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CLAIMS TRIBUNAL

دیوان داری دعاوی ایران - ایالات متحدہ

ORIGINAL DOCUMENTS IN SAFE

Case No. 53

Date of filing: 6 March 86

** AWARD - Type of Award Final
- Date of Award _____
11 pages in English 11 pages in Farsi

** DECISION - Date of Decision _____
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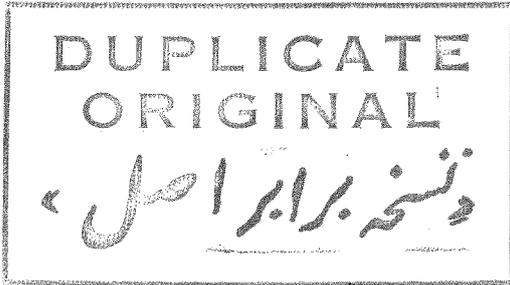
** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
- Date _____
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- Date _____
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CASE NO. 53

CHAMBER ONE

AWARD NO. 216-53-1

BLOUNT BROTHERS
CORPORATION,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
BANK TEJARAT, BANK SADERAT,
BANK REFAH KARGARAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران - ایالات متحدہ	
ثبت شد - FILED		
Date	6 MAR 1986 ۱۳۶۴ / ۱۲ / ۱۵	تاریخ
No.	53	شماره

AWARD

Appearances:

For the Claimant:

Mr. A.K. Gaede

Mr. L.B. Davis

Attorneys,

Mr. J.T. Honan,

Representative of

Blount Brothers

Corporation,

For the Respondents:

Mr. M.K. Eshragh

Agent of the Government

of the Islamic Republic
of Iran,

Dr. S.K. Khalilian
Adviser to the agent,
Mr. H. Gholami
Assistant to the Agent
Mr. S. Nazari
Banking Adviser to the
Agent,
Mr. M. Kakavand
Representative of Bank
Tejarat, Bank Saderat and
Bank Refah Kargaran.

Also present:

Mr. J.R. Crook
Agent of the Government
of the United States of
America.

1. The Proceedings

On 16 November 1981, the Claimant Blount Brothers Corporation ("BBC") filed with the Tribunal a claim against the Respondent, The Government of the Islamic Republic of Iran, seeking damages of U.S. \$262,514 representing the balances of seven bank accounts held at four Iranian banks in the name of BBC itself or of its Iranian subsidiary, BCJ Development Co. ("BCJ").¹ Interest and legal costs are also claimed.

¹ It was agreed by the Parties and confirmed by the
(Footnote Continued)

The claim was expressed to be based on the alternative theories of breach of contract by the banks themselves; expropriation of BBC's 90% interest in BCJ, including its bank accounts; and of interference with contractual rights on the part of the Government. The same facts are relied upon in support of each line of argument.

Statements of Defence were filed by the Government of the Islamic Republic of Iran, Bank Tejarat, Bank Saderat and Bank Refah Kargaran. A pre-hearing conference was held on 3 December 1982. In a brief filed on 30 October 1984, Bank Tejarat raised a counterclaim in respect of BCJ's alleged tax liability of 11,473,813 rials for which a Garnishment Order had been served on the bank on 9 October 1983. After further exchanges of pleadings between the Parties, an oral hearing was held on 17 September 1985.

Mr. Richard M. Mosk participated in the hearing and Award in this Case pursuant to Article 13, paragraph 2 (as amended) of the Tribunal Rules and pursuant to an agreement between the Governments of the Islamic Republic of Iran and the United States of America.

2. Facts and Contentions of the Parties

BBC is a building construction corporation organized under the laws of the United States of America. It began doing business in Iran in 1974, and undertook four construction projects, one of which involved the provision of housing for workers in Bushehr. An Iranian subsidiary, BCJ, 90% of which was owned by BBC, was formed for the purposes of that project. The bank

(Footnote Continued)

Tribunal at the hearing of this case that the successor to two of the banks originally involved, Bank Etebarate and Iranian's Bank, namely, Bank Tejarat, be named as Respondent together with Bank Saderat and Bank Refah Kargaran, in addition to the Government.

accounts which are the subject of the present claim were opened and operated in connection with the Bushehr development. The claim concerns the following bank accounts:

<u>Bank</u>	<u>Account No.</u>	<u>Owner</u>	<u>Denomination</u>	<u>Amount</u>
1) Iranians Bank	71051-2	BBC	US \$	\$ 1,729
2) Iranians Bank	60670	BBC	Rials	R 5,699,130
3) Iranians Bank	313	BBC	Rials	R 355,191
4) Etebarate	01-85871	BCJ	Rials	R 11,967,171
5) Etebarate	673	BCJ	Rials	R 55,038
6) Saderat	-	BCJ	Rials	R 36,380
7) Refah Kargaran	50731	BCJ	Rials	R 6,972

With the exception of the Bank Saderat account, the existence and balances of the said accounts are not disputed.

BBC relies principally on the theory of breach of contract. It makes this claim both in its own right and indirectly, pursuant to Article VII, paragraph 2 of the Claims Settlement Declaration as the owner of 90% of the stock of BCJ. It alleges that the Respondent banks were contractually obliged to allow the withdrawal of funds on demand, but that when attempts were made to transfer certain amounts into BBC's U.S. dollar account in the United States, the banks failed to comply with their obligations. BBC alleges that insofar as the refusal to transfer funds was based upon exchange controls imposed by the Central Bank of Iran (Bank Markazi), such restrictions were in breach of

the Treaty of Amity² because they were imposed without the approval of the International Monetary Fund.

The Respondents contend that the Tribunal has no jurisdiction over the claims insofar as they relate to accounts held by BCJ, an Iranian corporation on whose behalf no indirect claim can lie. They argue, further, that there is no evidence of demands having been made - and refused - to repatriate the funds prior to 19 January 1981 such as would have given rise to an "outstanding" claim within the meaning of the Claims Settlement Declaration. Finally, they assert that the funds are still available to the respective account holders and that there is no question of the accounts having been expropriated.

3. Reasons for Award

It is well settled from previous cases before this Tribunal that the mere ownership of money in a bank account gives rise to a contractual right to payment, but does not of itself fall within the definition of Article II, paragraph 1 of the Claims Settlement Declaration as being a claim "outstanding on the date of this Agreement, whether or not filed with any Court". Thus the Claimant must establish that the claim, as it presently stands before the Tribunal,³ had crystallized by that date.

Evidence was presented to the Tribunal at the hearing by Mr. Henry Quade and Mr. Terry Honan, respectively the Operations Manager and the Project Manager for BBC on the Bushehr project at the material time, about the conduct of the various bank accounts held by BBC and BCJ, for which they had responsibility.

² Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957.

³The claim was pursued at the hearing as one based on breach of contract; no further evidence or argument was offered by the Claimant as to expropriation.

Each of the accounts was used to serve a particular function in financing the Bushehr project. When the overall balance in Rials exceeded BBC's current requirements, Mr. Quade explained, the surplus would be remitted in dollars, through the main Iranians' Bank account no. 60670, to BBC's account in the United States, with Bank of America. Prior to November 1978, Mr. Quade said, no problems had been encountered in the repatriation of funds in this manner. The first intimation of difficulty with such a transfer came in November 1978, when Bank of America reported that it had been unsuccessful in its attempts to obtain Rials from the Iranians' bank account to cover the dollars with which it had credited BBC's account in the United States. That transaction did not form part of the present claim.

There followed a period during November and December 1978 and January 1979, when, according to the Claimant's witnesses, strikes, closures and demonstrations seriously disrupted BBC's normal banking practices. Even routine operations such as paying subcontractors became difficult when the banks were frequently closed. The witnesses told how, even when the banks were open, they were evidently suffering from shortages in the supply of cash with which to meet their customers' cheques, and shortages of staff to process even routine transactions.

Mr. Quade explained that contact with the banks was maintained by personal visits on the part of BBC's office manager. In December 1978, the office manager was instructed to visit Iranians' Bank and try to arrange a forthcoming transfer of 50 million Rials from account no. 60670 to the United States. There is no record either of the making of this request, or of any steps being taken as a result of it; but no such transfer was ever completed.

When asked by a member of the Tribunal what form this request took, Mr. Quade replied that such requests to the bank were invariably made verbally, and were never reduced to writing.

Mr. Honan was responsible for the financial management of the Bushehr project until he returned to the United States in October 1978. Thereafter, he stated, he was closely involved in efforts to repatriate BBC's funds from Iran, and was aware of the steps which had been taken, and which continued to be taken by BCJ's Iranian employees during 1979.

Mr. Honan described the attempts made by BBC to try to repatriate the funds. Apparently on the advice of Bank of America, two letters were written to the Foreign Exchange Control Department of the Central Bank of Iran (Bank Markazi), Tehran. The first, dated 27 July 1979, requested approval for the transfer into dollars, of 14,500,000 Rials on Account No. 85871 held in the name of BCJ at Bank Etebarate. The second, dated 23 October 1979, merely referred to "our rial bank account in Tehran", and specified neither the account number nor the amount for which the transfer permission was required. Neither letter brought forth any response. Indeed, at the hearing, it was denied that either letter had been received.

Prior to this, by letter of 2 April 1979, BCJ itself had approached Credit Lyonnais in New York and sought their help in repatriating funds from the same Bank Etebarate account. Credit Lyonnais was unable to offer any assistance.

There is no record of any written communications in this connection with the banks at which the accounts were held, nor did Mr. Quade or Mr. Honan recall that any such approaches had ever been made other than verbally. After the events of November 1979, no further attempts were made to move funds from Iran; though a claim in respect of certain of the bank accounts was included in proceedings commenced by BBC in the U.S. Courts. There were, however, continued transactions on some of the accounts, and in particular, cheques were being drawn on BBC's Iranians Bank Account No. 60670 as late as November 1980 most of which were cleared.

It was held in the case of Harza Engineering Company and The Islamic Republic of Iran (Award No. 19-98-2 of 30 December 1982, reprinted in Iran-United States C.T.R. Vol. 1, p. 499) that, "[A] mere right to payment from a bank account is not a "claim" within the meaning of the Claims Settlement Declaration, but a claim that the use of the account has been interfered with unreasonably or that the account has in some other manner been taken is such a claim" (at p. 504). That case, unlike the present one, was pleaded substantially as one of expropriation, and concerned the alleged interference with the Claimant's rights to draw on its Iranian bank account. The issue of repatriation of funds did not arise.

Another case to come before the Tribunal which raised broadly similar issues was the case of Schering Corporation and The Islamic Republic of Iran (Award No. 122-38-3 filed on 16 April 1984). Here, the Claimant alleged, inter alia, that Bank Markazi had wrongfully refused to allow Foreign Trade Bank of Iran to pay two bank drafts in dollars in favour of two subsidiaries of the Claimant. The claim was upheld on the grounds that Bank Markazi's refusal was not based on, or justified by, existing provisions of Iranian law.

But the Tribunal finds that there is an important distinction between the Schering case and the facts surrounding the present claim. In the Schering case, two drafts had been drawn and an application for transfer made to Bank Markazi with specific reference to these drafts. There was thus no question of the existence of an outstanding claim.

The present case can be distinguished, in the Tribunal's view, by the complete and striking absence of any written request for transfer of the specific moneys requested, to any of the banks where the accounts were actually held. Moreover, there is evidence that cheques were written on some of the accounts and honoured, events inconsistent with alleged efforts to repatriate all funds. Although, as was known to BBC, permission for the

transfer itself had to come from Bank Markazi, it would seem necessary, in order to found an actual claim against the account - holding banks themselves, that there be evidence of some request having been made to them to take steps to process the transfer for which permission was being sought. This must be especially true in the case of sophisticated company personnel, who, by their own admission, had available to them the advice of banking experts. It would surely require some attempt by BBC or BCJ to make a specific disposition of identifiable funds, the refusal of which might either constitute a breach of contract on the part of the account banks, or, alternatively, give rise to a claim for contractual interference against Bank Markazi.

There is evidence in the present case of one specific request to Bank Markazi concerning Account No. 85871 at Bank Etebarate - the letter of 27 July 1979. The other written request to Bank Markazi, the letter of 23 October 1979, was made by Blount International, Ltd. and was framed in such general terms as to be impossible of consideration by Bank Markazi without further clarification.

It is axiomatic that the duties of a banker to honour its customer's cheques and make such dispositions or transfers as are requested, only crystallize into a specific obligation once a cheque is presented or a request is made with respect to particular funds. Otherwise, the balance remains in the account, untouched - precisely the state of affairs which, the Parties agree, exists at the present time.

The Tribunal therefore concludes, on the specific facts of this case, that there is insufficient evidence of demands having been made on the banks at which the respective accounts of BBC and BCJ were held to support a finding that an "outstanding claim" existed as at 19 January 1981.

This conclusion is not affected by the oral evidence offered at the hearing that claims based on some of the same bank accounts

formed part of a lawsuit commenced prior to that date in the United States. This evidence was offered in order to rebut the statement, made on behalf of the Respondents, that Bank Markazi never received the two letters addressed to it. The statement made on behalf of BBC was not sufficiently specific as to identify the particular amount, and accounts, in respect of which relief was sought in the U.S. proceedings, with those which are the subject of the present claim. Nor can the Tribunal accept as evidence a copy of the stipulation as to service of process in the same United States court proceedings, a substantial document which the Claimant produced for the first time and sought leave to file during the hearing. The Tribunal therefore leaves open the question whether the result would have been influenced by that document had it been submitted timely.

Given the conclusion of the Tribunal on this point, it is not necessary to address the issues raised concerning BBC's nationality or its entitlement to bring an indirect claim based on its 90% ownership of the stock of BCJ.

The Counterclaim

The Counterclaim filed by Bank Tejarat refers to an attachment, or garnishment, of BBC's accounts up to an amount of 11,473,813 Rials in respect of alleged tax debts. It is supported by reference to a copy of a "Decision of Assessment Committee" dated 30 September 1982 whereby the garnishment of the said accounts was authorized. However there is no evidence that the underlying liability was incurred or notified before 19 January 1981 so as to give rise to an outstanding claim. There is thus no need to address the jurisdictional questions of whether the claim, as one based on the operation of Iranian municipal law, is one which can properly be brought before this Tribunal; or the issue of whether it can be said to arise out of the same contract, transaction or occurrence as the principal claim.

Costs

In a brief filed on 8 October 1984, the Government of the Islamic Republic of Iran requested an award of "costs and attorney's fees". However, since this request remains unsubstantiated by documentation, the Tribunal is not in a position to make such an award in this Case.

For the foregoing reasons,

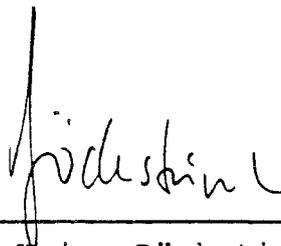
THE TRIBUNAL DETERMINES AS FOLLOWS:

The Claim of BLOUNT BROTHERS CORPORATION against THE ISLAMIC REPUBLIC OF IRAN, BANK TEJARAT, BANK SADERAT and BANK REFAH KARGARAN is dismissed.

The Counterclaim of BANK TEJARAT against BLOUNT BROTHERS CORPORATION is dismissed.

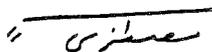
Each Party shall bear its own costs of the arbitration.

Dated, The Hague
28 February 1986



Karl-Heinz Böckstiegel
Chairman
Chamber One

In the name of God



Mohsen Mostafavi
Separate Opinion on
Costs



Richard M. Mosk
Dissenting Opinion