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Case No. 10172

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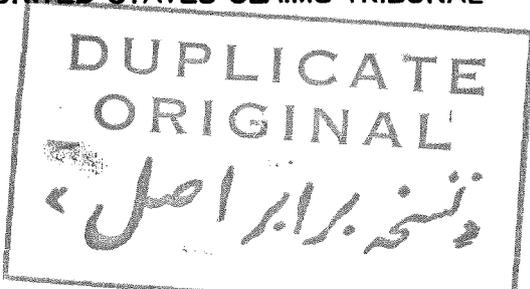
** CONCURRING OPINION of _____
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CASE NO. 10172
 CHAMBER ONE
 AWARD NO. 313-10172-1

SCOTT, FORESMAN AND COMPANY,
 a claim of less than US\$250,000
 presented by the UNITED STATES OF AMERICA

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
 BANK MARKAZI IRAN,

Respondents.

AWARD

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	16 JUL 1987 تاریخ
	۱۳۶۶ / ۴ / ۲۵
No.	10172 شماره

Appearances:

For the Claimant:

Mr. Alan Simon,
 Attorney-Adviser, Department
 of State,
 Ms. Lucy Reed,
 Attorney-Adviser to the Agent,
 Mr. Ronald J. Bettauer,
 Assistant Legal Adviser to the
 Agent,
 Ms. Mary Beth West,
 Attorney-Adviser to the Agent,
 Mr. Michael F. Raboin,
 Deputy Agent.

For the Respondents:

Mr. Mohammad K. Eshragh,
 Agent of the Government of the
 Islamic Republic of Iran,
 Mr. Mohammad H. Bordbar,
 Legal Adviser to the Agent,
 Mr. Abdolmajid Aghigi,
 Assistant to the Agent,
 Mr. Mohammad Ekhteraie,
 Legal Representative of Bank
 Markazi Iran.

I. PROCEEDINGS

1. On 19 January 1982, the Government of the United States of America presented a claim of less than \$250,000 on behalf of the Claimant, Scott, Foresman and Company.

2. On 22 August 1984, the United States filed a Supplemental Statement of Claim, and on 3 March 1986 Bank Markazi Iran filed a Statement of Defence.

3. On 2 July 1986, the Claimant filed its Reply to the Statement of Defence. The Respondents did not file any further statement or brief, although invited by the Tribunal to do so.

4. A Hearing was held on 9 April 1987. Mr. Koorosh Hossein Ameli, having been designated by Presidential Order No. 52 of 3 April 1987 to act as a member of Chamber One instead of Mr. Seyed Mohsen Mostafavi for the purpose of this Case, participated as an arbitrator.

II. FACTS AND CONTENTIONS

A. Jurisdiction

5. It is not disputed that the Claimant is a U.S. national or that it has continuously owned this Claim as required by Article VII, paragraph 2, of the Claims Settlement Declaration. The Claimant offered evidence that it was originally incorporated in 1896 as an Illinois corporation, and that on 30 September 1969 it changed its State of incorporation to Delaware by merging into its wholly-owned subsidiary there. On 20 February 1980, the Claimant became a wholly-owned subsidiary of SFN Companies, Inc., a

publicly-owned Delaware corporation. The Claimant offered evidence that more than fifty percent of its outstanding stock was owned continuously, from the date on which the Claim arose to 19 January 1981, by nationals of the United States.

6. There is also no dispute that Bank Markazi Iran comes under the definition of "Iran" pursuant to Article VII, paragraph 3, of the Claims Settlement Declaration.

B. Merits

7. The Claimant is a publisher of educational and scientific materials. Until 1979, it sold or consigned for sale, either directly or through a representative, books to six private bookstores in Iran: (1) Reza Shah Kabir University, (2) Iran Book Company, (3) Iran-American Society, (4) Iranian Amalgamated Distribution Agency, (5) Tajerzadeh Keyvan Book Shop, and (6) The Bookshop.

8. The Claimant argues that it received payments from these six bookstores in U.S. dollars until November 1978, when Bank Markazi Iran imposed new exchange restrictions by issuing Circular NA/11600. Thereafter, the Claimant contends that it received no payments for books it had shipped to these bookstores and learned from various sources that the exchange restrictions issued in November 1978 and later in May 1979 (Circular NA5/2090) were allegedly blocking such transfers. The Claimant argues that under the circumstances prevailing in Iran at the time it could only assume that the six bookstores were attempting to transfer payments through Bank Markazi Iran and that such transfers were denied due to Bank Markazi Iran's exchange restrictions, although the Claimant could offer no direct proof to this effect. These exchange restrictions, the Claimant argues, violated the Treaty of Amity, Economic Relations and Consular Rights of 1955 between Iran and the United States, the International Monetary Fund Agreement ("IMF Agreement"), and customary

international law,¹ and therefore Iran is liable for the transfers allegedly denied due to such restrictions. Thus, the Claimant seeks \$149,650.29, representing the total amount allegedly owed to it by all six bookstores, plus interest. The Claimant also seeks an additional 1.5 percent of the claimed amount for its costs in preparing this Claim.

9. The Respondent Bank Markazi Iran makes four basic arguments in its defence. First, it argues that the Claimant cannot rely on the Treaty of Amity because, in its view, the Treaty was not enforceable during the relevant period and, in any event, the Claimant does not have standing to invoke it. Second, it argues that the Tribunal does not have jurisdiction to determine whether Iran's exchange restrictions violate the IMF Agreement. Third, it argues that Iran's exchange restrictions are valid under the Treaty of Amity, the IMF Agreement, and international law.² Finally, it contends that the Claimant was not paid because the bookstores failed to follow the proper procedures to transfer money out of Iran. It is alleged that, had they done so, and had no "irregularity" been found, Bank Markazi Iran would have approved of the transfer. Thus, Bank Markazi Iran requests that the Claim be dismissed and that it be awarded \$5,000 as costs of arbitration.

¹In view of its holding on the merits, the Tribunal finds it unnecessary to detail the Claimant's arguments in this respect.

²Similarly, in view of its holding on the merits, the Tribunal finds it unnecessary to detail Bank Markazi Iran's arguments in this respect.

III. REASONS FOR AWARD

A. Procedure

10. On 27 February 1987, the Claimant filed a Memorandum of the Legal Adviser of the United States Department of State entitled "Application of International Law to Iranian Foreign Exchange Regulations," explaining that it was mistakenly not attached as an Exhibit to its Supplemental Statement of Claim. At the Hearing, the Agent of the Government of the Islamic Republic of Iran objected to the admissibility of this document on the ground that it was untimely filed. In view of its holding on the merits, the Tribunal does not have to decide whether the filing was admissible.

B. Jurisdiction

11. Based on the undisputed record before it, the Tribunal is satisfied that it has jurisdiction over the Parties and the Claim. In light of its holding on the merits, the Tribunal finds it unnecessary to reach the issue of whether it has jurisdiction to determine whether Iran's exchange restrictions violate the IMF Agreement.

12. In accordance with the understanding of the Parties, and in consideration of the fact that Bank Markazi Iran filed a Statement of Defence, Bank Markazi Iran shall be considered a Respondent in this Case.

C. Merits

13. The dispositive issue before the Tribunal is whether the Claimant has carried its burden of proof to show that measures by the Respondents gave rise to its Claim. As

stated in Article 24, paragraph 1, of the Tribunal Rules, "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence." Based on the record before it, the Tribunal concludes that the Claimant has not carried its burden of proof in this respect. In particular, it has failed to offer sufficient evidence that the Iranian exchange restrictions prevented any of the six bookstores from making payments.

14. The Claimant offers four pieces of related evidence to support its Claim that the bookstores failed to pay because of the Iranian exchange restrictions. First, the Claimant offers the affidavit of Mr. George Gabriel, the manager of the Corporate Credit Department of Scott, Foresman and Company. In his affidavit, Mr. Gabriel states that the Claimant's foreign sales representative, International Publishers Representatives ("IPR"), located in Athens (Greece), sent word that Iranian bookstores in general were trying to transfer payments but that Bank Markazi Iran was blocking these transfers. Mr. Gabriel also states that other publishers were experiencing delays in payment because of the restrictions. Finally, Mr. Gabriel states that, in an effort to facilitate a transfer, the Claimant sent an itemized statement of account to one of the six bookstores, the Iran Book Company.

15. Second, the Claimant offers an undated memorandum from IPR to all of IPR's clients, such as Scott, Foresman and Company. This memorandum begins by stating:

"From the media, you will have gathered that the situation in Iran is deteriorating at a rapid pace. Since most of you have vested interests in Iran, we are sending you this report as a guideline for present and future actioning. The turmoil has affected business in such an adverse manner that most booksellers are not realizing any sales. If you are still shipping into Iran, we would urge you to discontinue immediately, since we have no guarantee that parcels will arrive, and if they do, that they will be delivered. Most

airline personnel, dock workers, customs, and postal employees are on strike. Even if the troubles came to an end right now, there is a monumental backlog of deliveries which would take months to straighten and clear out.

A very strict foreign exchange control has been put into effect, thereby making it very difficult to transfer money out of the country. . . . Those booksellers who wish to pay must apply to [Bank Markazi] and cross their fingers that the transfer will eventually go through."

The memorandum then goes on to discuss the general status of the accounts of various bookstores, including some of the six bookstores in question.

16. Third, the Claimant offers a letter dated 27 April 1979 which it sent to one of the six bookstores, the Iran Book Company. This letter is the cover letter to the itemized statement of account referred to in Mr. Gabriel's affidavit. It states that "[w]e understand from the information we have regarding the Islamic Republic of Iran, that this information will facilitate your transferring of money through [Bank Markazi Iran] to Scott, Foresman."

17. Finally, the Claimant offers a letter dated 27 December 1978 to IPR from another Iranian bookstore, Le Livre Pour Tous, which is not one of the six bookstores involved in this Case. This letter mentions the new exchange restrictions and appears to suggest that IPR sent it an itemized statement of account in order to facilitate payment.

18. The Tribunal finds that the Claimant has offered insufficient evidence to support its Claim that the six bookstores in question failed to make payment because of the exchange restrictions. Mr. Gabriel's affidavit contains general allegations and makes no mention of any of the six bookstores applying for a transfer or being prevented from making such a transfer because of the exchange restrictions. The IPR memorandum is also insufficient to support the

Claim. It is addressed to all of IPR's clients and contains no specific information regarding the six bookstores' payment problems with the Claimant. The closest the memorandum comes to providing evidence that one of the six bookstores applied for a transfer is in its discussion of the Iran Book Company's account, where it states that the general manager had told IPR that they "made transfers to [Bank Markazi Iran] but is not sure that the bank has released any money." However, there is no indication that the attempted transfer was in favor of the Claimant rather than another of the store's suppliers. Similarly, the Claimant's letter to the Iran Book Company and Le Livre Pour Tous' letter to IPR offer no evidence that any of the six bookstores attempted to transfer payments or that the exchange restrictions prevented such payments. Indeed, the Claimant's letter to the Iran Book Company indicates that the Claimant recognized that an application process existed and that there was at least some possibility that a transfer might be made. Thus, the Claimant has provided insufficient evidence that the Iranian exchange restrictions were the cause of its failure to be paid by the six bookstores in question.

19. Moreover, the Claimant's evidence suggests that there may have been other reasons, unrelated to the exchange restrictions, for the six bookstores' failure to pay. In particular, the IPR memorandum states that "[o]ne of the most worrying problems to us is that many bookstores may be forced to declare bankruptcy." This statement raises the possibility, especially in the absence of evidence to the contrary, that the six bookstores may have failed to pay their accounts for reasons other than the exchange restrictions.

20. Finally, the Tribunal notes that the Claimant also failed to provide sufficient evidence that the books in question were actually delivered to the six bookstores. At

the Hearing, the presenter of the Claim stated that he had been informed by Mr. Gabriel that such books were shipped FOB, although he admitted that no such statement or proof thereof appeared in the record. Counsel argued that because these books were shipped FOB, delivery could therefore be assumed. In the absence of any proof of shipment FOB or of delivery, however, the Tribunal cannot conclude that the books in question were in fact delivered to the six bookstores.

21. In summary, the Tribunal concludes that the Claimant has failed to offer sufficient evidence demonstrating that measures by the Respondents gave rise to its Claim. Therefore, the Tribunal dismisses the Claim. In light of this holding, the Tribunal does not have to reach the issue of the validity of the exchange restrictions.

C. Costs

22. In view of the Claimant's failure to submit sufficient evidence to prove its Claim and taking into account that the Respondents have totally prevailed in their defence, the Tribunal determines to award the Respondents the total amount of \$2,000 for their costs of arbitration. In arriving at this amount, the Tribunal, noting that the Claimant as is usual in claims of less than \$250,000 has requested costs equal to 1.5 percent of the claim, considers it reasonable in the circumstances of this Case to apply a similar formula in determining the Respondents' costs of defence.

IV. AWARD

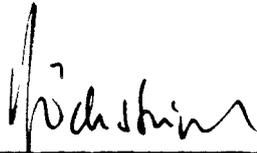
23. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a. The Claim of SCOTT, FORESMAN AND COMPANY is dismissed.

b. The Claimant shall pay the Respondents THE ISLAMIC REPUBLIC OF IRAN and BANK MARKAZI IRAN the total amount of Two Thousand United States Dollars (U.S.\$2,000) as costs of arbitration.

Dated, The Hague
16 July 1987



Karl-Heinz Böckstiegel
Chairman
Chamber One

In the name of God



Koorosh H. Ameli



Howard M. Holtzmann

My joining in the awarding of costs in this Case is solely because the Claim was frivolous. I also hope that the United States would pay for these costs or see to it that they are paid because it presented this Claim. Otherwise it would make meaningless this awarding of costs by requiring the Respondents to spend many times more than such awarded costs in order to enforce this Award.