

ORIGINAL DOCUMENTS IN SAFECase No. 219Date of filing 30 March 1983✓ AWARD. Date of Award 30 March 198316 pages in English. 12 pages in Farsi,       DECISION. Date of Decision                                        pages in English.        pages in Farsi.       ORDER. Date of Order                                        pages in English.        pages in Farsi.       CONCURRING OPINION of   Date                                         pages in English.        pages in Farsi.       DISSENTING OPINION of   Date                                         pages in English.        pages in Farsi.       OTHER; Nature of document:   Date                                         pages in English.        pages in Farsi.219-47  
119-47

IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داری دعاوی ایران - ایالات متحده

47

219-47  
219-47

BENJAMIN R. ISAIAH,  
Claimant,

and

BANK MELLAT (as successor to  
International Bank of Iran),  
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحده
ثبت شد - FILED	
No. 219 219	شماره
Date 30 MAR 1983	تاریخ
۱۳۶۲ / ۱۱ / ۱۹	

CASE NO. 219  
CHAMBER TWO  
AWARD NO. 35 -219-2

AWARD

DUPLICATE  
ORIGINAL

نسخه برابر اصل

Appearances

For Claimant:

Mr. Lawrence W. Newman,  
Baker and McKenzie, New York  
Mr. Hamid Sabi, London  
Mr. Benjamin R. Isaiah,  
Claimant

For Respondent:

Mrs. Zahra Hydari,  
Representative  
Mr. Mohammad K. Eshragh,  
Deputy Agent of the Islamic  
Republic of Iran  
Mr. A. Shirazi, Legal Advisor  
to the Agent  
Mr. S. Niazi, Bank Advisor  
to the Agent

Also Present:

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

I. The Proceedings

The Claimant, Mr. Benjamin R. Isaiah, stating that he has been at all times relevant to the claim a citizen of the United States, filed a Statement of Claim on 11 January 1982 against the International Bank of Iran. The relief sought by the Claimant is the payment of U.S. \$380,000, representing the amount of a dishonored check drawn by the International Bank of Iran on the Chase Manhattan Bank, together with interest from 2 January 1979.

The Respondent, Bank Mellat, filed its Statement of Defense on 6 May 1982, contending that the Tribunal has no jurisdiction over this claim because the check in question was payable to someone other than the claimant, a person whose nationality was not established, and offering some defenses on the merits.

The Claimant filed comments on the Statement of Defense on 26 July 1982, in which he described the circumstances surrounding the issuance of the check and submitted various documents relative to his alleged beneficial ownership of the funds represented by the check.

The Respondent then elaborated its defenses in a Rejoinder filed on 20 October 1982.

The Claimant filed a Hearing memorial on 23 December 1982. The Hearing was held on 26 January 1983, at which the Claimant submitted his United States naturalization certifi-

cate, the original check, and a volume of the Claimant's business records for examination by the Tribunal. The Claimant also submitted at the Hearing copies of a letter dated 22 January 1978 from himself to Mr. Haim Farkash, the payee of the check, and two affidavits relating to interest and costs. The Claimant spoke at the Hearing and presented the testimony of two witnesses, Mr. Haim Farkash of Tel Aviv, Israel, and Mr. Masoud A. Alikhani of London, England.

## II. The Facts and Contentions

In the Statement of Claim, Isaiah contended that he was the "owner and holder" of the check, which was dated 2 January 1979. He asserted that the check was not paid because of expropriation of the assets and properties of the Bank by the Government of Iran. He said that Mr. Farkash, the named payee (although misspelled as Farash on the check), was an "affiliate" of his in the transaction with respect to which the check was issued, and he attached copies of the check and of an undated "endorsement separate from negotiable instrument," allegedly made on 9 November 1979, which provided as follows:

### ENDORSEMENT SEPARATE FROM NEGOTIABLE INSTRUMENT

I, HAIM FARKASH, hereby endorse to Benjamin R. Isaiah all of my right, title and interest in and to the check to my order dated January 2, 1979, a copy of which is attached to this endorsement and, by such endorsement transfer and set over to Benjamin R. Isaiah all of my right, title and interest in and to said check and the proceeds thereof as if the check were endorsed "Pay to the order of Benjamin R. Isaiah" and signed by me.

(signed)  
Haim Farkash

Isaiah later described the transaction that gave rise to the check by submitting documents and testimony to show that he had entered into an agreement dated 10 January 1978 with the Karayesh Co. for the purchase by Isaiah of beer in the United States and elsewhere and its shipment to and sale in Iran. The agreement called for Isaiah to receive 25 percent of the profits of this enterprise. The agreement was signed by Isaiah and by Masoud Alikhani on behalf of the Karayesh Co. Isaiah also wrote Alikhani appointing Farkash as his representative to fulfill part of his responsibilities in Iran.

On 3 November 1978, Alikhani wrote Isaiah stating that, to the end of October 1978, Isaiah's share of the profit amounted to \$380,000 and asking how he wished the funds paid. Isaiah replied by a letter of 18 December 1978 asking Alikhani to arrange a bank transfer to Farkash's account in Israel after the first of the year so the income would be recorded in 1979, rather than in 1978. On 4 January, Farkash wrote Isaiah saying that he had received and deposited the check and "will hold the amount in my account until you tell me how to handle the transfer of these funds." On 13 January Farkash again wrote Isaiah, this time telling him that the check had been dishonored for insufficient funds.

The Respondent raised various defenses to this claim, including the absence of legal right for Isaiah, who was not the payee of the check, to sue on the check, the ineffectiveness of the separate undated and unauthorized endorsement or assignment of rights by Farkash to Isaiah, the lack of jurisdiction of the Tribunal in these circumstances, the requirements of Iranian law that any check be reaffirmed by the drawer after six months and that any suit on the check be in Iranian courts, the illegality of the underlying transaction and the related question whether the foreign exchange transaction was legitimate under the applicable Bank Markazi circular.

The Claimant, in rebuttal, asserted, inter alia, that the Tribunal has jurisdiction over a claim by Isaiah as beneficial owner of the funds represented by the check against the bank which dishonored the check and retained the funds, that no renewal requirement exists for a dishonored check, that the underlying transaction was legal when it occurred, that it qualified for foreign exchange under the applicable circular, and that the bank is now estopped from asserting the contrary.

As the case developed in the pleadings and at the Hearing many of the above contentions of both parties were not pursued or were made irrelevant by jurisdictional problems. In the end, the principal issues were whether

there was continuity of nationality of ownership of the claim so as to give the Tribunal jurisdiction and whether the evidence was convincing to establish Isaiah's claim for unjust enrichment.

### III. Jurisdiction

The Claimant proved his American nationality by submitting his certificate of naturalization showing that, while originally a citizen of India, he became a citizen of the United States in 1972.

Bank Mellat acknowledges that it is the successor to the International Bank of Iran and thus is the successor as Respondent. The Tribunal has changed the title of the claim accordingly. Bank Mellat is a state owned bank and is included within the term "Iran" as defined in Article VII (3) of the Claims Settlement Declaration.

The only difficult jurisdictional question involves continuity of nationality of the claim:

"Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claims arose to the date on which this agreement enters into force, by nationals of that state,...

Insofar as Isaiah's claim is based upon the check -- that is, for dishonor of the check -- he faces an obvious and

insurmountable problem in that the payee is an Israeli national. Thus, at the time the claim for dishonor of the check arose, that claim could not have been pursued directly by Isaiah, no matter what his beneficial interest, as he was not a holder in due course. The subsequent separate endorsement by Farkash to Isaiah, being subsequent to the date the claim arose, would not satisfy the requirements of the Declaration for continuity of nationality of the ownership of the claim, even if it had made Isaiah a holder in due course, which it probably did not do, since Isaiah paid nothing for the endorsement and it was separate from the check. See Chapter II of Annex I to the Geneva Convention on Bills of Exchange of 1932; Uniform Commercial Code, sec. 3-302. Thus, this Tribunal has no jurisdiction over a claim by Isaiah as an alleged holder in due course on the check itself.

Isaiah could, of course, have brought a claim against the Karayesh Co. on the underlying transaction, that is, for his share of profits of the beer business. Assuming that the company could be shown to be controlled by 19 January 1981 by the Government of Iran, the Tribunal would have had jurisdiction over that claim, but Isaiah made no such claim, so it is not before us.

Isaiah argues<sup>\*</sup> that he has a claim against Bank Mellat for unjust enrichment on the ground that the bank was

---

\* Isaiah made this argument, not in his Statement of Claim, but later in the pleadings, after he changed counsel.



given funds of which he was the beneficial owner and that it has retained those funds for its own benefit and to his detriment. He points out that this check was not an ordinary check which, in the event of dishonor, gives rise to a claim against the drawer either on the check or on the underlying debt, but rather was a bank check, purchased by the Karayesh Co., the drawer of which was the predecessor of Bank Mellat. Thus, in the event of dishonor (an extremely rare occurrence with bank checks) and retention by the bank of the funds, a claim may be made by the beneficial owner of the funds against the bank for unjust enrichment. While such a claim is novel, the Tribunal agrees with the claimant that, if it can be proved, it is within our jurisdiction because it arose prior to the date of the Algiers Declaration and was owned continuously thereafter by him.

Therefore, the Tribunal holds that it has jurisdiction over the claim for unjust enrichment.

#### IV. Merits of the Claim

The Claimant submitted evidence to prove that the check in question was issued by the International Bank on 2 January 1979 and that payment was refused by Chase Manhattan Bank in New York on 10 January by reason of insufficient funds. Testimony at the Hearing indicated that the check was left with Chase Manhattan for some time in the expectation that International Bank's credit facilities with Chase

would be restored and that officials of the International Bank in Tehran repeatedly assured Mr. Alikhani that the check would soon be paid.

The Claimant submitted evidence in the form of letters exchanged between himself and Mr. Alikhani and between himself and Mr. Farkash, as well as testimony at the Hearing by both of those individuals, which indicated that the check was purchased with Isaiah's 25 percent of the profits of the beer importing business through the end of October 1978 and that it was made payable to an account in the name of Farkash at Isaiah's request.

The Claimant points out that the Respondent has been unjustly enriched at the expense of the Claimant, because it received from the Karayesh Co. funds for the purpose of paying off its debt to the Claimant and that it has never paid those funds to the Claimant or to anyone else. It alleges that this detention of funds by the bank was wrongful, and the beneficial owner, Mr. Isaiah, has a right to restitution.

Restitutionary theories such as unjust enrichment and enrichissement sans cause are found in the laws of many nations. See J. Dawson, Unjust Enrichment: A Comparative Analysis (1951). In Iranian law, Articles 301 and 303 of the Civil Code provide as follows:

Article 301

"Anyone who intentionally or inadvertently acquires goods to which he has no claim, is bound to deliver such goods to the actual owner."

Article 303

"Anyone who receives any property without any right is responsible for the actual property and for any profits that may accrue thereto, whether or not he is aware of his having no right to the property."

In international law unjust enrichment is an important element of state responsibility. See 8 Whiteman, Digest of International Law 1035-36; 1 Schwarzenberger, International Law 577-79 (3rd.ed.). While the Tribunal is unaware of any judicial decisions holding a drawer bank of a dishonored check liable to the beneficial owner of the funds on the grounds of unjust enrichment, that is scarcely surprising as bank checks are rarely dishonored. In any event, the Tribunal believes that it would be inequitable for such a bank to be able to escape liability to the beneficial owner of the funds represented by such a dishonored check and retain the funds to which the bank has no claim.

While it might be argued that Iranian law must be applied to this claim on the ground that the act giving rise to the unjust enrichment took place at least partly in Iran, and that the enrichment occurred there,\* it might also be argued that this is unnecessarily restrictive in view of the fact that the dishonored check was drawn on a New York bank and much of the underlying transaction occurred outside Iran.

---

\* (See Batiffol and Lagarde, Traité de Droit International Privé, No. 561 (6e ed.); Dicey and Morris, Conflict of Laws, Rule 170 (1980).

Article V of the Claims Settlement Declaration leaves the Tribunal with considerable flexibility in this regard. It provides as follows:

ARTICLE V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

Under this rule, the Tribunal is free to apply general principles of law in a case such as this, although there is no reason to believe the result would be different if only Iranian law were applied.

While Bank Mellat raised many defenses in the course of the written pleadings, in the end its defense against the unjust enrichment claim rested upon the assertion that Isaiah was not the beneficial owner of the funds represented by the check when the check was dishonored and that the right to the funds was later transferred to him for the purpose of giving this Tribunal jurisdiction over the claim. The Bank did not challenge the theory of unjust enrichment per se, but rather Isaiah's entitlement under that theory. To substantiate its defense, Bank Mellat offered no evidence. It challenged the credibility of the testimony of the Claimant and of his two witnesses and the authenticity of his documentary evidence, but it presented no evidence of its own. In effect, it implied that the evidence presented

by the Claimant had been fabricated to present the case as that of an American when, in fact, the real party in interest was either Farkash or Alikhani. It pointed out that Alikhani wrote on the letterheads of several different companies and that he was not authorized to sign on behalf of the Karayesh Co. in making the agreement with Isaiah. Alikhani replied that he had a power of attorney at the time to sign on behalf of Karayesh, which was one of his family's group of companies, and that no significance should be attached to his using letterheads of various companies in that group. He said that all his papers, including that power of attorney, had been left in Iran and that he no longer had access to them.

The Respondent points to the endorsement separate from the check by Farkash as indicating that the claimant received his rights only subsequent to dishonor of the check. The Claimant said at the Hearing that the endorsement had been requested by Chase Manhattan long after the dishonor to clarify the Claimant's interest in the question. In any event, such an endorsement by a payee of a check is not dispositive of the question of who owned the beneficial interest in the funds represented by the check.

The Tribunal notes that the Respondent has presented no evidence to substantiate its defense except its suspicions. The Alikhani family's companies were allegedly among those

expropriated by the Islamic Republic of Iran, and the documents therefore were presumably available to the Respondent.

The Tribunal has copies of (a) the agreement of 10 January 1978 between Karayesh Co. and Isaiah for the purchase of beer abroad and its sale in Iran which allocates to Isaiah 25 percent of the profits; (b) the agreement of 22 January 1978 appointing Farkash as Isaiah's representative to develop and manage the beer business in Iran; (c) Alikhani's letter of 3 November 1978 informing Isaiah that his share of profit to the end of October was \$380,000; (d) Isaiah's letter to Alikhani of 18 December 1978 asking that the money be sent to Haim Farkash's account in Israel as soon as possible after the first of the year; (e) Alikhani's letter to Isaiah of 4 January 1979 saying that the check representing Isaiah's share of the profits had been purchased from the International Bank of Iran and had been given, as instructed, to Haim Farkash; and (f) Farkash's letter of 4 January 1979 informing Isaiah that he had received the money and would hold it in his account pending directions from Isaiah. These documents, buttressed by credible testimony at the Hearing, constitute a prima facie case that the money represented by the check was Isaiah's money and that he has held the claim for that money from the time the check was dishonored. In the absence of evidence to the contrary, that evidence is decisive.

As to the defense raised based on the prohibition of beer sales in Iran, the Tribunal notes that sales of beer in Iran were lawful at the time these sales were made.

With respect to the alleged violation of Bank Markazi Iran's circular on foreign exchange, the Tribunal notes that Bank Mellat neither alleged nor proved any refusal by Bank Markazi of the foreign exchange approval which it was incumbent on Bank Mellat to seek pursuant to the circular. Moreover, the Respondent explained in its plea that the check was dishonored only because Chase Manhattan Bank suddenly withdrew the credit facilities which it previously had made available to Bank Mellat, and that the latter made unsuccessful efforts to restore its credit facilities with Chase Manhattan Bank so that the check could be paid. Such explanation is inconsistent with any impediment to payment which would allegedly have resulted from Bank Markazi Iran's position as to the operation of foreign exchange control in this case. In any event, exchange regulations are not relevant to a claim for unjust enrichment.

Therefore, the Tribunal holds that the Respondent Bank Mellat has wrongfully detained Mr. Isaiah's \$380,000 since 10 January 1979 and that Isaiah is entitled to an award in that amount.

V. Interest

The award of interest is certainly permissible in the discretion of the Tribunal. In this case there is no evidence that the International Bank of Iran or its successor, Bank Mellat, deliberately deprived the Claimant of his money; on the contrary, the evidence indicates that the Bank made unsuccessful efforts to restore its credit facilities with Chase Manhattan Bank so that the check could be paid. In view of the special circumstances in this case, the Tribunal declines to award interest.

VI. Costs

Each party shall be left to bear its own costs of arbitration.

AWARD

The Tribunal Awards As Follows:


The Respondent, Bank Mellat, is obligated to pay the Claimant, Benjamin R. Isaiah, U.S. \$380,000, which obligation shall be satisfied by payment out of the Security Account established by Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981.



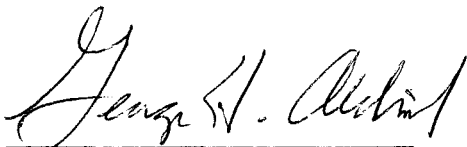
Each of the parties shall bear its own costs of arbitrating this claim.

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

The Hague  
30 March 1983

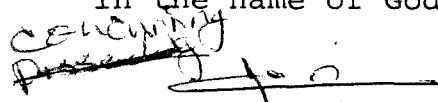


Pierre Bellet  
Chairman  
Chamber Two



George H. Aldrich

In the name of God



Shafie Shafeiei