

100-79
100-79

ORIGINAL DOCUMENTS IN SAFE

Case No. 100

Date of filing: 13 July 84

** AWARD - Type of Award FINAL
- Date of Award 13 July 84
17 pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

- Date _____
_____ pages in English _____ pages in Farsi

HOOD CORPORATION,

Claimant,

-and-

THE ISLAMIC REPUBLIC OF IRAN,
BANK MARKAZI IRAN and BANK
MELLAT,

Respondents.

AWARD

Appearances:

For Claimant:

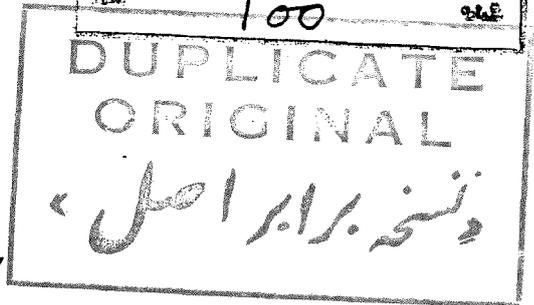
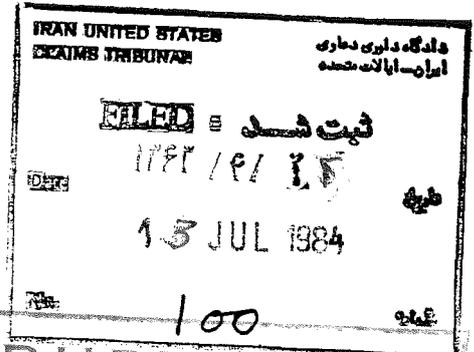
Mr. W.L. Craig,
Attorney
Mr. Floyd Smith,
Vice-President, Hood
Corporation

For Respondents:

Mr. Mohammad K. Eshragh,
Deputy Agent of the Islamic
Republic of Iran
Mr. Khosrow Tabasi,
Legal Adviser to the Agent
Mr. Hasan Moadi,
Attorney for Bank Mellat
Ms. Fatemeh Shirvani,
Bank Mellat
Mr. Hossein Ali Farzad,
Bank Markazi

Also present:

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



I. THE PROCEEDINGS

On 18 November 1981, Claimant HOOD CORPORATION ("Hood") filed a Statement of Claim against Respondents THE ISLAMIC REPUBLIC OF IRAN, BANK MARKAZI IRAN ("Bank Markazi") and BANK MELLAT (formerly Iran-Arab Bank) requesting an award of (a) US \$1,952,871 representing the alleged value of funds deposited in rials in Hood's account with Bank Mellat and interest thereon accrued by 15 November 1979, and (b) US \$501,416 representing amounts due under a letter of guarantee, together with (c) interest and costs of arbitration. On 15 March 1982, the Respondents filed Statements of Defence, and a Counterclaim seeking cancellation of the letter of guarantee and costs. On 14 May 1982, Hood submitted its Reply to the Counterclaim and to the Statements of Defence.

On 25 June 1982, the Tribunal scheduled a Hearing to be held on 28 October 1982 and ordered the parties to file by 30 August 1982 written submissions, including memorials on legal issues and a specification of documents and witnesses to be presented at the Hearing. By its Order of 9 July 1982, the Tribunal rescheduled the Hearing for 26 November 1982. Hood filed its materials on 30 August and a Hearing Memorandum on 22 November 1982. Respondents filed materials on 7 September 1982 and additional materials on 19 November and 24 November 1982.

At the Hearing, Respondents presented further written material and withdrew the Counterclaim to cancel the letter of guarantee. At the Hearing Respondents asserted, for the first time, that the Tribunal has no jurisdiction over the claim relating to the bank guarantee since according to Respondents that claim was not outstanding on the date of the Claims Settlement Declaration, 19 January 1981.

On 18 March 1983, Respondents filed supplemental written pleadings. As this filing was not authorized, fairness, orderliness and possible prejudice to the other party require that the Tribunal disregard that submission.

II. THE PARTIES' CONTENTIONS

1. Claimant's contentions

Hood sets out the factual background to its claims as follows:

In 1975, the National Iranian Oil Company ("NIOC") requested bids from international contractors for construction work in connection with pumping stations along an oil pipeline. Hood bid on the contract in conjunction with a local Iranian contractor, Norm Engineering and Construction Company ("Norm"). The bid was accepted and Hood entered into a contract with NIOC on 30 December 1975 ("Hood-NIOC Contract"). Shortly thereafter Hood and Norm formed an Iranian private joint stock company named Hood-Norm Company ("Hood-Norm") for the purpose of acquiring material and providing engineering and construction services in connection with the construction of pumping stations required by the Hood-NIOC contract. Hood owned 55 per cent of the shares of Hood-Norm and Norm the remaining 45 per cent. Hood assigned all of its rights under the Hood-NIOC contract to Hood-Norm. NIOC accepted the arrangement, and all payments under the contract were made by NIOC to Hood-Norm.

The Hood-NIOC contract provided that payments to Hood would be made in specified percentages of specified currencies. A large initial payment was supposed to be made in US Dollars. Hood-Norm, however, permitted NIOC to make a larger percentage of payments in rials than required by the

Agreement. Over the period of 1975 to 1979, in connection with the acquisition of permanent job materials to be incorporated into the pumping stations, Hood advanced US Dollars to Hood-Norm to enable Hood-Norm to purchase such materials in the United States and other countries to be shipped to Iran and used there by Hood-Norm for construction of the pumping stations. During this same time period, Hood-Norm maintained bank account in the Iran-Arab Bank (now Bank Mellat, Hejrat branch). On several occasions during this period, with the assistance of the Iran-Arab Bank, Hood-Norm converted progress payments it received from NIOC in rials into US Dollars and transferred those funds to Hood's bank account in the United States to effectuate repayment of some of these advances.

By mid-1979, the first two stages of the pumping station project had been virtually completed, including the engineering for the project and the acquisition and shipment of imported materials and equipment. Hood and Hood-Norm continued to render services after the Revolution and after most American companies had ceased doing work in Iran. NIOC made all of its required payments.

In the middle of 1979, Norm indicated its desire to take over the project. Accordingly, Hood and Norm began to negotiate Hood's withdrawal from the project by having Hood relinquish its interest in Hood-Norm for consideration. On 7 October 1979, Hood and Norm executed a written agreement whereby Hood was to transfer all of its shares of stock in Hood-Norm and other rights in connection with the NIOC contract to Norm (or in the case of the stock, to Norm's shareholders) in return for an immediate payment by Norm to Hood in the amount of 137,000,000 rials ("first payment") and a payment from Norm to Hood to be made "at project hand

over time but in no event later than" two years from the date of the agreement, in the amount of 35,400,000 rials ("second payment").¹⁾ The second payment was to be secured by the posting of an irrevocable bond for the 35,400,000 rials.

The Hood-NIOC contract was assigned to Hood-Norm, with the consent of NIOC.

Hood asserts that the 137,000,000 rial amount of the first payment in effect covered unpaid advances by Hood to Hood-Norm and additional dollar expenses that Hood would incur in connection with assisting Hood-Norm in performing the NIOC contract. According to Hood, the unpaid advances were based on invoices for goods and services provided by Hood in connection with performance of the NIOC contract.

According to Hood, the second payment reflected for the most part an agreed upon amount for the value of the shares in Hood-Norm. This contract, providing for the payment in rials, was made at a time when Iran was restricting the exchange of money.

¹⁾ The agreement stipulated inter alia as follows:

"Hood hereby agrees to assign to Hood-Norm all of its rights and obligations under the Contract, including all its receivable funds from NIOC, retention funds, interests, incomes, profits and losses resulting from the entire Project... and to transfer all its shares and interests in Hood-Norm to the shareholders of Norm for a consideration of... [172,400,000 rials]"

In connection with the first payment Norm delivered to a representative of Hood in Iran, Mr. Floyd Smith, a 137,000,000 rial cheque drawn on the Iran-Arab Bank. On 14 October 1979, Hood opened a 31 day time deposit account with Iran-Arab Bank. Under the terms of the deposit contract, funds deposited in the account were to earn interest at the annual rate of 7 ½ per cent. On the same date Hood deposited the 137,000,000 rial cheque in that account.

By telex of 30 November 1979 sent to Iran-Arab Bank, Hood requested the transfer of the entire principal of its time deposit account and accrued interest thereon to Hood's account at a bank in Munich, West Germany, which monies were apparently to be converted into Deutschmarks. By telex dated 1 December 1979, Iran-Arab Bank answered Hood that any transfer from the account required the permission of Bank Markazi. After an exchange of several telexes regarding transfer from the account, Hood finally received information from Bank Mellat, Hejrat branch, on 23 May 1981 to the effect that Bank Markazi would not authorize such a transfer.

Hood contends that it had a right to repatriate the deposited amount of 137,000,000 rials plus accrued interest on 30 November 1979. Hood claims that Iran-Arab Bank and its successor Bank Mellat had an obligation to act promptly in the interest of its client Hood to obtain the authorization required to repatriate that amount. The claim against Bank Mellat is based on the alleged failure, by negligence, of the two banks to fulfill their obligation.

Hood further contends that the refusal of the competent governmental authority, Bank Markazi, to permit repatriation of the bank funds was a violation of Iranian law, namely the Law Concerning the Attraction and Protection of Foreign Investments in Iran ("Foreign Investments Law"), and of international law, including a breach of Article IV, paragraph 2, and Article VII, paragraphs 1 and 2, of the Treaty of Amity, Economic and Consular Rights between the United

States of America and Iran ("Treaty of Amity") and the International Monetary Fund ("IMF") Agreement. Hood also asserts that Respondents had allowed repatriation of monies in the past and that they should therefore be estopped to prevent the repatriation of the monies now in question. In this connection Hood further asserts that during the negotiations regarding the sale of Hood's interest in Hood-Norm, and also when Mr. Smith deposited the cheque, representatives of Iran-Arab Bank gave assurances that the monies would be repatriated.

As a further basis for Bank Markazi and the Government of Iran being liable under the claim, Hood asserts that the use of exchange controls to prevent Hood from repatriating its property constituted an expropriation for which Hood is entitled to indemnification.

With regard to second payment, Hood made a telex request to Norm on 25 September 1981 for payment of the agreed amount of 35,400,000 rials. By 7 October 1981, which was the deadline for Norm's performance, Norm had not paid any of that sum. Accordingly, on 7 October 1981, Hood made a telexed demand on Bank Mellat Hejrat to perform its obligation under the letter of guarantee. Bank Mellat Hejrat did not respond to this demand, and the amount is still outstanding.

In 1980, Hood commenced a civil action in a United States Court against Respondents, seeking payment of US \$1,945,000 for the 137,872,671 rials and US \$502,576 for actions rendering the second payment of 35,400,000 rials and the letter of guarantee worthless. Claimant also obtained attachments in connection with such claims. The attachments were removed and the case stayed by virtue of the Algiers Declarations.

Hood claims that on 30 November 1979 Iran-Arab Bank anticipatorily repudiated its obligations under the letter of guarantee since it was clear on that date that the bank

did not intend to respect its obligations under the letter of guarantee and that, because of such anticipatory repudiation, Hood had a right to be paid and repatriate funds relating to the letter of guarantee. Hood further maintains that the Government of Iran and Bank Markazi are liable under the claim for the second payment on the same grounds as those argued by Hood in connection with the claim for the first payment.

2. Respondents' contentions

Respondents contend that Iran's exchange controls and the actions of Iran-Arab Bank and Bank Mellat thereunder were legal, arguing, inter alia, that the Treaty of Amity is no longer in force because it was breached through actions of the United States. Respondents further contend that Hood knew or should have known of the exchange restrictions when it received the monies; that the obligation secured by the letter of guarantee did not mature until after the date of the Algiers Declaration so that the Tribunal has no jurisdiction over the claim for the second payment; and that in any event the original letter of guarantee was returned to Bank Mellat for cancellation and therefore it has no further obligation with respect thereto.

III. JURISDICTION

Claimant, being a corporation 50 per cent or more of whose shares are owned by United States citizens, is a national of the United States as defined by Article VII, paragraph 1 of the Claims Settlement Declaration. Respondents as the Government of Iran and political subdivisions, agencies or instrumentalities thereof, clearly constitute "Iran" as that term is defined in Article VII, paragraph 3, of the Claims Settlement Declaration.

The claim is one brought by a national of the United States against Iran arising "out of debts, contracts

(including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights" as required under Article II, paragraph 1, of the Claims Settlement Declaration.

The remaining issue to be dealt with concerning jurisdiction is whether the claim for the second payment is one that was "outstanding on the date of the agreement", 19 January 1981. The 7 October 1979 agreement between Hood and Norm provides for an irrevocable bond for 35,400,000 rials in favour of Hood Corporation. That agreement further provides that "the value of bond shall belong to Hood and shall be paid directly to Hood at project hand over time - but in no event later than two (2) years from the date of this agreement". The letter of guarantee, dated 21 October 1979, issued by the Iran-Arab Bank was termed accordingly.

Neither party has alleged that the "project hand over time" in fact occurred before the maturity date stipulated in the letter of guarantee, that is 7 October 1981. Thus the payment under the letter of guarantee was to be made if Norm had failed to make the second payment on that date. Nor has it been alleged that Norm's payment obligation matured before 7 October 1981. Instead, Hood's argument is that Iran-Arab Bank breached its obligations under the letter of guarantee as it became evident already as from 30 November 1979, the date when Hood requested the transfer of the first payment, that the bank would not fulfill those obligations. As it has not been contended that Hood at that time contacted the bank regarding the letter of guarantee, Hood's argument apparently is based on the information given by the bank in its telex of 1 December 1979 that any transfer from Hood's deposit account (the first payment) required the permission of Bank Markazi.

Hood's argument, however, is not on point. Under the terms of the guarantee the bank's obligation was to make payment in rials, and there is no showing that it was implied that payment under the guarantee was to be made in

any other currency. In view of this, the Tribunal finds no ground for holding that the guarantor's obligation fell due at any date prior to the maturity date expressly stipulated in the guarantee, 7 October 1981, because of an anticipatory breach.

In light of the above, the Tribunal finds that the claim against Bank Mellat cannot be held to have been outstanding on 19 January 1981, as required in order to vest the Tribunal with jurisdiction over that claim under the Claims Settlement Declaration.

IV. THE MERITS OF THE CLAIM FOR THE FIRST PAYMENT

1. Question of liability of Bank Mellat

The claim against Bank Mellat is based on the allegation that Iran-Arab Bank and subsequently Bank Mellat acted negligently in not seeking promptly to obtain the necessary authorization for the requested transfer to Hood's bank account in West Germany of the rial amount deposited.

On this point, the evidence shows, inter alia, that on 30 November 1979 Hood requested Iran-Arab Bank to transfer the funds; that on 1 December 1979 the bank answered that such transfer required Bank Markazi's permission; that a number of telexes were then exchanged between Hood and the bank; that in March 1981 Bank Mellat requested permission of Bank Markazi for transfer of the funds; and that in May 1981 Bank Markazi refused to give such permission.

The submitted telexes show that, despite Hood's inquiry as to what action it was expected to take with regard to the requested transfer, the banks did not advise their client of any such action. The Tribunal considers that under such circumstances Hood would have been justified in assuming that the banks, having received Hood's request for transfer of the deposited funds to a foreign bank, would take the

necessary steps to seek to obtain the required permission for such transfer. It appears from the evidence that this was eventually done, but not until March 1981, close to 16 months after Hood's request. In view of this it is arguable that the banks did not comply with proper banking procedures in seeking to obtain Bank Markazi's permission.

However, there is no sufficient evidence that Hood suffered damage as a result of any possible negligence, as there is no showing that the required permission, which was denied in May 1981, would have been granted by Bank Markazi at any earlier point of time after Hood's request to Iran-Arab Bank on 30 November 1979. In this connection, the Tribunal notes that the relevant Bank Markazi circulars concerning foreign currency exchange had been issued already in November 1978 and May 1979 (see below at IV 2(b)). In view of the above, the Tribunal finds that the claim against Iran-Arab Bank/ Bank Mellat cannot be granted.

2. Question of liability of the Government of Iran and Bank Markazi

(a) Alleged violation of Iranian Law

Hood argues that it is entitled to transfer of the amount of the first payment by virtue of the Foreign Investments Law which was adopted in Iran in 1955.

Hood has, however, not shown or even alleged that it met with the requirements laid down in the Foreign Investments Law. In light of this, the Tribunal is not satisfied that Hood is entitled to transfer of the deposited amount by virtue of the Foreign Investments Law.

(b) Alleged violation of the International Monetary Fund Agreement

Hood has argued that the exchange controls imposed by Iran were in violation of Iran's obligations under the IMF Agreement of which Iran is a member. Hood particularly refers to Article VIII, Section 2(a), which limits the power of member states to "impose restrictions on the making of payments and transfers for current international transactions", and to Article VI, Section 3 (quoted below), which deals with capital movements.

Respondent Bank Markazi states that Iran never joined Article VIII of the IMF Agreement and that, thus, the obligations under that Article are not binding on Iran. Bank Markazi further argues that Iran has advised IMF about its own exchange control regulations in accordance with Article XIV, Section 2, and that IMF has taken no objection to such regulations.

The Tribunal notes that under Article II (c) of the Banking and Monetary Law enacted in Iran in 1972, Bank Markazi is empowered, inter alia, to formulate regulations pertaining to foreign exchange transactions and to control such transactions.

On 14 November 1978 Bank Markazi issued a Circular to International Bank of Iran (No. Na/11600) and a list attached to this Circular. It appears that this Circular was also addressed to other Iranian banks. The attached list specifies to what extent and under what circumstances banks are allowed to sell foreign exchange in different types of cases. The items of particular interest in this case are Nos. 4 and 14. Item 4 of the list provides, inter alia, that sale of foreign exchange for services by virtue of concluded agreements between domestic and foreign firms requires the confirmation of Bank Markazi. Under Item 14, sale of commercial foreign exchange for purposes other than those mentioned in the list is in each case subject to prior approval of Bank Markazi.

A Bank Markazi Circular issued on 5 May 1979 (Na 5/2090), which purported to supersede all previous circulars issued by Bank Markazi in this connection, likewise provided, in Item 6, for approval of Bank Markazi in cases of sale of foreign exchange for services rendered under contracts between domestic and foreign agencies.

In determining whether the currency regulations embodied in the above circulars were issued in violation of the IMF Agreement it is of particular interest to note Article VI, Section 3 of the Agreement which reads:

"Controls of capital transfers. - Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3 (b), and Article XIV, Section 2".²⁾

2) Article VII, Section 3(b) provides for the possibility of imposing temporary limitations on the freedom of exchange operations in a currency which IMF has declared scarce. Article XIV, Section 2, deals with exchange restrictions regarding current transactions for members during a transitional period. Neither of these Sections is relevant in the present case.

The concept of "current transactions" is defined in Article XIX(d) of the IMF Agreement as follows:

"Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation:

- (1) all payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;
- (2) payments due as interest on loans and as net income from other investments;
- (3) payments of moderate amount for amortization of loans and for depreciation of direct investments; and
- (4) moderate remittances for family living expenses."

The distinction between capital and current transactions is not an easy one. The amount in question was paid to Hood in consideration for "shares and interests" in Hood-Norm which Hood sold to Norm under the 7 October 1979 agreement. Regardless of the original source of the monies the transaction appeared to be cast as a capital one. The parties presented virtually no material on the definitions of "current" and "capital" transactions. In the absence of any material on this subject, the Tribunal finds that the amount represents payment for capital rather than payment for any transaction that could be termed "current" under the definition given in Article XIX(d) of the IMF Agreement. This being so, the Tribunal finds that the amount deposited should be viewed as remuneration for the transfer of capital. Consequently, based on the material before the Tribunal, it would appear that Article VI, Section 3 of the IMF Agreement applies here. That provision gives the members freedom in principle to exercise exchange controls with regard to capital transfers.

In conclusion, the Tribunal holds that Iran's Exchange restrictions insofar as they are relevant to the present case, were not imposed in violation of the IMF Agreement. The claim for the first payment therefore cannot be granted on the basis of such violation.

(c) Alleged violation of Treaty of Amity

Hood argues that the restrictive practices of Bank Markazi constitute a taking of the bank deposit, for which taking Hood is entitled to just compensation under Article IV, paragraph 2, of the Treaty of Amity, and violate the exchange control provisions of the Treaty.

The general provision concerning exchange restrictions in Article VII, paragraph 1, reads:

"Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to assure the availability of foreign exchange for payments of goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund."

The more specific provision in Article VII, paragraph 2 provides, in its relevant part, as follows:

"If either High Contracting Party applies exchange restrictions, it shall promptly make reasonable provision for the withdrawal, in foreign exchange in the currency of the other High Contracting Party, of ... (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, depreciation of direct investments and capital transfers, giving consideration to special needs for other transactions."

Prior to 19 January 1981 the Claimant only made a request for the transfer of its funds into a Deutschmark account in Germany. As it made no request for the transfer of its funds to the United States or into U.S. Dollars by the appropriate time³, Article VII of the Treaty of Amity is by its terms not applicable. The Tribunal has no jurisdiction over claims arising from requests after 19 January 1981. Claims Settlement Declaration Article II, paragraph 1. In light of the above, the Tribunal does not have sufficient evidence of a taking of the funds.

In view of the above findings, there is, for purposes of resolving the present dispute, no need to deal with the question whether the Treaty of Amity is valid.

(d) Hood's argument concerning estoppel

Hood has argued that since Respondents had allowed repatriation of monies in the past, they should now be estopped from preventing the bank deposit to be repatriated. The Tribunal does not accept this argument. There is no evidence that Hood had made any previous capital transfer out of Iran. Moreover, accepting Hood's argument could in effect mean that lawful exchange restrictions were made ineffective in individual cases and might thus constitute an infringement on the powers of sovereign states.

There is insufficient evidence that representatives of Iran-Arab Bank gave assurances that the deposited monies could be later repatriated, as contended by Hood. Moreover, even if such assurances were in fact given, this would not

³ The commencement of a civil action in the United States based on alleged prior actions of Respondents does not satisfy the demand requirement. As to the requirement for a proper request, see Schering Corporation v. The Islamic Republic of Iran, Award No. 122-38-3 (16 April 1984).

in this case supersede the exchange restrictions imposed by Iran.

3. Costs

In the circumstances of this case, and applying Articles 38 and 40 of the Tribunal Rules, the Tribunal holds that each Party should bear its own costs of arbitration.

V. AWARD

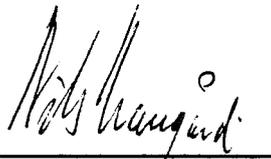
THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

The Claims of Claimant HOOD CORPORATION are dismissed.

The Counterclaim is terminated on the basis of Respondents' withdrawal.

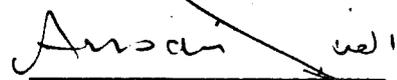
Each Party shall bear its own costs of this arbitration.

Dated, The Hague
13 July 1984

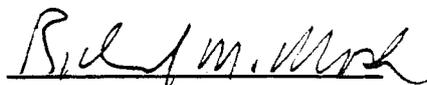


Nils Mangård
Chairman
Chamber Three

In the Name of God



Parviz Ansari Moin



Richard M. Mosk
Dissenting Opinion