

ORIGINAL DOCUMENTS IN SAFE

108

Case No. 187

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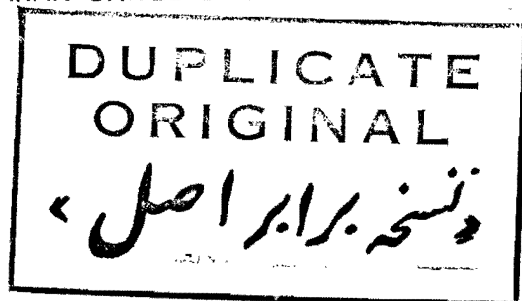
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CASE NO. 187

108

CHAMBER THREE

AWARD NO. 342-187-3

GORDON WILLIAMS,

Claimant,

and

ISLAMIC REPUBLIC OF IRAN,

BANK SEPAH,

and BANK MELLAT (formerly
Bank of Tehran),

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	18 DEC 1987 ۱۱/۲۲/۸۷
No.	187

AWARD

Appearances:

For the Claimant:

Mr. Leonard van Sandick,
Mr. Albert Dreese,
Counsel.

For the Respondent:

Mr. Mohammad K. Eshragh,
Agent of the Government of
the Islamic Republic of Iran;
Mr. Nozar Dabiran,
Legal Adviser to the Agent;
Mr. Hosein Piran,
Assistant to the Agent;
Mr. Abbas Jamshidi,
Mr. Mohammad Bagher
Shahmoradi,
Representatives of Bank
Sepah and Bank Mellat.

Also present:

Mr. Michael F. Raboin
Deputy Agent of the United
States of America.

I. PROCEDURAL HISTORY

1. On 22 December 1981 GORDON WILLIAMS ("the Claimant") filed a Statement of Claim against the ISLAMIC REPUBLIC OF IRAN ("Iran") alleging that BANK SEPAH and BANK MELLAT (formerly Bank of Tehran) have failed to honor two letters of credit in the amount of U.S.\$167,521 each, issued in his favor. The Claimant seeks a total amount of U.S.\$335,042.00, together with attorney's fees and costs of arbitration.

2. Bank Sepah and Bank Mellat filed Statements of Defense on 30 April 1982. On 27 August 1982 Bank Sepah filed a Supplement to its Statement of Defense and introduced a counterclaim in the amount of U.S.\$10,000. The banks seek attorney's fees and costs of arbitration.

3. The Claimant subsequently raised an alternative claim that, should the banks not be held liable under the letters of credit, Iran should be ordered to return the equipment or to compensate the Claimant for his loss.

4. On 6 May 1982 a claim was submitted by K & S Irrigation Company based on the same subject matter as the present Case. Filing of this claim was refused by the Co-Registrars "since the claim had not been received by the Tribunal on or before 19 January 1982." See Refusal to accept the claim of K & S Irrigation Company, Decision No. DEC 16-Ref 29-1 (22 October 1982). The Claimant explained that the filing of the claim was made without his knowledge by a friend on his behalf. He asserts that the filing and refusal of the duplicate claim has no consequence for the claim in the present Case.

5. Bank Mellat states that the "claim was once considered and refused by Chamber One of the Tribunal" and invokes refusal of the duplicate claim as a ground for

dismissal of the present Case, alleging that the matter is res judicata.

6. The Tribunal notes that the present claim was timely filed. The rejected claim was refused solely on the procedural ground of late filing, without prejudice as to the merits. Therefore Bank Mellat's objection is rejected.

7. A Pre-Hearing Conference was held on 27 September 1982. After a further exchange of submissions, the final Hearing in this Case was held on 18 December 1986.

II. JURISDICTION

8. The Claimant is a national of the United States, as shown by a copy of his Certificate of Birth filed with the Tribunal. The Statement of Claim recites that the "claimant is Gordon Williams doing business as K & S Irrigation Company, a sole proprietorship." The banks have challenged Gordon Williams' right to file a claim by objecting that the Claimant has not proved his ownership of K & S Irrigation Company, in whose name the underlying documents were issued, nor has he introduced evidence of the nationality of K & S Irrigation Company. Following these objections the Claimant submitted a Fictitious Business Name Statement filed on 11 December 1979 with the County Clerk of Orange County, California, which shows that, as of that date, the Claimant was doing business under the name "K & S Irrigation Co." The Claimant states that at the time of the underlying sale of equipment he was domiciled in Ohio and "moved to California late in 1979."

9. The banks also object that the Fictitious Business Name Statement is dated subsequent to the letters of credit and contend that K & S Irrigation Co. may not have had any legal persona at the time of issuance of the letters of

credit. Bank Sepah further objects that the claim is not attributable to Iran.

10. The Tribunal recognizes that the Fictitious Business Name Statement submitted by the Claimant is dated subsequent to the letters of credit involved in this Case. However, the letters of credit were allegedly presented, and the claim therefore arose, after the filing of the Fictitious Business Name Statement and so the question of prior status is irrelevant. The Fictitious Business Name Statement contains the phrase: "This business is conducted by an individual" and clearly shows that K & S Irrigation Co. is not a corporation. Moreover, as a sole proprietorship K & S Irrigation Co. has no separate legal identity. Therefore the Claimant has shown to the Tribunal's satisfaction that he is the direct owner of the claim and that he is a national of the United States. Accordingly, the Tribunal finds that Gordon Williams is the proper Claimant in this Case.

11. The Statement of Claim names Iran as Respondent, without specifically designating Bank Sepah and Bank Mellat as Respondents. However, each of the banks has filed a Statement of Defense denominating itself as "Respondent" and has acted as such during the course of the proceedings. The Tribunal therefore deems it proper to consider Bank Sepah and Bank Mellat as proper Respondents as well as the Islamic Republic of Iran.

12. Iran, Bank Sepah and Bank Mellat clearly fall within the definition of "Iran" laid down in Article VII, paragraph 3, of the Claims Settlement Declaration.

13. The Claimant's claim clearly arose out of "debts, contracts ... or other measures affecting property rights" as required by the Claims Settlement Declaration and is therefore within the Tribunal's jurisdiction.

III. THE MERITS OF THE CASE

14. In 1979 the Claimant met Mr. Shahroukh Ordoubadi, who wanted to purchase irrigation equipment to be installed on his farm in Iran. They subsequently entered into a sales contract and agreed that the purchase price would be paid by letters of credit. Two letters of credit, referenced No. MA/68117/8 and No. SH 546521, respectively, were issued, each for the amount of U.S.\$167,521, and are the subject of the present claim.

A. The Claim Under The Letter Of Credit No. MA/68117/8 Issued By Bank Sepah

i. Factual Background

15. On 11 October 1979 Bank Sepah issued a letter of credit, No. MA/68117/8, the text of which reads, in relevant part, as follows:

By order and for account of M.S Mohammad Reza Tabrizi for Shahrokh Ordoubadi Tehran, Iran. We hereby issue this irrevocable documentary credit in favour of M.S K & S Irrigation Co 190 North Main Street Johnstown Ohio 43031 USA. up to the aggregate amount of US\$167,521 ... valid until 10/12/79 in U.S.A.

The letter of credit is stated to be subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision) ("the UCP (1974 Revision)").

16. Payment for the goods described in this letter of credit was to be made upon presentation of (1) "Full set clean on board ocean Bill of lading issued or endorsed to our [the bank's] order ... dated not later than 10/12/79"; (2) signed invoices; (3) a certificate of origin; and (4) a packing list. The letter of credit was amended by undated telex to extend its validity to 10 February 1980 and to

provide for air transport of the goods from Los Angeles, rather than by sea from New York. Bank Sepah does not dispute that Mr. Ordoubadi deposited with it sufficient funds to cover the credit at a date which does not appear in the record. Senderex Cargo Inc., acting as forwarding agent for the Claimant, arranged for the carriage of the goods by Lufthansa Airlines. The goods were received by the airline for carriage in Los Angeles on 8 January 1980, as shown by the air waybill No. 220 1436 3731, and arrived in Tehran on 17 January 1980.

17. The Claimant states that the letter of credit and the required documents were presented at the New York office of Bank Sepah on 28 January 1980. In support of this contention he has submitted the affidavits of his representatives, Mr. J. Macchi, Mr. J. Arnst and Miss P. Harris, who presented the letter of credit and the documents for collection, and who state that upon presentation they "were advised by Mr. Mehdi Habibi Amin, the director of the bank, that the documents should not be formally presented at this time due to the fact that the funds would be frozen and could not be collected in the U.S.A." They further declare that they were "advised to either send the documents to a European bank for collection or present them to the Sepah Bank in Tehran, Iran, requesting payment through a European bank."

18. On 31 January 1980 the Claimant wrote to Bank Sepah in Iran stating as follows:

With reference to above Letter of Credit, and per your Telex instructions dated May 12, 1979, and per confirmed instructions No. T11820 Sepah Bank of New York, we have air shipped the merchandise purchased by Mr. Shahrokh Ordoobadi to Tehran on January 8, 1980. However, upon presentation of our documents for payment, we discovered that due to the existing situation, of which we are sure you are aware, Sepah Bank of New York is unable to make the payment due to us. We are advised by your branch in New York to send our documents directly to you for payment.

With regard to above, in good faith, we are herewith presenting our documents to you for payment. We respectfully request the payment be made promptly ...

19. On the same date the Claimant wrote to Mr. Ordoubadi informing him of the situation and asking him "to follow up and facilitate speedy payment." On 18 February 1980 Mr. Ordoubadi answered the Claimant's letter as follows:

In response to your two letters of January 31, 1980 I would like to advise you that on February 2, 1980 Lufthansa Airlines informed me that the merchandise from your company had arrived and asked me to contact the Bank of Sepah and the Bank of Teheran to arrange for the delivery of the consignment.

I immediately called upon both banks requesting the necessary documents to take charge and delivery of the consignment as I had made full payments for both of the orders and the two respective letters of credit. However, both banks declined to furnish the documents on the grounds that Iranian banks had been nationalized by the Government and that further clarifications and confirmations were required.

I have a feeling that due to the freeze of Iranian funds in the U.S. the Iranian Government is declining to pay the American companies. Please note that due to the facts that I have stated above I am unable to assist you to collect the funds owed to you in the same manner and for the same reasons that I am unable to collect my merchandise. I only hope that these matters will be solved in the future.

20. On 12 February 1980 the following telex was sent from Lufthansa's Tehran office to its office in Los Angeles:

Re CN 220-1436 3731 [air waybill number for the Bank Sepah shipment] and WWPEEE 220-1436 3742 [air waybill number for the Bank Mellat shipment] LACEE LAX [Los Angeles] THR [Tehran] dated Jan 8/80 issued Senderex. According info received today from consignee [Mr. Ordoubadi] shipper [Claimant] informed consignee both shipments wrongly shipped to him. Shipments still not delivered. Please contact shipper and clarify matter.

(Spelling standardized.)

21. On 13 February 1980 the following response was sent to Tehran:

Please hold shipment as agent [Senderex] will provide written authorization to have goods returned to Los Angeles at their cost. We will advise once OK to ship.

(Spelling standardized.)

Also on 13 February 1980 the following telex was sent from Tehran to Los Angeles:

For your information re-export fee will be approximately 150 U.S. dollars plus storage and customs formalities will take six weeks time.

(Spelling standardized.)

22. On 6 April 1980 Mr. Ordoubadi wrote as follows to Bank Sepah:

Please cancel letter of credit No. 68177, the validity of which has expired, and no documents have so far been negotiated therefor, and, credit my current account No. 4164 with the proceeds.

By credit advice dated 9 April 1980 Bank Sepah informed Mr. Ordoubadi that: "The following amount is credited to your current account [No. 90077] against Letter of Credit/Order Registration Draft No. 68177.8 [... rials] 11,826,982."¹

23. On 29 April 1980 the law firm of Shipley, Smoak & Ackerman wrote to Bank Sepah in New York on behalf of the Claimant. The letter reads as follows:

¹Rials 11,826,982 is the equivalent of \$167,521 (the amount of the letter of credit) at 70.6 rials per dollar).

We represent K & S Irrigation Company referred to above, in a claim of \$167,521.00 due our client under the above referenced letter of credit, a copy of which is attached. According to the terms of the letter of credit, Bank of Tehran on November 10, 1979, made these funds available to K & S Irrigation Company through your bank. As we understand it, the \$167,521.00 was vested property of our client forthwith, and should be paid to them upon demand, as the funds were made available at sight against certain shipping documents, all of which have been provided, and copies of which are enclosed for your information. Please let us hear from you at once, as our instructions from our client are to attach sufficient assets to cover the claim and take whatever other action is necessary to see that the claim is satisfied.

24. The following reply, dated 22 May 1980, was received from Bank Sepah in New York:

1 - This letter of credit was only advised by us, not confirmed by us, accordingly, there is no vested property since Bank Sepah, Head Office, Tehran, Iran, the issuing bank specifically limited our role to an advising bank without adding our confirmation.

2 - Bank Sepah, Tehran, did not make these funds available to us or to K & S Irrigation, as stated in your letter.

3 - We were authorized, under the terms of this L/C to negotiate the documents required if they were presented to us in order before the letter of credit expired.

4 - Our records indicate that no documents whatsoever were presented to us under this letter of credit.

5 - From the copies of documents enclosed with your letter, it appears that your clients, sent the documents directly to the buyers in Teheran, thus not in compliance with the terms of the L/C.

6 - T[h]e copies referred to also, indicate that your clients effected shipment on January 8, 1980, I.e, after the freeze imposed by the President of the U.S. on such transactions, and as such acting on their own responsibility.

In bringing all these facts to your attention, we believe that after referring to the Uniform Customs and Practise (1974 revision), you will advise your clients differently.

25. The final correspondence relative to this letter of credit is a letter from Lufthansa Airlines to Bank Sepah in Tehran dated 3 April 1982 stating that:

The shipment of above AWB [air waybill No. 220-14363731] arrived at Tehran via Lufthansa FLT No. 600 dated 17.1.1980. Since it was forwarded to Tehran by mistake, as asserted by the consignee of the goods Mr. Shahrokh Ordoubadi, he has requested that the shipment be returned. Also, as requested by the point of origin station, it should be returned to Los Angeles.

The shipment in question is still in Iran.

26. The Claimant states that he has requested information about the whereabouts of the equipment from Lufthansa but that Lufthansa has been unable to give him any information. The Claimant denies that the equipment was ever returned to the United States.

ii. The Claimant's Arguments

27. The Claimant argues that all the documents required for payment under the letter of credit were duly and timely submitted. He states that the letter of credit and accompanying documents were presented to Bank Sepah in New York on 28 January 1980, i.e., within the validity period of the letter of credit. Thereafter all the documents were sent to Bank Sepah in Iran on 31 January 1981, upon the instruction of the director of Bank Sepah in New York. According to the Claimant: "The documents must have arrived before the expiry of the credit on February 10, 1980."

28. The Claimant therefore alleges that Bank Sepah wrongfully withheld payment under letter of credit No. MA/68117/8 and requests an award ordering it to pay the sum of U.S.\$167,521 under this letter of credit.

iii. Bank Sepah's Defense

29. Bank Sepah argues that the Claimant has submitted no evidence in substantiation of the allegation that the documents were ever presented, either in New York or in Tehran. In this regard, it relies on the letter dated 22 May 1980 quoted above at paragraph 24. It also argues that the Claimant has not established that the documents were ever received by the bank in Tehran and that, even if they were so received, no evidence has been submitted to show that such receipt was prior to the date of expiry of the letter of credit.

30. Bank Sepah further contends that, even if the Claimant did present the letter of credit within its validity period, it was entitled to refuse payment on the ground that the documents did not conform to the requirements of the credit. It submits that the "documents were issued directly in the name of Mr. Mohammad Reza Tabrizi for Mr. Shahrokh Ordoobadi," whereas the letter of credit clearly requires that "the Airwaybill should be issued in the name of the Bank."

31. Bank Sepah further alleges that "no sale has been actually concluded" and that, therefore, the Claimant was not entitled to demand payment under the letter of credit. In support of this allegation it relies on the letter to Bank Sepah dated 3 April 1982 from Lufthansa Airlines in which reference is made to Mr. Ordoubadi's request that the shipment be returned to Los Angeles and the letter dated 6 April 1980 in which Mr. Ordoubadi requested the bank to cancel the letter of credit and credit his account accordingly.

32. Finally, Bank Sepah invokes Article 11 of the UCP(1974 Revision), which provides:

Banks assume no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control or by any strikes or lockouts. Unless specifically authorised, banks will not effect payment, acceptance or negotiation after expiration under credits expiring during such interruption of business.

iv. Claimant's Response

33. In reply to Bank Sepah's allegations the Claimant reasserts his contention that the documents were presented within the validity period of the letter of credit, either in New York on 28 January 1980, or subsequently in Tehran.

34. The Claimant further denies that the letters invoked by Bank Sepah show that Mr. Ordoubadi wanted to cancel the purchase of equipment. According to the Claimant, Mr. Ordoubadi requested the bank to cancel the letter of credit only after it became clear that the bank would not make payment. The Claimant argues that this also explains why Mr Ordoubadi "subsequently requested that the equipment be returned."

35. The Claimant admits that the air waybills erroneously mentioned "the buyer as consignee and the bank as notify party," whereas: "This should have been the other way around." The Claimant states, however, that "Bank Sepah had no legitimate excuse to rely on the discrepancy" as Mr. Ordoubadi had deposited the full amount of the letter of credit with the bank, thus shielding the bank from any risk of loss.

36. The Claimant further alleges that Bank Sepah should have informed him of the discrepancy in good time, that is after presentation of the documents, to enable him to correct the defect if possible. He adds that Mr.

Ordoubadi was ready to waive any defect contained in the documents in order to receive the goods.

37. Finally, the Claimant alleges, without discussion, that the defense based on Article 11 of the UCP (1974 Revision) must fail "because the respondent in these proceedings is not the banks but the Islamic Republic of Iran," and thus not subject to the UCP (1974 Revision).

v. The Tribunal's Decision

38. The letter of credit required that the documents be presented for payment on or before 10 February 1980. It is clear from the evidence that the letter of credit and accompanying documents were produced to Bank Sepah in New York on 28 January 1980.

39. Despite the absence of any written communication or statement, the Tribunal finds that Bank Sepah in New York advised the Claimant's representatives not to make a formal presentation in New York, as the funds could not be collected in the United States because of the Executive Orders of the President of the United States blocking Iranian assets in the United States, and instructed them to either send the documents to a European bank for collection or present them to the issuing bank in Tehran.

40. The Claimant submits that the documents were sent to Bank Sepah's office in Tehran, under cover of a letter dated 31 January 1980. The Claimant supplied no evidence of that mailing such as a registered return receipt or courier invoices. During oral proceedings the representative of the Claimant indicated that he did not know whether the documents had, in fact, ever been in Bank Sepah's possession. No other evidence has been produced which would assist the Tribunal to determine whether or not Bank Sepah did, in fact, receive the documents.

41. The Tribunal finds that the Claimant has not adduced sufficient evidence on which to base a finding that a demand for payment under the letter of credit was timely received by Bank Sepah. The Tribunal therefore does not find any evidence that Bank Sepah breached its obligations under the letter of credit. The Tribunal therefore dismisses this part of the claim for lack of proof.

B. The Claim Under The Letter Of Credit No. SH 546521
Issued By Bank Mellat

i. Factual Background

42. The price of a further shipment of irrigation equipment was covered by a second letter of credit, No. SH 546521 issued by Bank Mellat on 11 November 1979. This letter of credit reads as follows:

We open our above Irrevocable Documentary credit for account of Mr Mohammad Reza Tabrizi for Mr Shahrokh Ordoobadi ... In favour of Messrs K & S Irrigation Company ... for US\$:167,521 ... valid until 28th, Dec, 1979 in USA available at sight against the following documents: ... Full set and one non negotiable copies on Board Bill of Lading issued or endorsed to our order.

The letter of credit lists also the other documents required and states that it is subject to the UCP (1974 Revision). Manufacturers Hanover Trust Company was the advising bank for this letter of credit. By telegram dated 8 December 1979 Bank Mellat notified Manufacturers Hanover Trust Company that two amendments had been made to the letter of credit, extending its validity to 26 February 1980, and permitting shipment by way of "Los Angeles to Tehran by air way bill instead of B/L [Bill of Lading]." Bank Mellat does not dispute that Mr. Ordoubadi provided it with funds to cover the amount of the credit. The goods were delivered to Lufthansa Airlines on 8 January 1980 at the same time as the goods supplied under the Bank Sepah letter of credit and

arrived in Tehran on 17 January 1980. The telexes between Lufthansa's Tehran and Los Angeles offices referred to in paragraphs 20 and 21, supra, relate to both shipments.

43. The Claimant states that on 29 January 1980 the letter of credit and the accompanying relevant documents were presented to Manufacturers Hanover Trust Company in New York by the same three individuals involved in the presentation of the letter of credit issued by Bank Sepah (See paragraph 17, supra.) Those individuals have testified in their affidavits that they were advised by an official of Manufacturers Hanover Trust Company's letter of credit department "that the documents should not be formally presented at this time, due to fact that the funds would be frozen and could not be collected in the U.S.A." They were therefore advised "to either send the documents to Barkley [sic] Bank in London for collection or present them directly to the issuing bank in Iran, with request for payment through a European bank."

44. In compliance with these instructions, on 31 January 1980, the Claimant wrote to Bank of Tehran, submitting the necessary documents and requesting payment. On the same date the Claimant wrote to Mr. Ordoubadi informing him of the situation and requesting his assistance in obtaining payment.

45. As mentioned in paragraph 19, supra, on 18 February 1980 Mr. Ordoubadi wrote to the Claimant stating that on 2 February he had attempted to obtain the necessary documents from the two banks to collect the goods, but that the banks had refused to provide the documents to him.

46. Bank Mellat confirms that Mr. Ordoubadi presented various documents to it. According to the bank: "The production to the Bank of the Claimant's letter dated 31 January 1980 was effected by the Customer [Mr. Ordoubadi]

along with the shipping documents."² At that time, according to the bank, Mr. Ordoubadi requested "endorsement of the shipping documents for the clearance of the goods as well as the request for transferring to the U.S.A. the amounts of the letters of credit, via Great Britain, in the equivalent pound sterling." Thereupon "the documents were endorsed by the customer and were delivered to him for customs clearance." The originals of all the shipping documents (which were produced to the Tribunal) bear Bank Mellat stamps, and certain of the documents bear Bank Mellat date stamps showing that they were received by 25 February 1980.

47. Bank Mellat asserts that it thereafter requested the authorization of Bank Markazi Iran for the transfer of the funds due to the Claimant in pounds sterling to the U.S.A. via Great Britain. On 9 March 1980 Bank Markazi Iran responded to Bank Mellat, referring to Bank Mellat's letter of 2 March 1980 (which has not been submitted to the Tribunal) and authorized the transfer as follows:

In the event the importer may have secured the Commerce Ministry's approval showing no objection to the import of the commodity in the name of ... Mr. Shahrokh Ordoubadi at the time of opening the credit, and presented the same to that Bank, and if the documents received are in accordance with the conditions laid down in the credit, endorsement of the relevant documents against collection of their rial equivalent is allowed by this Bank. This point, however, must be kept in mind that transfer of the amount of these documents is subject to production of bill of lading, and customs clearance slip of the value equivalent to the amount of the documents to this Bank, and securing the renewed approval of Bank Markazi Iran.

Bank Mellat replied to Bank Markazi Iran on 17 May 1980, referring to their prior correspondence, as follows:

²Elsewhere the Bank clarifies that Mr. Ordoubadi "had presented the original of the shipping documents."

The said Client states: Customs clearance is possible in the event a photocopy of the telex on the amount of the credit, sent to the transport company, is presented to the Customs Office at Mehrabad for receiving the customs clearance slip. In view of the aforesaid conditions, the client requests the collection of the credited amount of the commodity duly stating that the commodity & the documents have been returned to the country of origin.

You are requested to notify your comments on the payment of the rial amount of the documents.

48. Bank Mellat states that Mr. Ordoubadi thereupon requested the customs clearance certificate from Lufthansa but that Lufthansa would not deliver such a certificate without "receipt of a copy of the transfer order of the price of the goods." According to Bank Mellat, Mr. Ordoubadi "pursu[ed] the matter for a long time" but he was unable to obtain the necessary clearance permit. Therefore, according to the bank, Mr. Ordoubadi "requested to return the Rial amount of the documents owing to non-clearance."

49. Sometime thereafter Mr. Ordoubadi sent the following undated letter to Bank Mellat:

Since I have not succeeded in securing customs clearance of the goods, subject of Documentary Credit No. 546521, on the strength of the photocopies of the documents which were put, in the past, at the disposal of that Bank by the Seller, and as you are already aware, the original documents have not yet been received through your correspondent bank, kindly arrange to cancel the credit and restore its monies to Current Account No. 3322 Hafez Branch in the name of Shahrokh Ordouabadi.

50. On 7 August 1980 the Mehrabad customs office wrote to Bank Mellat as follows:

Subject: Commodity relating to Bill of Lading No. 220-14363742 [the Lufthansa shipment relating to the Bank Mellat letter of credit].

With reference to letter No. 32/704 dated 4 August 1980, according to the relevant assessor's report, the commodity, subject of the aforesaid Bill of Lading, exists in Warehouse No. 6 of Mehrabadi Customs (General Warehouses).

51. Finally, sometime after 18 August 1980, Mr. Monajemi, the Assistant to the General Director of Mehrabad customs, wrote to the general warehouses of Mehrabad customs as follows:

Subject: Non-performance of clearance

With reference to the letter No. 33/988 dated [...] (18.8.1980) of Bank Mellat Ferdossi Branch indicating cancellation of letter of credit subject to bill of lading No. 220-14363942 you are hereby requested to issue stop delivery order of the consignment. However the forwarder's right to return the goods abroad shall duly be preserved.³

52. No other correspondence between the Parties exists in the record. The Claimant states that the goods were never returned. Bank Mellat asserts that it took steps to transfer the amount of the letter of credit to the Claimant "via British banks" but that "owing to the violation of the beneficiary of the L/C (Claimant) the assistance of the Bank proved to be of no avail."

ii. The Claimant's Arguments

53. The Claimant alleges that he fully complied with the requirements of the letter of credit, stating that the documents were presented to Manufacturers Hanover Trust Company within its validity period. He argues that when Manufacturers Hanover Trust Company refused to honor the letter of credit, due to the freeze of Iranian assets

³The copy of the letter submitted is typed on Bank Mellat stationery; apparently the English translation submitted was done by Bank Mellat, but the letter is clearly internal Iranian customs correspondence.

imposed by the United States, the documents were sent to Bank Mellat in Iran on instruction from Manufacturers Hanover Trust Company. According to the Claimant: "Stamps put on several of the documents show that the Bank of Tehran received the documents before or on February 25, 1980 ... whereas the Letter of Credit had been extended until February 26, 1980" and that therefore payment was wrongfully withheld.

iii. Bank Mellat's Defense

54. Bank Mellat alleges that the Claimant has not proved that the letter of credit and the originals of the accompanying documents were presented within the validity period of the credit. Bank Mellat admits that it received the documents, which have been date-stamped by the bank. In this respect, however, it alleges that "the stamps which may be observed on some of the documents were placed at Mr. Ordubadi's request [who had requested] that they be sealed." Bank Mellat also argues that presentation of the documents was not made by the Claimant, the beneficiary of the credit. It states: "The production to the Bank of the Claimant's letter dated 31 January 1980 was effected by the Customer [Mr. Ordoubadi] along with the shipping documents." According to Bank Mellat, this constitutes a breach of the credit itself and of "international regulations relating to such documents." Bank Mellat therefore denies any commitment by the bank to make payment.

55. Bank Mellat also objects that the air waybill improperly named Mr. Ordoubadi as consignee of the goods, whereas it should have been issued in the name of the bank or endorsed in its favor as required in the letter of credit. According to the bank, this error invalidates the credit.

56. Bank Mellat further contends that it cannot be held liable for the consequences which arose from the freeze of Iranian assets imposed by the President of the United States, as these were "beyond the Respondent's control" and that it too is excused from performance by Article 11 of the UCP (1974 Revision), (see paragraph 32, supra), which "expressly makes provision for the matter."

57. Finally, Bank Mellat states that it did, in fact, attempt to transfer the amount of the letter of credit to the Claimant "via British banks, however owing to the violation of the beneficiary of the L/C (Claimant) the assistance of the Bank proved to be of no avail."

iv. The Claimant's Response

58. In reply to Bank Mellat's arguments the Claimant reasserts his contention that the documents were timely presented. The Claimant admits that the air waybill contained a technical error and should have mentioned the bank as consignee of the goods rather than the buyer. He states that this discrepancy does not, however, constitute sufficient ground for the bank to refuse to make payment, since Mr. Ordoubadi had placed the bank in funds and was willing to waive the defect to obtain delivery of the equipment.

59. The Claimant finally states that Bank Mellat did not raise the argument that the documents were defective at the time of the presentation of the documents, but "allowed the claimant to believe that there was only one difficulty preventing payment: lack of funds due to political tension between Iran and the United States."

60. As to Bank Mellat's assertion that it was excused from performance under Article 11 of the UCP (1974 Revision), the Claimant reiterates the argument already

stated in paragraph 37, supra, in the context of the Bank Sepah letter of credit.

v. The Tribunal's Decision

61. It appears clear to the Tribunal that the letter of credit and accompanying documents were produced to the advising bank in New York on 29 January 1980 and that Manufacturers Hanover Trust Company in New York advised the Claimant to attempt presentation in Tehran, as payment in the United States had been made impossible as a result of the Executive Orders freezing Iranian assets.

62. The Claimant sent the documents to Bank Mellat under cover of a letter dated 31 January 1980. Despite the lack of evidence concerning that mailing Bank Mellat has admitted that it date-stamped the documents on 25 February 1980. The Tribunal is satisfied that Bank Mellat received the originals of the documents in Tehran within the validity period of the letter of credit.

63. The Tribunal must therefore determine whether Bank Mellat is liable for payment under the letter of credit.

64. The Claimant's arguments proceed on the premise that Bank Mellat received a valid demand for payment which was not honored and that the bank is therefore liable for improper performance of its obligations under the letter of credit and should be required to pay the amount thereof. Bank Mellat asserts that the documents were not in conformity with the credit and that it is therefore not required to make payment thereunder.

65. Article 8 c.-e. of the UCP (1974 Revision) sets out clearly the steps to be taken by an issuing bank if it wishes to reject documents submitted to it as defective and refuse payment. These include notification without delay to

the remitting bank and return of the documents, thus allowing the beneficiary to correct the defect, if possible, within the validity period of the credit. If the issuing bank fails to do this it is precluded under Article 8f from claiming that "acceptance .. was not effected in accordance with the terms and conditions of the credit." The language of Article 8e refers to the more usual situation in which the issuing bank receives the documents from an intermediary bank, rather than directly from the beneficiary. However, there appears to be no justification for applying a different rule in the Case now before the Tribunal. It has not been shown that Bank Mellat ever raised any question of a defect in the shipping documents at any stage prior to the commencement of these proceedings, and the Tribunal therefore determines that Bank Mellat waived the defect and thus accepted the documents on, or prior to, the date of its application to Bank Markazi Iran for authorization for transfer.

66. Bank Mellat also raises a defence of force majeure stating: "Non-payment of the L/C (were it true) was for reasons out of the Bank's (Respondent's) control and power." Article 24.1 of the Tribunal Rules provides that: "Each party shall have the burden of proving the facts relied on to support his claim or defence." Bank Mellat has only argued the existence of one specific event of force majeure, namely, "that the freezing of the Iran's funds in U.S. banks by the order of the then U.S. President was beyond the Respondent's control." On this point, the Tribunal finds that the action of Bank Mellat in taking the necessary steps to obtain authorization from Bank Markazi Iran to transfer the value of the letter of credit through a British bank is inconsistent with the argument that Bank Mellat was wholly prevented from effecting payment by reason of the freeze of

Iranian assets in the U.S.A. and thus this defence fails.

67. Bank Mellat further argues that "owing to the violation of the beneficiary of the L/C (Claimant) the assistance of the Bank proved to be of no avail." The Tribunal has already determined (see paragraph 65, supra) that Bank Mellat waived any defect in the documents and thus it cannot rely on any alleged violation of the terms of the credit by the Claimant. Although Bank Mellat cites certain other alleged "violations", such as Mr. Ordoubadi's departure from Iran, the Tribunal finds from the evidence before it that the crucial issue is to determine whether the letter of 9 March 1980 from Bank Markazi Iran requiring production of a customs clearance certificate and authorizing payment only in rials constitutes an event of force majeure. Bank Mellat may only be relieved of its obligation to pay if it can demonstrate that these requirements not only made payment in accordance with the strict terms of the credit impossible at the time, but also that they have continued to do so to date, and that Bank Mellat was not aware of the requirements at the time the letter of credit was issued. Bank Mellat has introduced no evidence or argument on these points. In the absence of any such argument or evidence, Bank Mellat has not shown that the requirements of Bank Markazi Iran as set out in the letter of 9 March 1980 constitute a continuing event of force majeure and thus the Tribunal finds that Bank Mellat is required to pay the value of the letter of credit.

68. Bank Mellat has further argued that it is released from any liability by virtue of Article 11 of the UCP (1974 Revision). Article 11 states in relevant part:

Banks accept no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars or any other

causes beyond their control or by any strikes or lockouts.

69. The Tribunal does not accept that Bank Mellat is released from its obligation to pay under this letter of credit by virtue of Article 11. In order to rely upon Article 11, a bank must first show an interruption of business for one of the reasons specified therein and then establish that the liability it is trying to avoid has arisen out of such interruption. As noted in paragraph 67, the fact that Bank Mellat applied to Bank Markazi Iran for authorization for transfer belies any substantial interruption of its business. Bank Mellat has produced no other evidence to show any interruption of its business and therefore has failed to establish that it is entitled to the benefit of the provisions of Article 11.

C. The Alternative Claim For Return Of The Goods

70. The Claimant asserted an alternative claim for the return of the goods, arguing that, should the banks not be held liable under the letters of credit, Iran should be required to compensate the Claimant for the loss of the equipment. The Claimant alleges that Iran is:

responsible for the banks' failure to have the goods returned to the claimant in order to limit the claimant's losses. Apparently as a result of the disorder at and around Tehran Airport the equipment has disappeared. Since a government is responsible for maintaining order in its country the claimant requests the Tribunal to order the respondent to compensate the claimant for the loss of the equipment.

71. The banks have submitted no defense to this alternative claim. In a submission dated 21 November 1986 the Agent of the Islamic Republic of Iran argues that this claim is not admissible since "the Tribunal Rules prohibit the change of a cause of action beyond the respective time-limit."

72. In view of the decision to award payment of the Bank Mellat letter of credit, the alternative claim relates only to the goods under the Bank Sepah letter of credit. The Tribunal notes that the Claimant has not introduced any evidence to support the allegation that the loss of the goods is attributable to wrongful acts of Iran, nor has he demonstrated that, in the circumstances prevailing in Iran at that time, Iran failed to exercise due diligence.

73. This alternative claim for the return of the goods therefore is dismissed for lack of substantiation.

D. Bank Sepah's Counterclaim

74. Bank Sepah has asserted a counterclaim in the amount of U.S.\$10,000 for: "Compensation of time consumed by the personnel in connection with this claim as well as overhead costs."

75. The Claimant contends that this counterclaim should be dismissed, without stating specific grounds.

76. Bank Sepah has provided no evidence to substantiate the allegation that such costs have been incurred, nor has it submitted any evidence that they were incurred prior to 19 January 1981, so as to be within the jurisdiction of this Tribunal. The Tribunal therefore concludes that this counterclaim cannot be granted.

IV. INTEREST

77. The Claimant seeks interest at the rate of 22% per annum "since the day payment should have been to the claimant in the ordinary course of business until the date of full payment."

78. In the absence of any contractual provision for payment of interest and of any evidence as to the accuracy of the rate submitted by the Claimant, the Tribunal finds it proper to fix the interest rate at 10% pursuant to the principles laid down by the Tribunal in McCollough and Company Inc. and Ministry of Post, Telegraph and Telephone, Award No. 225-89-3 (22 April 1986).

79. Interest on the amount of U.S.\$167,521 due from Bank Mellat shall be calculated from the date following the date of presentation of the documents to the bank, i.e. 26 February 1980.

V. COSTS

80. The Claimant claims costs for compensation for attorney's fees and costs estimated at U.S.\$40,000. The Tribunal determines that each party shall bear its own costs of arbitration.

VI. AWARD

81. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

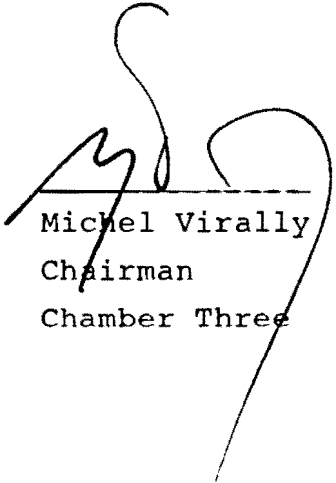
- a) The Claimant's claim against BANK SEPAH under letter of credit no. MA/68117/8 is dismissed.
- b) The Respondent BANK MELLAT is obligated to pay the Claimant GORDON WILLIAMS the sum of one hundred sixty-seven thousand five hundred twenty-one Dollars (U.S.\$167,521.00) plus simple interest at the rate

of ten percent (10%) per annum (365-day basis) from 26 February 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

- c) This obligation shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria on 19 January 1981.
- d) The alternative claim for the return of the goods is dismissed.
- e) BANK SEPAH's counterclaim is dismissed.
- f) Each party shall bear its own costs of arbitration.


This Award is submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

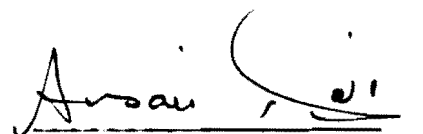
Dated, The Hague
18 December 1987



Michel Virally
Chairman
Chamber Three

In the name of God


Charles N. Brower
Concurring and
Dissenting Opinion


Parviz Ansari Moin
Concurring in part
Dissenting in part
See Separate Opinion