IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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Case No. 812

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- Date 2 March 1993

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** SEPARATE OPINION of _____

- Date _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 812
CHAMBER THREE
AWARD NO. 546-812-3

ABRAHIM RAHMAN GOLSHANI,
Claimant,

and

MINISTRY OF NATIONAL DEFENCE
OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

SEPARATE CONCURRING AND DISSENTING OPINION OF RICHARD C. ALLISON

1. I concur in the conclusion that the Claim must be dismissed by reason of the Claimant's inability to make out a prima facie case for the authenticity of the deed of conveyance dated 15 August 1978 (the "Deed") upon which he relies as the basis for his ownership of the Claim. While this determination renders moot any definitive pronouncement concerning the Respondent's defense that the Deed was forged, this is not to say that we must ignore the voluminous and exhaustive pleadings presented on this subject. Nor are we required to expunge from our minds the testimony and arguments offered at three lengthy days of hearings on the forgery allegation. I deem it appropriate, therefore, to address certain elements of the Case that occupied the time and attention of the Tribunal in the course of its very thorough consideration of this Claim. Reference is made to the Tribunal's Award, in which I concur with the exception stated below, for a more complete recitation of the facts and contentions of the Parties.

2. Because of the bearing that in my view they have upon the question of an award of costs, it is necessary to comment upon certain aspects of the Respondent's defense that the Deed was a forgery. That the burden of proving this defense rested on the Respondent is clear under Tribunal Rule No. 24(1). Moreover, the nature of the Respondent's assertions of forgery, with their implications of various illegal acts by the Claimant and others, was such that clear and convincing proof was required to sustain them.[1]

3. As presented by the Respondent, however, the evidence and arguments with respect to the alleged forgery were inconsistent, confused and sometimes misleading. Several examples will suffice.

4. The first is the Malayeri puzzle. In its 1 September 1988 submission, the Respondent informed the Tribunal that it was clear that the Deed (which bears the number 25345) had been forged because an exhaustive investigation of NPO 319's records by Inspector Ali Abolahrar had revealed that the notarial document bearing No. 25345 and dated 15 August 1978 was an affidavit executed by a Mr. Kamal Malayeri and not a deed of conveyance involving the Claimant. (The Parties agree that it is impossible for two different documents executed before the same notary to have the same number.) In support of this statement, the Respondent on 1 September 1988 tendered (i) the 24 February 1985 affidavit of Inspector Abolahrar in which he advances the Malayeri proposition citing his "[d]etailed and thorough" examination of the records of NPO 319, as well as (ii)

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[1] According to the Claimant's expert, the former Minister of Justice of Iran, Dr. Mohammad Baheri, the burden of proving that an official document is forged falls upon the party asserting it to be so; he stressed that "convincing" evidence is required to support such an allegation. Anglo-American law also recognizes that an especially high burden of persuasion attaches in analogous cases. See E. Cleary, "McCormick on Evidence" 958-60 (1984) (charges of fraud) and J. Buzzard, "Phipson on Evidence" 54 (1976) (allegations of fraud, under English law). Tribunal authority is consistent with this pattern. See, e.g., Oil Field of Texas and Government of the Islamic Republic of Iran, et al., Award No. 258-43-1 (8 Oct. 1986), reprinted in 12 Iran-U.S. C.T.R. at 308, 315 (alleged bribery in procurement of lease agreement not established if "reasonable doubts remain").

a certification executed on 8 June 1983 by the Iranian Ministry of Justice and (iii) an undated affidavit by Acting Notary Public 319, both to the same effect. However, in its 20 March 1990 submission the Respondent provided a report and a procès verbal signed 18 May 1983 by the same Inspector Abolahrar that antedated by nearly two years his 24 February 1985 affidavit submitted to this Tribunal. The documents filed by the Respondent on 20 March 1990 recount an inspection of the records of NPO 319 by Mr. Abolahrar on 17 May 1983 and report inter alia that Office 319's income ledger indicated that document No. 25345 was a deed of admission executed by a Mr. Hekmat and not an affidavit signed by Mr. Kamal Malayeri. This conclusion was, according to the Respondent, based upon yet another "thorough" examination by Mr. Abolahrar. Thus, in its 20 March 1990 submission the Respondent abandoned Malayeri and adopted Hekmat. This submission provided, in addition to the 1983 inspection documentation noted above, an undated affidavit by Inspector Abolahrar in which he explains that he had executed his 24 February 1985 affidavit concerning Malayeri "without taking the facts into consideration." One can but marvel at how an alleged fact of central importance to this Case, apparently known and attested to in May 1983 by Inspector Abolahrar, the Iranian Ministry of Justice and the Notary Public acting in the office where the Deed was allegedly executed, came to be contradicted in a crucial 1985 affidavit filed by the Respondent in 1988, which in turn was repudiated by the Respondent in 1990.

5. The Respondent's pleadings then compounded the problem by arguing that the earlier misrepresentations should be attributed to the Claimant or his agents in Iran, who according to the Respondent altered the registration number borne by the original Malayeri document to make it the same as that of the Claimant's Deed.[2] How this explanation accounts for the Respondent's earlier misstatements is unclear; moreover, if it were so, this would mean that the Claimant, who was sponsoring before this

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[2] Visual inspection of the Malayeri document as filed with the Tribunal by the Respondent does seem to show that the fourth digit was altered to a "4" so as to make the document number coincide with that of the Claimant's Deed. It is not possible to say by whose hand this was done.

Tribunal a document (the Deed) bearing a unique registration number, deliberately created a second document with the same number, thus effectively undermining his Case. This, in my view, is an instance of the explanation being more problematical than the event being explained.

6. A second and equally perplexing example is the Respondent's 20 March 1990 proffer of a report by Inspector Ali-Akbar Rezvani which details his investigation of NPO 319 and which is heavily relied upon in respect of Respondent's forgery allegation. As originally filed with the Tribunal, the report stated that it was commissioned by an official order dated 23 May 1982. In his report Inspector Rezvani refers to the registration number and date borne by the Claimant's Deed. A quandary arose because the Respondent, which claims never to have found either the registration book in which the Deed's number and date were recorded or a copy of the Deed itself, could not have known the particulars of the missing Deed in May 1982 since this information was not filed by the Claimant with the Tribunal until 5 October 1982. That is, if the Respondent never found the registration book or a copy of the Deed, the only source of the details referred to in the Rezvani report would have been the information filed by the Claimant some months after the Rezvani report stated that he had received the commission describing the allegedly missing and non-existent Deed in detail.

7. When confronted with this inconsistency, the Respondent offered the explanation that the date appearing in both the English and the Persian versions of the Rezvani report for the commissioning order was a typographical error; according to the Respondent, the correct date of the order was 23 May 1983 (not 1982). As proof of the later date the Respondent ultimately produced a document described as Inspector Rezvani's original handwritten report, which referred to a commissioning order of 2.3.62 (23 May 1983). The Respondent also provided copies of the commissioning order and eventually the original of that order, the accuracy of which was challenged by the Claimant.

8. The above explanation by the Respondent, however, was impaired by various inexplicable omissions, additions and inaccuracies.[3] For example, the Rezvani report refers to several attachments describing the steps taken by him during his investigation. These attachments, which should have conclusively settled the date problem one way or the other, were withheld by the Respondent and never submitted to the Tribunal. More troubling still, other official documents submitted by the Respondent referred to Rezvani's commission by the 1982 date. A single typographical error -- even in a key document -- is perhaps understandable. When there are more than one, however, the evidence becomes virtually impenetrable.

9. The third example is the fact that the Respondent initially argued that the code and serial numbers imprinted on the pages of the Deed showed conclusively that they had been produced by the Government's printing office after the Deed's purported date of 15 August 1978. It later emerged, however, that there were at least two printings bearing the same code and serial numbers as the Deed, and that at least one of these was produced and made available to notarial offices well before that date. Moreover, at the Hearing the Respondent admitted that pages bearing the Deed's code, serial and sheet numbers could have been distributed before the Deed's alleged date.

10. In these and other respects the Respondent's efforts to sustain its forgery argument resulted in an array of asseverations so convoluted, contradictory and incomprehensible that the most persistent attempt to reconcile them was unlikely to succeed. While it is not necessary to perceive any deliberate attempt at deception, it is impossible to escape the conclusion that the exercise of a very modest degree of care could have avoided these conundrums. That the Tribunal ultimately concluded that the Claim must be dismissed for lack of a prima facie

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[3] The Rezvani report as originally submitted by the Respondent to the Tribunal in Persian and in English was undated. In subsequent submissions the date "12.6.1983" had been added. Elsewhere in its pleadings the Respondent referred to the report as being dated 7 January 1989.

showing of the Deed's authenticity does not alter the fact that these problems consumed much time and effort of the Tribunal.

11. In reflecting upon these anomalies it is perhaps worth noting that the inconsistencies in the Respondent's evidence and argument cannot be attributed to disarray resulting from the Iranian revolution. According to the Respondent, highly regarded professionals working with its investigative and judicial machinery were involved between 1983 and 1991 in the analysis of this Claim, which involved a massive transfer of wealth to the Government of Iran. Nevertheless, the Tribunal was presented with a maze of self-styled "errors" that raised more doubts about the Respondent's allegations than about the Deed itself. The Tribunal expended substantial time and resources in its attempt to unravel the Respondent's submissions.

12. The present question raised by this record is whether the Tribunal should take these matters into consideration in deciding whether to award costs to the Respondent as the prevailing Party. Normally, in my view, such an award is proper. See Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298 ("Sylvania"). As is recognized in Sylvania, however, the Tribunal's Rules[4] as well as ordinary prudence leave the Tribunal with a substantial degree of discretion on the matter, and the judgment of the three Chambers has been notably divergent on the issue of costs. Chamber Three has, correctly I think, awarded costs to the prevailing party when under the circumstances such an award appeared warranted. See, e.g., Development and Resources Corp. and The Government of the Islamic Republic of Iran, et al., Award No. 485-60-3 (25 June 1990), reprinted in 25 Iran-U.S. C.T.R. 21, 109-110 ("[w]ith reference to Articles 38 and 40 of the Tribunal Rules and in

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[4] Article 40, paragraph 1 provides in pertinent part:

> [T]he costs of arbitration ... shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

accordance with Tribunal precedent, the Tribunal may award reasonable costs of arbitration and, where applicable, make a reasonable apportionment of other costs").

13. While this has been its general approach, the Chamber has not always awarded costs to the prevailing party. In Eastman Kodak Company and The Government of Iran, Award No. 514-227-3 (1 July 1991), reprinted in 27 Iran-U.S. C.T.R. 3, for example, the Claimant was successful in obtaining an award of US$1,805,080.24 plus interest. Nevertheless, the Tribunal determined that each party should bear its own costs of arbitration. Moreover, where the Tribunal has dismissed a case for lack of jurisdiction, it has often left each party to bear its own costs of arbitration. See, e.g., Orton/McCullough Crane Company and Iranian State Railways, et al., Award No. 484-440-3 (25 June 1990), reprinted in 25 Iran-U.S. C.T.R. 15 (Claim dismissed on Tribunal's sua sponte determination of lack of jurisdiction; no costs awarded); see also Western Dynamics Corporation and The Government of the Islamic Republic of Iran, et al., Award No. 165-341-1 (28 February 1985), reprinted in 8 Iran-U.S. C.T.R. 49; Continental Grain Export Corporation and The Union of Consumers' Co-operatives for Iranian Workers, Award No. 243-112-1 (6 August 1986), reprinted in 11 Iran-U.S. C.T.R. 292; and The Ministry of National Defence and The Government of the United States of America, et al., Award No. 247-B59/B69-1 (14 August 1986), reprinted in 12 Iran-U.S. C.T.R. 33 (dissenting opinion of Judge Mostafavi at pp. 38-39).

14. In the Case at hand I do not believe an award of costs to be appropriate. It seems to me that the Tribunal, in approaching this determination, has a duty to take into account the degree to which the Case has been unnecessarily complicated -- and the time and energy of all concerned (Members, legal assistants, translators, et al.) wasted -- by the Respondent's representatives. Such an approach is supported by Tribunal precedent. For example, in Behring International, Inc. and Islamic Republic of Iranian Air Force, et al., Award No. 523-382-3 (29 October 1991),

reprinted in 27 Iran-U.S. C.T.R. 219, 245-46, the Tribunal stated:

> In accordance with Tribunal precedent, a Party's conduct during the arbitral proceedings may be taken into account in determining the appropriate amount of costs to award. The Tribunal on several occasions has held that a party is entitled to the reimbursement of extra costs which it was forced to bear because of the other party's inappropriate conduct.

Similarly, in William J. Levitt and Islamic Republic of Iran, et al., Award No. 520-210-3 (29 August 1991), reprinted in 27 Iran-U.S. C.T.R. 145, 185, in which the Claimant prevailed, the Tribunal stated:

> In determining the appropriate amount of costs to award, the Tribunal has on several previous occasions taken into account a party's conduct during the arbitral proceedings. See The Ministry of Defense v. The Government of the United States of America, et al., Award No. 247-B59/B69-1, pp.5-6 (15 Aug. 1986), reprinted in 12 Iran-U.S. C.T.R. 33, 36; International Schools, Award No. 290-123-1 at para. 49, reprinted in 14 Iran-U.S. C.T.R. at 80.

15. While vigorous argumentation is understandable and expected, chimerical theories and careless contradictions -- whether they are a product of overzealous lawyering or other questionable behavior -- are not acceptable. Such conduct, which in some jurisdictions could lead to severe sanctions imposed by the court, should not be excused or endorsed by this Tribunal through an award of costs.

Dated, The Hague
2 March 1993

Richard C. Allison