

ORIGINAL DOCUMENTS IN SAFE

Case No. 172

Date of filing 15 APR 1983
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AWARD. Date of Award 15 APR 1983

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_____ DECISION. Date of Decision _____

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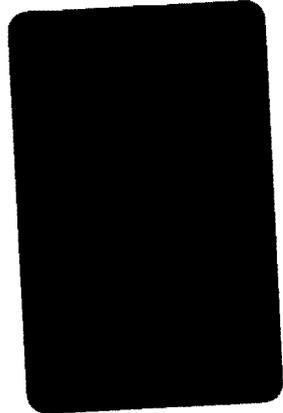
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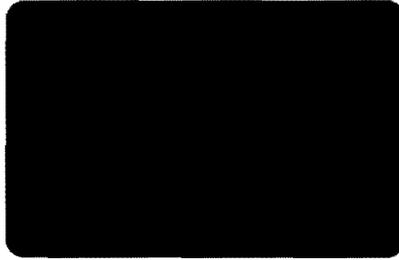
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CASE NO. 172
CHAMBER ONE
AWARD NO. 37-172-1

QUEENS OFFICE TOWER ASSOCIATES,

Claimant,

and

IRAN NATIONAL AIRLINES CORP.,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعوی ایران - ایالات متحده
فایلت شد - FILED	
No. 172	شماره ۱۷۲
Date	تاریخ
15 APR 1983	۱۳۶۲ / ۱ / ۲۶

Award

Appearances

For the Claimant:

Mr. George A. Lehner
Attorney
Arent, Fox, Kintner, Plotkin
& Kahn

For the Respondent:

Mr. M.R. Askari
Attorney for Iran Air

Also Present:

Mr. M.K. Eshragh
Deputy Agent of the Islamic
Republic of Iran

DUPLICATE
ORIGINAL
نسخه برابر اصل

Mr. P. Ansari
Mr. A. Noori
Legal Advisers to the Agent
of the Islamic Republic of
Iran

Ms. Jamison Selby
Deputy Agent of the United
States of America

Mr. John Reynolds
Attorney-Adviser to the Agent
of the United States of
America

I. Proceedings

On 18 December 1981 Queens Office Tower Associates ("QUOTA") filed this claim against Iran National Airlines Corp. ("Iran Air"), seeking damages for the alleged breach of a lease of property in New York, plus interest and costs of arbitration. Iran Air filed a Statement of Defence on 1 September 1982, both denying the claim and instituting a counter-claim for damages alleged to have been suffered by its having to vacate the premises. A hearing was held on 20 January 1983. Respondent filed a "Further Written Statement and Amendment to Counter-Claim" at the hearing itself. The Tribunal decided to allow the Amendment.

II. Facts and Contentions

QUOTA is a limited partnership organized under the laws of the State of New York. QUOTA submitted official copies of the birth certificates of various members of the Lefrak family, who together owned 100% of the partnership. Those birth certificates prove that QUOTA's owners are all United States citizens. QUOTA, moreover, has owned this claim continuously since the time it arose. This claim thus falls within the Tribunal's jurisdiction under Article VII, paragraphs 1 and 2 of the Claims Settlement Declaration.

Iran Air is an entity 100% of whose shares are owned by the Government of Iran, nor has it timely alleged that it is

not controlled by the Government of Iran within the meaning of Article VII, paragraph 3 of the Claims Settlement Declaration. The Tribunal has, therefore, jurisdiction over Iran Air for the purposes of this claim.

On 1 August 1979 Iran Air entered into a lease (the "Lease") of certain commercial office space from QUOTA for "General and Executive Offices for [Iran Air's] business and for no other purpose." Lease, Covenant 2. Iran Air at that time paid \$11,332.29 as an advance payment of one month's rent. The Lease was projected to run for 10 years, from a commencement date to be determined by the completion date of certain interior construction work. QUOTA delivered possession of the premises to Iran Air on 24 November 1979. By a supplemental agreement dated 27 November 1979, the Parties agreed that the commencement date of the Lease was 24 November 1979, with the Lease to expire on 30 November 1989. The \$11,332.29 was credited as the December 1979 rent.

On 4 November 1979, prior to Iran Air's commencing occupancy, the American Embassy in Tehran was seized by Iranian nationals, who detained United States nationals. On 14 November 1979 the President of the United States, stating that he was acting in response to those events, issued Executive Order 12170 blocking "all property and interests in property of the Government of Iran, its instrumentalities

and controlled entities" within the jurisdiction of the United States. Pursuant to that Order the United States Secretary of the Treasury issued the Iranian Assets Control Regulations, 31 CFR § 535.101 et seq. ("Asset Regulations").

At the hearing, Mr. Askari contended that on 7 November 1979 due to lack of provision of necessary landing services by relevant authorities in J.F. Kennedy Airport, Iran Air's flight was deviated to Toronto and hence its operations to the United States were stopped.

Although rent was due the first day of each month, Iran Air did not pay the 24-30 November 1979, and the January, February, March, April, May, and June 1980 rents as they became due. In March 1980, QUOTA, acting under the Lease, drew down \$13,964.16 on a letter of credit established in QUOTA's favor by Iran Air as security for rent payments, which amount covered the end of November and the January rents. The February rent was collected on 3 April 1979 in the same way.

On 7 April 1980 the President of the United States issued Executive Order 12205 "Prohibiting Certain Transactions With Iran," including the shipment from the United States of all but emergency goods "on vessels or aircraft registered in Iran."

On 15 April 1980 QUOTA filed suit in the Civil Court of New York (Queens County) seeking repossession of the premises based on Iran Air's failure to pay the March and April rents when they fell due.

On 17 April 1980 the President of the United States issued Executive Order 12211 entitled "Further Prohibitions on Transactions with Iran", which included an order for the revocation of "existing licences for transactions by persons subject to the jurisdiction of the United States with Iran Air ... previously issued pursuant to regulations under Executive Order No. 12170 or Executive Order No. 12205." The President stated that the order for such revocation "will have the effect of closing down the offices in the United States of [Iran Air.]" President's Message to Congress Reporting on Further Prohibitions on Transactions With Iran and Transmitting an Executive Order, paragraph 5 (17 April 1980).

On 24 April 1980 the New York court awarded possession of the premises to QUOTA as of 29 June 1980 unless before then Iran Air paid \$22,644.58 for the March and April rents. Iran Air vacated the premises on 30 June 1980. In August 1980, QUOTA drew down the remaining balance of the letter of credit, an amount sufficient to cover all but \$575.61 of rent owing through June 1980. QUOTA relet the premises to another tenant on 12 March 1981.

QUOTA took the position before the New York court that Iran Air was in breach of the Lease as of the beginning of March 1980, when it failed to pay the rent due on the first day of that month. QUOTA relies in the instant case on those sections of the Lease which outline the landlord's remedies and entitlement to fees and expenses, in support of its claimed damages due to lost rent, costs of renovation of the premises, and broker's and attorney's fees.

Iran Air's response is that after 14 November 1979 there was no Lease, on the theory that the Asset Regulations imposed as of that date made unlawful and destroyed the purpose of the Lease, and therefore discharged it of its obligations thereunder. Moreover, Iran Air counterclaims for all rents collected by QUOTA after 24 November 1979 by drawing down on the letter of credit, alleging that under the Asset Regulations it was illegal for QUOTA to have transferred possession of the premises after 14 November 1979, and that QUOTA could not therefore recover rent or later seek damages in light of that illegal transfer. Iran Air also seeks recovery of damages it says it suffered by vacating the premises on 30 June 1980.

QUOTA replies that even if there had been a frustration of the Lease's purpose, and even if payment of rent became nearly impossible as of 1 May 1980, any such frustration was ultimately caused by the Government of Iran through the

seizure of the United States nationals, and therefore cannot be relied upon by Iran Air as an entity wholly-owned and controlled by that Government. To this contention Iran Air replies by stating that as a separate juridical entity it was not involved in the events in Tehran of November 1979, and therefore was not the "party" causing frustration of the Lease, even if those events were at all attributable to the Government of Iran.

III. Reasons

A. Frustration/Impossibility of the Lease

The Tribunal's first task is to determine whether the purpose of the Lease was frustrated or its performance made impossible by the Asset Regulations and, if so, as of what date. The issue must be decided under New York Law, which applies to rights and obligations arising out of a New York real estate transaction. In 119 Fifth Ave. v. Taiyo Trading Co., 190 Misc. 123, 125 (N.Y. Sup. Ct. 1947), aff'd, 87 N.Y.S.2d 430, the court stated that "[t]he essential element in every case involving frustration is impossibility of performance", and then distinguished "absolute impossibility" from "relative impossibility." So-called "absolute impossibility" situations involve supervening events which prohibit or make illegal performance of the contract. "Relative impossibility" circumstances are those where performance, though physically possible, would be so different in character from that under the original contract, as to render the performance obligations different altogether.

The specific test under New York law in cases involving the impact of government action on leases is that the party seeking to be discharged of his obligations must show:

1) that "the purpose of the lease was completely frustrated and performance rendered impossible by the exercise of governmental authority," 119 Fifth Ave., 190 Misc. at 126;

2) that "the supervening event or circumstance was [not] within the contemplation of the parties at the time of the execution of the lease and might not have been anticipated and guarded against," 119 Fifth Ave, supra; Lloyd v. Murphy, 153 P.2d 47, 50 (Cal. 1944) (cited by the New York court); and

3) that "[t]he event or circumstance which produces frustration [is] not attributable to the fault of the party alleging frustration." McNair and Watts, The Legal Effects of War 180 (1966) (cited from an earlier edition by the New York court).

If the test is met, a court will hold the lease discharged as from the date of the occurrence of the supervening event or circumstance. As a consequence, parties are "discharge[d] ... from liability for acts of performance not yet due." McNair and Watts, supra at 182.

At the same time, "where money has been paid under a contract which in the event is frustrated, and there has been a total failure of consideration for that payment, the sum may be recovered" Id. at 184. It is agreed also, that in the case of frustration of a lease, the tenant will nevertheless "be held liable ... so long as he retains possession." 6 Williston, On Contracts § 1955 at p. 143 (rev.ed.); 3 M. Friedman, On Leases § 27.302c at p. 1018 (1978).

The Tribunal holds that it has been proved by Iran Air that the purpose of the Lease was frustrated as of 1 May 1980, if not sooner, and that performance of its payment obligations was, from a practical, commercial point of view, rendered impossible at least as of the same date. On 7 April 1980, the President of the United States, by Executive Order 12205 effective that day, prohibited most shipments of goods out of the United States on Iran Air's aircraft, unless a license were obtained authorizing such shipment. On 9 April 1980, the Asset Regulations were amended in furtherance of that Order. Asset Regulations § 535.207(a)(3). On 17 April 1980, the President by Executive Order 12211 directed the Secretary of the Treasury "to revoke", effective 1 May 1980, any "existing licenses for transactions subject to the jurisdiction of the United States with Iran Air ... previously issued under Executive Order No. 12170 [of 14 November 1979] or Executive Order No. 12205 [of 7 April 1980]."

At the same time, the scope of the prior restrictions on Iran Air's business was widened to include a bar on transactions involving travel by U.S. citizens to Iran, Asset Regulations § 535.209(a)(1), though not on transactions involving travel to Iran by citizens of Iran. Id. at § 535.209(b). By a later amendment, the Treasury Department made it clear that the transactions prohibited by § 535.209(a) included "arranging through transportation to Iran; selling passages aboard a foreign carrier providing service to Iran, whether or not originating in the United States; chartering an aircraft or vessel; or arranging accommodations, ground transportation or travel activities within Iran." Asset Regulations § 535.432 (3 June 1980). It was the President's intent to "clos[e] down the offices in the United States [of Iran Air]." In the opinion of the Tribunal, that intent was realized.

Beginning 1 May 1980 Iran Air could no longer obtain licenses for the major part of its business. Such licenses were theoretically possible under prior restrictions on payments, shipments, and flights. See, e.g., Asset Regulations §§ 535.201 (restricting transfers of property "except as authorized"), 535.207(a) (restricting shipments of goods to Iran "except as authorized by means of regulations, rulings, instructions, licenses or otherwise"), and 535.801 et seq. (detailing licensing procedures). While funds could legally be transferred to pay past obligations without having those funds blocked, Asset Regulations at § 535.904,

obligations incurred on or after 1 May 1980 could not be so easily paid. See Letter of 1 May 1980 from U.S. Treasury Officer W. Nichols to Lefrak Organization re payments by Iran Air.

Once it is acknowledged that at least beginning 1 May 1980 the premises were no longer useful for the "General and Executive Offices for Tenant's business" -- because the tenant had no more business -- the commercial impracticality of continuing payments to QUOTA by means of some unprovided-for foreign arrangements becomes apparent. The Tribunal finds therefore that there was a combination of frustration of purpose and impossibility of payment in the United States of Iran Air's Lease obligations at least as of 1 May 1980.

From what has been said it should be clear that Iran Air's contention that QUOTA was in violation of the Asset Regulations in transferring possession to it on 24 November 1979 is without merit. It is true that any conveyance of a leasehold interest to Iran Air after 14 November 1979 would have been a transfer of property within the meaning of the Asset Regulations. See Asset Regulations §§ 535.201, 535.310, and 535.311. The conveyance, however, of Iran Air's leasehold interest took place on 1 August 1979, the date it acquired enforceable rights against QUOTA, not the date it actually took possession. In all events, a license could have been sought by Iran Air from the Treasury

Department in the event of doubts, with or without QUOTA's cooperation. Asset Regulations at § 535.801(b)(2). Since QUOTA's actions in allowing Iran Air to take possession were not illegal, QUOTA cannot be barred from using the fact of Iran Air's tenancy as "the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property." Id. at § 535.203(a); cf. id. at § 535.203(d)(1) (requiring that for sanctions to be applied, violations must have been "willful").

B. Forseeability of the Frustration/Impossibility

The second question before the Tribunal is whether the combined frustration/impossibility which occurred may "reasonably be said to have been in the contemplation of the parties at the date of the contract," Krell v. Henry, 2 K.B. 740, 752 (1903), so that it "might have been anticipated and guarded against." 119 Fifth Ave., 190 Misc. at 126. By virtue of the determination that a transfer of a leasehold interest occurred on 1 August 1979, it follows that any such foreseeability must be measured as of that date. By August 1979 the Islamic Revolution in Iran had taken place. Iran is not the first country to undergo sweeping social change, nor is it likely to be the last; with some such countries the United States has maintained relations, with others not. While it is a close question, the Tribunal concludes that reasonable men in the position of the parties would not have foreseen such a further deterioration in United States-Iran relations as would have led to a total cessation of economic and diplomatic relations.

C. Attributability of the Supervening Events

A third issue has been raised by QUOTA. It questions whether Iran Air, as an entity owned by the Government of Iran, is entitled to invoke the doctrines of frustration and impossibility when the supervening events causing such frustration and impossibility were acts of the Government of the United States taken in response to events which occurred in Iran. QUOTA's position is that the supervening events were "attributable to the fault of the party alleging frustration", and that in this case the real party in interest is the Government of Iran.

The Tribunal does not, however, find it necessary to resolve the question as presented. The Tribunal concludes instead that regardless of who the real respondent party in interest is in this case, it was the sovereign political acts of the Government of the United States which proximately caused the frustration of purpose and impossibility of performance of the Lease, not the acts attributed to the Government of Iran. The United States, faced with the seizure of its Embassy and personnel, had a range of responses available to it, from the most peaceful to the most belligerent. It chose, freely, to impose beginning in mid-November 1979 a sophisticated series of measures to control assets of Iran within its jurisdiction. It chose later that month also to seek redress before the International Court of Justice. During the pendency of those proceedings it chose to attempt a military rescue operation. In time the two Governments peacefully settled their disputes by means of the Algiers Declarations.

The free exercise by a State of one of its options in the international sphere is an independent cause of the events which ensue therefrom, regardless of the acts of another State which may have triggered such a response. Iran Air may therefore invoke the acts of the Government of the United States as events and circumstances causing the frustration of purpose and impossibility of performance of the Lease. The Tribunal declares, accordingly, that the Lease was discharged as of 1 May 1980, at the latest.

D. Consequences of Discharge of the Lease

The Tribunal's final task is to determine the rights and liabilities of the parties in light of that discharge. The governing rule is that the loss must "lie where it falls". The apportionment of the loss is subject generally to the Tribunal's equitable discretion, using the contract as a framework and reference point.

In apportioning the loss the Tribunal notes that Iran Air received benefits from QUOTA by remaining in possession of the premises through June 1980. Iran Air was free to vacate the premises on 1 May 1980, but did not do so until 30 June 1980. The Tribunal thinks it fair that Iran Air should pay the rent during the period it remained in possession of the premises. See City of New York v. Pike Realty Corp. 247 N.Y. 245, 247 (1928); 6 Williston, supra at 143; 3 M. Friedman, supra at 1018. Approximately all of that rent was collected by means of the letter of credit.

The Tribunal holds in the exercise of its discretion that neither party should receive anything further from the other, by way of rent, damages, interest, costs or otherwise.

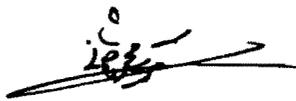
III. Conclusion

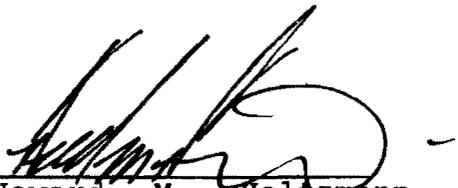
For the foregoing reasons the claim and the counter-claim are dismissed; accordingly neither party is obligated to the other.

Each party shall bear its own costs.

Dated: The Hague
15 April 1983


Gunnar Lagergren
Chairman
Chamber One


Mahmoud M. Kashani
Concurring


Howard M. Holtzmann
Dissenting Opinion
as to the Claim;
Concurring as to the
Counterclaim.

