IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

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Case No. 149 Date of filing 10 June 1983

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✓ AWARD. Date of Award 10 June 1983

13 pages in English. 11 pages in Farsi.

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

[redacted]

CASE NO. 149
CHAMBER ONE
AWARD NO. 53-149-1

MARK DALLAL,
Claimant,
and
ISLAMIC REPUBLIC OF IRAN,
BANK MELLAT (formerly
INTERNATIONAL BANK OF IRAN),
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date ۱۳۶۲/۳/۲۰ تاریخ
10 JUN 1983
No. 149 ۱۴۹ شماره

AWARD

Appearances:

For the Claimant:

Mr. Richard D. Coopersmith,
Coopersmith & Coopersmith, New York.

For the Respondents:

Mr. Mohammad K. Eshragh,
Agent of the Islamic Republic of Iran,
Mr. Hossein Safai,
Legal Adviser to the Agent of the
Islamic Republic of Iran,
Mr. M. H. Maadi,
Representative of Bank Mellat

Mr. Rackvel,
Assistant to the Representative of Bank Mellat.

Also present: Mr. Arthur W. Rovine, Agent of the United States of America.

I. FACTS AND CONTENTIONS

The Claimant in this case, Mr. Dallal, contends that he in January 1979 received and is the lawful holder of two cheques drawn by International Bank of Iran on Chase Manhattan Bank N.A., New York, payable to his account at Chemical Bank New York, each cheque in the amount of $200,000. He further contends that both of these cheques were dishonoured. He therefore seeks the face amount of the two cheques - $400,000 in United States currency - together with interest and costs.

The Respondents request the Tribunal to dismiss the claim and seek compensation for costs and attorney's fees. The Respondents argue that Mr. Dallal has not demonstrated that he is the beneficiary of the cheques and further that the issuance of the cheques by International Bank of Iran was prohibited by a binding circular of Bank Markazi Iran. In this respect the Respondents refer to a circular of Bank Markazi dated 14 November 1978 containing certain currency regulations and allege that the cheques were issued in violation of these regulations and that the cheques therefore were null and void. The Respondents further

allege that the circumstances in connection with the issuance of these cheques indicate that the cheques formed a part of a fraudulent act aimed at circumventing the Iranian currency regulations.

The Claimant has maintained that he is the beneficiary of the cheques and has denied that the issuance of the cheques violated any valid currency regulation in Iran and further that, in any event, a bank which issues a cheque should not be permitted to avail itself of any breach by it of internal regulations in respect of which it was guilty for issuing a cheque in the face of a claim for payment by the payee after issuance of the cheque. The Claimant contends that cheques drawn in Iran which call for payments to be made in New York in United States dollars from one New York banking corporation into an account in another are governed by the laws of the State of New York and that this law requires adjudication in his favour. He has challenged the validity of the Bank Markazi circular on the ground that the currency regulations were never published as required by the laws of Iran. He contends that the circulars apply only to banks, that they are ambiguous and that it is not clear whether they were complied with and whose duty it was to create compliance.

Furthermore, in a post-hearing brief Mr. Dallal has argued that if the Respondents' defence were to be sustained, the bank would be unjustly enriched from its own culpable act, i.e. it would be the beneficiary of the $400,000 worth of Rials which it undertook to pay and which it has not.

Since this additional basis for the claim was first presented in a post-hearing brief, the Tribunal holds, in accordance with Article 20 of the Tribunal Rules, that it would be inappropriate to allow this amendment to the claim.

Bank Mellat has declared that the Rials could be recovered directly from the bank by the person entitled to them.

The Claimant has submitted photocopies of the cheques concerned and has made the originals of the cheques available for inspection by the Tribunal. The two cheques are dated 15 January 1979 and are drawn by the International Bank of Iran on Chase Manhattan Bank and are payable to Chemical Bank account No. 400-358611MDNS. The cheques do not indicate the holder of this account with Chemical Bank. A note by Chase Manhattan Bank on the face of the cheques indicates that they have been dishonoured because of insufficient funds.

A Hearing in this case was held on 10 September 1982. Following the Hearing the Claimant and Bank Mellat submitted post-hearing briefs.

II. REASONS

The Respondents have first argued that Mr. Dallal has not demonstrated that he is the beneficiary of the cheques. In this respect Mr. Dallal has presented a certificate sworn to by Jerry A. Maravegias, Vice President of Chemical Bank, indicating that Mr. Dallal is the sole holder of account No. 400-358611MDNS. The Tribunal therefore concludes that the amount of the cheques was to be paid to an account held by Mr. Dallal.

The Respondents have further argued that the issuance of the cheques by International Bank of Iran was prohibited by a binding circular by Bank Markazi and that the cheques were issued in violation of these regulations and therefore null and void. The Respondents have submitted a translation into English of Bank Markazi's circular letter of 14 November

1978 to International Bank of Iran and a list of the same date attached to this circular. It appears that this circular was also addressed to other banks. These regulations do not impose any restrictions as regards the sale of foreign exchange for import of goods. Sale of foreign exchange as payment for services is dealt with in Item 4 of the list attached to the Bank Markazi circular letter. This list specifies the circumstances under which banks may sell foreign exchange for other purposes than import of goods. Item 4 reads:

> Sale of foreign exchange for services by virtue of concluded Agreements between domestic and foreign firms[1] including salary of experts, foreign engineers and specialists, royalties as well as technical allowance, fee and remuneration for preparing charts and maps, the cost for supervision and installations of facilities, cost of technical documents and information (Code 52 for Services) with confirmation of Bank Markazi Iran.

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 (Item 14).

None of the Parties have alleged that Bank Markazi had confirmed or approved the monetary transaction at issue in this case.

Since both Iran and the United States are members of the International Monetary Fund (IMF) it is also of interest in this case to take into account the provisions in the IMF Agreement regarding the effects of currency regulations. The basic provision in this respect is Article VIII Section 2(b) of the Agreement which reads:

> (b) Exchange contracts which involve the currency of

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1 In the Annual Report for 1979 by the International Monetary Fund at page 216 this word has been translated as "institutions".

> any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this [Fund] Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

As to the Claimant's challenge of the validity of the Bank Markazi circular the Tribunal notes first that according to Article 11(c) of the Monetary and Banking Law of Iran of 1972 Bank Markazi, as the authority responsible for the monetary and credit system of Iran, shall inter alia formulate regulations pertaining to foreign exchange transactions, commitments and guarantees with the approval of the Currency and Credit Council, and shall also control foreign exchange transactions. The Tribunal also notes that the currency regulations embodied in the circular of 14 November 1978 and the attachment thereto have been reported to the International Monetary Fund and are reflected in the Fund's Annual Report for 1979. The Tribunal concludes that these regulations at least in so far as they apply to mere capital transfers under Article VI Section 3 of the IMF [1] Agreement are valid currency regulations within the meaning of Article VIII Section 2(b) of that Agreement.

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[1] This Section 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.

The Claimant has not even contended, that these currency regulations are inconsistent with the IMF Agreement.

As to the effects of the above-mentioned provision in the IMF Agreement it is of particular interest to note that the Board of Executive Directors of the Fund, in a decision of 10 June 1949 (Decision No. 446-4), interpreted the concept of unenforceability of exchange contract as laid down in Article VIII Section 2(b). In this decision the Board of Directors interpreted the provision as follows:

> 1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund
>
> Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreeing performance of the contracts or by awarding damages for their non-performance.
>
> 2. By accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2[1].
>
> An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (ordre public) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under

[1] Iran has chosen to avail itself of the transitional arrangements of Article XIV, Section 2; see the Annual Report of IMF for 1982, p. 498.

which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

This decision makes it clear that the question as to the law applicable to the contract and its performance is irrelevant as far as the obligation to observe currency regulations is concerned. The decision also makes it clear that member States of the IMF are obliged not to give assistance by their judicial or administrative authorities in obtaining the performance of exchange contracts involving the currency of a member of the Fund if the contract is contrary to exchange regulations of that member which are consistent with the IMF Agreement. This means that a court or administrative authority will have the right and duty to refuse enforcement of the contract.

In this case it has to be kept in mind that according to the Algiers Declaration "all funds in the security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement". Consequently, if the Tribunal were to permit the Claimant to obtain payment for the cheques in United States dollars from that account, the Tribunal would in fact enforce the exchange contract. Such an award would in practice circumvent the currency regulations which, if valid, both Iran and the United States as well as all other member States of the IMF are obliged to respect. Strong reasons suggest that also international tribunals should respect the relevant provisions in the IMF Agreement.

A crucial point for the Tribunal in this case is therefore to evaluate the evidence presented by the Parties as to the character of the underlying transaction. Because, if the true character of the transaction, as contended by the Respondents, simply was to exchange Rials for Dollars and

transfer the dollar amount to the United States, there is no doubt that the transaction was a capital transfer within the meaning of Article VI Section 3 of the IMF Agreement.

In this respect Mr. Dallal has alleged that the amount in question was paid to him pursuant to an oral agreement or understanding by a certain Iranian company - Lucky Company - engaged in the yarn trade, that it represented payment for services rendered to that company and that "it was in the nature of 'finders fees' or 'commissions'".

Bank Mellat has submitted a photocopy of incomplete Applications for Bank Drafts regarding said cheques and its Counsel stated: "On 9 January 1979 a Mr. Freydoon Kamyab visited an office of the International Bank of Iran and indicated that he wanted to perform a foreign exchange transaction. He handed over to the bank the incomplete application form which, contrary to normal practice, did not indicate the name and address of the receiver of the money. A transaction of this kind was normally followed by a tested telex to the United States bank requesting it to pay the money to the drawer. No such telex was sent in this case, which further demonstrates the improper character of the transaction."

In this connection, the Respondents have stated that an action had been commenced before a court in the United States based on the same checks as in this case by a "John Doe III". John Doe III vs. International Bank of Iran and Islamic Republic of Iran, United States District Court, Southern District of New York, (80 CIV 3528).

The Claimant has responded that pursuant to an order of 23 June 1980 in that case, he was given leave to proceed under the pseudonym "John Doe", because he feared retaliation against his relatives and business associates then in Iran

if he proceeded under his own name. The Claimant has added that the "III" after the name "John Doe" was placed there by the court since two other individuals or entities had brought anonymous suits before the same court on other matters.

The Respondents have further submitted a document issued by the Corporate and Patents Registration Bureau in Iran showing that a company named Locky Company was dissolved on 25 February 1962. They contend that enquiries have revealed that no company named Lucky (or Locky) Company existed in Iran after that date.

In response to questions by the Tribunal regarding the underlying transaction and the circumstances in connection with the issuance of the cheques Mr. Dallal declared that he did not know who Mr. Kamyab was. He refused to give further information regarding his contacts with Lucky Company.

It ought to be added that the monetary transaction in question occurred in the midst of the recent revolutionary period in Iran.

When considering in retrospect the circumstances in connection with the issuance of the cheques, the Tribunal notes in particular the following:

- the Applications for Bank Drafts have not been signed by Lucky Company - the company from which the Claimant alleges that he received the cheques, but seemingly by an individual named Freydoon Kamyab on his own behalf; a person whom Mr. Dallal has not been able to identify;
- doubts exist as to whether any company named Lucky Company existed at the time of the transaction in question;
- Mr. Dallal has refused to give any information

> regarding the character of the underlying transaction beyond the mere statement that the amount of the cheques represented "finders fees" or "commissions" in connection with services rendered to Lucky Company.

The Tribunal holds that the above-mentioned circumstances give rise to serious doubts as to the true character of the underlying transaction. But the Tribunal cannot find that the evidence presented by the Respondents fully proves that the transaction at issue was a capital transaction in disguise subject to prior approval by Bank Markazi and therefore contrary to the Iranian currency regulations. The Tribunal is simply left in doubts as regards the true character of the transaction. When a court or an international tribunal in cases of doubt in retrospect has to make a decision as to the character of a currency operation, an important consideration must be that it is in most cases the parties involved in the operation who have access to the evidence regarding the character of that operation and who are in a position to provide information on the circumstances in connection with the operation. It is on the other hand generally very difficult for other parties to present evidence in this respect.

As stated above, the language of the IMF Agreement imposes on courts and administrative authorities, as well as on international tribunals, not only a right but a duty to refuse enforcement of exchange contracts, including capital transfers[1] , falling under the provisions of Article VIII Section 2(b) of the Agreement. The effects of this provision

[1] See F.A.Mann, The Legal Aspect of Money, Oxford 1982, p. 382.

would to a considerable extent be negated, if a court always were to place the burden of proof regarding the character of the transaction on parties not involved in the operation.

In this case Mr. Dallal has chosen not to provide any further information regarding the transaction. His reticence to provide information about the character of the transaction cannot be sufficiently justified by his alleged concern for the safety of relatives and business connections in Iran, since it had been quite possible for him to give further details - e.g. regarding time and money spent by him for the project - without revealing the identity of his relatives and business connections.[1] The Tribunal therefore reaches the conclusion that the two cheques must be assumed to have been issued as part of a capital transfer, intended merely to exchange Rials for Dollars and to transfer the dollar amount to the United States. The Tribunal therefore concludes that it is unable to issue an award in favour of the Claimant.

The Claimant has not, in addition to the above-mentioned contentions, which in particular are directed against Bank Mellat, invoked any ground on which the Government of the Islamic Republic of Iran could be held liable in this case.

In view of the circumstances of the case the Tribunal finds that each Party shall bear its own costs for the arbitration.

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[1] The Tribunal reminds of the truism that a man may have a good case, but if he cannot prove it, he cannot prevail.

III. Conclusions

The claim of Mr. DALLAL against the GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN and BANK MELLAT is dismissed.

Each Party shall bear its own costs for the arbitration.

Dated, The Hague
10 June 1983

Gunnar Lagergren
Chairman
Chamber One

Mahmoud M. Kashani

Howard M. Holtzmann
Dissenting Opinion