors involved in the IBEX project, a system of coordination and monitoring of their work was set up. The Claimant's performance of work was to be monitored and evaluated by two United States corporations employed by the Respondent for that purpose. The Respondent gave Harris Corporation responsibility for system integration, and Questech, Inc. the task of evaluating the Claimant's performance and certifying Iranian Air Force personnel upon completion of their training.

The Statement of Work ("SOW"), attached as Appendix One to the Contract, lists six tasks that the Claimant was to perform: training program planning, instructional material development, instructional implementation, facility implementation, training segment management and training coordination. The Contract provided for a period of performance of 40 months, for the training of 667 Iranian Air Force personnel, and for a price of $57,300,000 with a possible increase to $60,000,000 for additional services and equipment if so authorized by the Respondent.

The Claimant asserts that it fully performed its contractual obligations for a period of 18 months from August 1977 through 14 February 1979. Although it acknowledges that there were some start-up problems, the Claimant asserts that all these problems were subsequently corrected and that as of the end of January 1979 its performance under the Contract was on or ahead of schedule.

The Claimant contends that in January and February 1979 the Respondent breached the Contract through various acts. It asserts that the Respondent's breaches constituted a repudiation of the Contract as of 14 February 1979, which left the Claimant with no other choice but to withdraw its personnel from Iran on 16 February 1979 and to stop performance in Iran. In particular, the Claimant asserts that in February 1979, when the present Iranian Government replaced the Imperial Government, the new Government decided to repudiate the Contract. This allegedly was demonstrated by a number of actions by the Respondent, including its removal of the Program Director, failure to name a replacement, and failure to respond to the Claimant's letters regarding the situation. The Claimant contends that the Leader of the Islamic Revolution publicly declared as early as October 1978 his intention to repudiate such contracts with foreigners that were considered to be against the interests of Iran, especially contracts constituting "command" of the military forces "by foreign advisors".

The Claimant further contends that the Respondent breached the Contract in the following additional ways:

First, the Claimant asserts that on 5 February 1979 the Respondent directed the Iranian students in training in the United States to return to Iran. On 10 February 1979, the Iranian students left the training facility at Doshen Tappeh Air Force Base in Tehran, and did not return. On the following day, the Program Director told the Claimant's Deputy Project Manager in Iran that the Claimant's employees should not return to the facility until further notice from the Respondent.

Second, according to the Claimant, the Respondent further materially breached the Contract by failing to pay invoices for the months December 1978 through July 1979, and by paying the invoice for November 1978 too late.

Page: 302
Third, the Claimant alleges that the Respondent failed despite the Claimant's requests, to fund adequately letters of credit that the

Respondent had opened to ensure payment of the Claimant's invoices.

Fourth, according to the Claimant, the Respondent further breached the Contract when it failed to cooperate, as required under the Contract, by not appointing a replacement for the Program Director who became unavailable after 11 February 1979, by not ensuring that the other IBEX contractors that had to review and approve the Claimant's performance continued to perform, and by not responding to the Claimant's repeated communications regarding the Respondent's alleged breaches of the Contract.

Fifth, the Claimant asserts that the Respondent also breached the Contract by its failure to negotiate payment for extra services as well as to negotiate the Parties' differences following a letter of 16 July 1979, in which the Respondent announced to the Claimant that as of 10 February 1979 "the accomplishment of all the works and expenditures under the Contract No. 116 has been considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran". In the Claimant's view, this letter, which "appears to be a belated attempt to terminate the Contract unilaterally", constituted a cancellation and repudiation of the Contract as of 10 February 1979.

Finally, the Claimant asserts that the Respondent made wrongful calls on letters of credit securing performance and down payment guarantees provided by the Claimant pursuant to the Contract. Instead of releasing the guarantees and cancelling the letters of credit, as required in the event of breach of the Contract, the Respondent on 1 May 1980 made fraudulent demands on the letters of credit, which constituted another breach of the Contract, the Claimant contends.

The Claimant argues that none of the provisions in the Contract dealing with termination is applicable to the situation brought about by the Respondent's breach and repudiation of the Contract, and that therefore it is entitled under "rules of law generally applicable to breach of contract" to "damages sufficient to place it in the same position as if the Contract had been performed". The "full compensation" that the Claimant demands comprises compensation for work performed and all costs incurred through the date of the alleged repudiation and breach of the Contract by the Respondent, post-breach costs, lost profit, interest and costs including attorneys' fees.

As of 18 February 1985; the date of the Hearing in this case, the Claimant has claimed $4,277,713 for work performed and costs

incurred through the breach of the Contract, $3,458,833.60 for post-breach costs, $3,708,082 for lost profit, $6,013,386.20 (as of 31 December 1984) for interest and $830,093.96 for costs, totalling $18,288,108.76.

As further relief, the Claimant seeks the release and cancellation of bank guarantees and related standby letters of credit it obtained pursuant to the Contract as guarantees of performance and as security for the Respondent's down payment. Should the Tribunal deny such release and cancellation, the Claimant makes a contingent claim of at least $14,740,425 for amounts that it may be liable to pay under these guarantees and letters of credit.

With regard to the Respondent's counterclaim for social security premiums and penalties, the Claimant seeks payment of any amounts awarded to the Respondent in that respect. The Claimant asserts that a provision of the Contract requires such reimbursement. The Claimant also requests a declaratory judgment that it is not liable to the Respondent for any payments to the Iranian Social Security Organization.

The Respondent has raised a number of defences to these claims and has interposed a counterclaim.

At the outset the Respondent raises two objections to the Tribunals jurisdiction over this claim. It argues that, pursuant to the provision in the Contract dealing with the settlement of differences between the Parties, this claim is within the exclusive jurisdiction of the Iranian courts and thus excluded from the Tribunals jurisdiction. It further contends that the Claimant has not furnished sufficient proof to establish its United States nationality. The Claimant rejects both objections.

In its defence on the merits the Respondent contends that by letters of 13 and 15 February 1979 the Claimant unilaterally breached and cancelled the Contract. The Respondent asserts that it performed its obligations under the Contract until
the Claimant's breach. In this connection it contends that it had made the advance payment, opened the required letters of credit, obtained the necessary Government authorizations in Iran, provided the facilities in Tehran, and paid 11 invoices totalling $16,006,147. It asserts that it appointed the Program Director and other relevant representatives, and kept the letter of credit sufficiently funded to pay the invoices that it was obliged to pay.

The Respondent denies the Claimant's contention that its letter of 16 July 1979 constituted a unilateral cancellation of the Contract. Rather it asserts that this letter recorded the fact that the Claimant had stopped performance under the Contract and therefore invited the Claimant to a meeting for "contractual negotiations".

When the Claimant invoked the *force majeure* clause of the Contract in a letter to the Respondent dated 13 February 1979, it had, according to the Respondent, already breached the Contract by not providing required services and material. The Respondent contends that this letter was a unilateral cancellation of the Contract by the Claimant. It further contends that the Claimant was estopped by this letter from basing the cessation of its performance on the Respondent's alleged breach of the Contract, which is the reason the Claimant gave in another letter to the Respondent dated 15 February 1979. The Respondent states that nothing had occurred during these two days that could have justified such a different legal consequence.

The Respondent asserts a counterclaim for damages resulting from the Claimant's alleged breaches and cancellation of the Contract in a total amount of $44,627,215. This amount is composed of payments under the Contract of $24,601,147 (including $8,595,000 in advance payments), interest for the years 1978 through 1980 of $11,526,068, and "[i]ncidental losses arising out of suspension of the contract" of $8,500,000.

In its "Exhibit of Counterclaim", consisting of a "Training Equipment Inventory List" dated 1 March 1979 and a one-page statement, the Respondent asserted that the listed equipment had been acquired under the Contract and was being held by the Claimant. The Respondent requests that an Award be issued ordering the Claimant to deliver the equipment to the Respondents.

The Respondent further requests the Tribunal to require the Claimant to lift injunctions obtained in United States courts that bar collection of the letters of credit securing the Claimant's performance and the Respondent's downpayment. The Respondent asserts that the Contract permits it to call the letters of credit when, as it asserts, the Claimant breaches the Contract.

The Respondent also asserts a counterclaim for social security premiums and penalties in the amount of Rials 248,892,835. The Claimant denies that any such premiums were owed. It states that an authorized representative of the Respondent expressly exempted the Claimant from payment of social security premiums, and that its liability for social security premiums under the law and their amount have in any case not been proven.

Finally, the Respondent requests reimbursement of "all the losses and costs incurred in these proceedings".

[...]

### III. REASONS FOR AWARD

2) Merits

d) Application of the Contract Provisions Governing Termination for Convenience

**dd) Interest**

The Claimant claims interest an any amount awarded it. It calculates the interest on the basis of the prime rate charged by Citibank for loans an equivalent amounts to substantial borrowers. It applies the average yearly rate to the average amount of the claim each year, thus reaching an interest amount of $6,013,386.20 as of 31 December 1984, based on a total average rate of 14.03 percent for the period 1979 through 1984. For each month thereafter until the date the Award is paid the Claimant seeks an additional $68,880, which amounts to an annual rate of 103/4 percent. That rate is also
based on the prevailing prime rate.

So far the Tribunal's practice in awarding interest does not show a great degree of uniformity. While the Chambers are consistent in generally awarding interest, when claimed, on the basis of compensation for damages suffered due to delay in payment, and while the Tribunal has never awarded compound interest, the rates applied by the Tribunal show little uniformity.

The rates stipulated in a contract and thus agreed to by the Parties are usually accepted by the Tribunal, although it has been stated that unreasonable or usurious rates will not be enforced. Award No. 145-35-3 of 6 August 1984 in R. J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran et al., at page 19. In the absence of a contractually stipulated rate, however, the Tribunal has exercised its discretion, applying rates varying from 8.5 percent to 12 percent, which it determined to be "fair rates".

This Chamber finds it in the interest of justice and fairness to develop and apply a consistent approach to the awarding of interest in cases before it. Unless there are special circumstances, the rates stipulated in a contract will be accepted by the Tribunal. In the absence of a contractually stipulated rate of interest, the Tribunal will derive a rate of interest based approximately on the amount that the successful claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country. Six-month certificates of deposit in the United States are such a form of investment for which average interest rates are available from an authoritative official source.

The Tribunal realizes that there is some precedent in arbitral tribunals that deal with single cases to base interest in their awards on borrowing rates from banks in the Claimant's country, sometimes utilizing the prime rate. In the circumstances of this Tribunal, however, it is desirable to have uniformity of treatment of a large number of parties in many cases, and therefore, a rate of interest based on return of investment during the relevant period is more appropriate. Uniformity can be accomplished by basing interest in Awards on the rate of return on certificates of deposit, which are available to all investors at substantially the same rates. In contrast, borrowing rates vary depending on the credit rating of each particular party, not all of whom are able to borrow at the prime rate, and some of whose credit standings may change during the relevant period. Also, not all parties who suffer from delayed payment actually borrow. For these reasons, basing a general interest rate in all Awards on the prime rate would often not be realistic.

The Tribunal notes that the practice of applying uniform rates of interest in all cases is followed by many courts in the United States, often as a result of statutory requirements. It appears that statutory rates of interest in many jurisdictions in the United States, while adjusted from time to time to reflect changing financial conditions, tend to be somewhat lower than the prime rate, due to various legislative considerations including time lag. In any event, many legislators and judges accept that general application of such rates is just. The fact that all United States claimants before the Tribunal have the benefit of the security provided by the Security Account established by the Algiers Declarations might also be seen as a reason supporting the use of a general rate of interest derived from rates of return an investment, even if in a particular case the Claimant may have been borrowing at a higher rate, since such a security is not available to most other international awards or judgments of national courts.

The average rate of interest paid on six-month certificates of deposit in the United States from 1979 through 1984, approximately the relevant period in this case, was 12.12 percent. The Tribunal therefore decides to apply an interest rate of 12 percent to the amount payable to the Claimant. The Claimant is entitled to such interest on $7,331,105.58 from 16 July 1979, a convenient date that corresponds to the date of the Respondent's letter concerning termination of the Contract, until the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

IV. AWARD
For the foregoing reasons,

THE TRIBUNAL DETERMINES AS FOLLOWS:

Guarantees Nos. 77/6, 77/7, 77/8, 77/9, 77/10, 77/11 and 77/12 issued by Bank Iranshahr have no further purpose, and the Respondent the Government of the Islamic Republic of Iran is hereby ordered to withdraw any and all demands for payment in connection with the above guarantees and to refrain from making any further demand thereon.

The Tribunal hereby orders the Respondent the Government of the Islamic Republic of Iran to take any and all actions that are necessary to assure that Bank Iranshahr cancels the above guarantees, releases Letters of Credit Nos. 013490 and 013491 issued by the Bank of America, withdraws any and all demands for payment made in connection with the mentioned letters of credit and refrains from making any further demand thereon. The Tribunal retains jurisdiction in this case to take any further action in the event that this Order is not complied with within ninety days after the date of this Award.

The Counterclaims of the Government of the Islamic Republic of Iran against Sylvania Technical Systems, Inc. are dismissed.

The Respondent the Government of the Islamic Republic of Iran is obligated to pay the Claimant Sylvania Technical Systems, Inc. the sum of Seven Million Three Hundred Thirty-One Thousand One Hundred and Five Dollars and 58 cents (U.S. $7,331,105.58) plus interest at the rate of 12 percent per year from 16 July 1979 to the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; plus costs of arbitration in the amount of $50,000.


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

SEPARET OPINION OF HOWARD M. HOLTZMANN ON AWARDOERING COSTS OF ARBITRATION

[...]

[not included in the TransLex]

1Dissenting Opinion, see p. 336 below.
2The signature of Mr. Holtzmann is accompanied by the words "Concurring. Separate Opinion on costs". See p. 329 below.
3Filed 27 June 1985.
11See D. P. O'Connell, International Law, Vol. 2, at 1123 (2d ed. 1970) ("The standard [to be used in deriving a rate of interest to be applied to international arbitral awards] is indicated by the answer to the question, what could the claimant reasonably have expected had he had the use of the property?"
12In the United States, the prime rate is the rate used as a base to determine rates on loans to banks' most creditworthy corporate customers.
13Judge Holtzmann agrees that the Tribunal should adopt a uniform method for determining the rate of interest in Awards. He believes that using the average rate paid on six-month certificates of deposit in the United States is not unreasonable, but that it would be more appropriate to base the Tribunals interest rate on the prime rate during the relevant period. In his view, it is reasonable to assume that most businesses habitually borrow while fewer regularly invest in certificates of deposit. Moreover, although the prime rate is not applicable to all businesses, it is generally representative because the difference between it and other lending rates is relatively small. In contrast, the six-month deposit rate is less representative because of the wide range of possible uses that businesses make of their funds and the relatively large differences in the rates of return on such uses.
14Judge Holtzmann does not believe that the existence of the Security Account is relevant to the determination of interest rates.
Referring Principles:

VII.6 - Duty to pay interest