161-111

161-111

S CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

111

Case No. 161

Date of filing: 2 Dec 86

** AWARD - Type of Award _____

- Date of Award _____

_____ 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 Corrections by mr Ameli

- Date _____

_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

_____

- Date _____

_____ pages in English _____ pages in Farsi

R/12

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 2 DEC 1986 تاریخ
۱۳۶۵/۹/۱۱
No. 161 شماره

IN HIS EXALTED NAME

111

CASE NO. 161
CHAMBER ONE
AWARD NO. 184-161-1

DUPLICATE ORIGINAL
«نسخه برابر اصل»

INA Corporation,

Claimant,

and

The Government of the
Islamic Republic of Iran,

Respondent.

CORRECTION TO DISSENTING
OPINION OF JUDGE AMELI

The following corrections should be made in the English version of my Dissenting Opinion in this case dated 5 Azar 1365/26 November 1986:

1. Page 27, line 17, last word should read "operations", rather than "operating".

2. Page 28, footnote 36, lines 2 and 3: page references to the Miliangos Case should read: 443, 463, 468 and 469 (instead of 68 and 69).

3. Page 32, line 6: "Declarations" should read "Declaration".

4. Page 49, line 6: last word should read "those", rather than "thoses".

5. Page 51, second paragraph, line 2: insert "which" after "United States".

A copy of the corrected pages is attached.

Dated, The Hague
11 Azar 1365/2 December 1986

Koorosh-Hossein Ameli

> Arbitrators will generally enforce such a clause despite inconsistent provisions of national law. In the absence of such a clause, however, arbitrators have generally concluded that the parties have assumed the risks of currency fluctuation.
>
> A party to an international contract generally must render payment in the designated currency even though its value has changed.[34]

Another author expresses the same views on an international arbitral award which dealt with currency fluctuations in a terminated contract, rather than an ongoing contractual relationship in respect of which the same rule would apply. He states:

> [I]nternational commercial arbitrators have the tendency to consider that any prudent businessman must protect himself against currency risks, attributing a speculative character to operations in which such protection is lacking. Already in 1932, in [ICC] Case no. 519, an arbitrator emphasized: 'Here it could generally be said that it is regrettable that in many instances, businessmen dealing in currencies other than the national one are not sufficiently concerned with the question of exchange rates. A good businessman must always take precautions in this sense, because his activity is to do business and not to speculate.' [Emphasis in original.] It is understandable then that the validity of exchange guarantees are admitted by arbitrators as a principle answering the needs of international commerce and that they not be concerned with solutions the applicable law of the contract may have in this respect. This equally explains their harshness when the contract contains no guarantee clause.[35]

Also, as Professor Mann notes, in 1976 by its Miliangos Case the United Kingdom House of Lords in conformity with

---

[34] W. Craig, W. Park & J. Paulsson, International Chamber of Commerce Arbitration, § 35.04 (1984).

[35] ICC Case No. 1717/72 in 101 Journal du Droit International, 890, 892 (1974).

the contemporary law of other European countries changed its previous rule precluding the awarding of damages in foreign currency to allow such damages if this was indicated by the facts of the case, such as by contract designating such currency or by non-contractual liabilities incurred in such currency in a foreign country. According to the new ruling it was

> only at the stage of payment or enforcement that conversion into Sterling at the rate of exchange then prevailing takes place. This is so whether the claim is for payment of a specific sum contractually due as for damages for breach of contract or tort or for a just sum due in respect of unjustified enrichment or for restitution. Nor does it matter whether the contract sued upon is governed by English or by foreign law. Nor is it necessary to ask for specific performance rather than payment: in either case the defendant will be ordered to pay foreign money. Moreover an award in an English arbitration may be expressed and enforced in foreign currency and a foreign award or judgment so expressed may be enforced like the English award or judgement.[36] (Emphasis added, footnotes omitted.)

The next question is whether the mere reduction in the purchasing power of money is an item of damage which, notwithstanding the principle of nominalism, the law recognizes as recoverable. Or whether it is at least possible to recover loss suffered by reason of the fact proved by the creditor that, had there been no default, he could and would have bought some property (or foreign currency) more cheaply than at the time of payment.

---

[36] Mann, supra n.33 pp. 347-48, citing Miliangos v. George Frank (Textiles) Ltd., [1976] A.C. 443, 463, 468 and 469 per Lord Wilberforce; The Despina R., [1979]A.C. 685; B. P. Exploration Co. (Libya) Ltd. v. Hunt, [1979]1 W.L.R. 783, per Robert Goff, J. aff'd [1981]1 W.L.R. 232, 245; and Re Dawson, [1966]2 N.S.W.R. 211.

It is clear that principally the award of compensation must be in the currency of obligation. Since the investment was in rials the Government of the Islamic Republic at most must be required only to pay the compensation in no currency other than the rial to make good the loss at the place of dispossession. The Declaration of the Government of Algeria, paragraph 7, establishing a Security Account for the payment of awards rendered in favour of United States claimants also does not modify this principle. At most, the Security Account makes it possible for the claimant to satisfy the rial obligation from the fund in case the Iranian respondent does not comply with the Tribunal's award. But this is not a substitute for the primary obligation and does not change it into a dollar obligation. As stated elsewhere:

> The true equity and the real reason should be that it is not the function of legal proceedings to interfere with substantive rights. It is their function to enforce rights. The idea that default or breach creates entitlement to a currency which previously was not the money of account, whether actual or potential, lacks both justification and attraction.[38]

In case the security is needed to satisfy the obligations then the dollar security must be converted into the rial, or a third currency if it be the currency of obligation, rather than vice versa.

Even if the Tribunal wrongly believes that just because the Security Account contains US dollars its awards in favour of United States claimants must be payable only in US dollars, still such a view, as recognized by the Tribunal in the McCollough Case, does not require that the rial obligation "established by the awards" "should necessarily be

---

[38] Mann, supra, n.33, pp. 346-47.

1980 had been arrested and subjected to described tortures, resulting in his permanent insanity and finally had been sent to Iran on 15 July 1980. The Award in that case does not indicate if the United States contested these allegations at all, but that it requested dismissal of the Case for lack of jurisdiction over claims other than those "arising out of a debt, contract, expropriation or other measures affecting property rights" under Article II, paragraph 1 of the Claims Settlement Declaration, and for lack of locus standi of the father to bring the claim of the son.

The Award dismissed that Case on three grounds. First, for lack of jurisdiction over claims based on personal injuries as required by the Tribunal's jurisdictional mandate. Second, insofar as the Claimant, as guardian, was acting as the legal representative of a son lacking capacity to sue, the claims were for personal injuries to the son, and for losses and expenses resulting from such injuries, and such claims were not embraced by the Tribunal's jurisdictional mandate. Third, to the extent the Claimant asserted his own damages resulting from the loss of a son, such losses also fell outside the jurisdictional mandate of the Tribunal. No basis was pleaded in the Case for supporting the assertion that the Claimant father enjoyed a property interest in his son's welfare which was diminished by the latter's incapacitation, or that the material and moral losses were the consequences of any other event than the personal injuries to the son.

Another is the Case of Karimpanahi and The United States of America, Case No. 182 before the Tribunal. The Claimant in that case, a civil engineer of Iranian nationality residing in the United States alleges among other things that in 1971 the New York City police entered into his apartment, destroyed a number of his documents and took with them a number of his other documents, and also jailed

Moreover, there is the Case of The Islamic Republic of Iran Ministry of Defence and The Government of the United States of America, Case No. 936, before Chamber 3 of the Tribunal, in which the Ministry seeks more than $600,000 in damages for the loss of personal effects resulting from the abrupt expulsion of 107 Iranian Navy and Army cadet students pursuant to the Executive Order of the President of the United States on 10 April 1980. The Ministry contends that the 36 hours alloted for the students' departure was so short that they were unable to collect their belongings and personal effects under the police surveillance and had to leave them behind, particularly where they had to get a number of connecting flights from long distances within the United States to reach the specified international airport in order to leave the country in time. The Ministry asserts that these "hostile and inhuman actions" by the United States violated both international law and the agreements between the respective military authorities of both governments, pursuant to which the Iranian cadets and officers were sent to the United States for further training. This, like the other case described above, has not yet been decided by the Tribunal, although similar to all other cases before the Tribunal it was filed in a three-month period ending on 19 January 1982.

Further, there is the Executive Order of 14 November 1979 of the President of the United States which declared an "emergency" and ordered "blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United