IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 149 Date of filing 27 July 1983

149-53

۱۴۹-۵۳

_____ AWARD. Date of Award _____

_____ pages in English. _____ 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 Judge Holtzmann

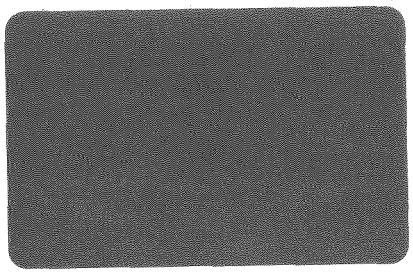
Date 27 July 1983 30 pages in English. — pages in Farsi.

_____ OTHER; Nature of document: _____

Date _____ _____ pages in English. _____ pages in Farsi.

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده



CASE NO. 149

CHAMBER ONE

AWARD NO. 53-149-1

MARK DALLAL,

Claimant

and

ISLAMIC REPUBLIC OF IRAN;
BANK MELLAT (formerly INTER-
NATIONAL BANK OF IRAN),

Respondents.

DISSENT OF HOWARD M. HOLTZMANN

I.

I regret that I must dissent from the Award in this case which dismissed the claim of Mr. Mark Dallal.

Mr. Dallal is the holder of two checks drawn by the International Bank of Iran, Tehran (now Bank Mellat) on Chase Manhattan Bank, N.A., New York. The checks, each in the amount of U.S. $200,000, are dated January 15, 1979 and

are payable to an account of Mr. Dallal at Chemical Bank, New York.[1] Both checks were presented for payment and were dishonored by Chase Manhattan Bank on February 16,1979. Chase Manhattan Bank returned the checks to Mr. Dallal stamped "Returned Unpaid" and indicating that International Bank of Iran had "Insufficient Funds" in its account at Chase Manhattan. The Chase Manhattan Bank stamp also stated "Have Wired -- Written for Instructions -- Present Again." Accordingly, Mr. Dallal presented the checks for payment a second time, on March 2, 1979; they were again returned unpaid because of insufficient funds.

What began as a simple claim for the dishonor of two checks, became more complex when Bank Mellat asserted that payment of the checks was stopped because they had been issued by the International Bank of Iran in violation of Iranian foreign currency exchange control regulations and as part of a scheme to circumvent those regulations. Bank Mellat, however, failed to present sufficient evidence to prove that assertion. As a result of that failure of proof, the majority correctly concludes in the Award that "the Tribunal cannot find that the evidence presented by the Respondents fully proves that the transaction at issue was . . . contrary to the Iranian currency regulations. The Tribunal is simply left in doubt as regards the true character of the transaction." Despite the failure of proof, the

---

[1] Although the Respondents alleged that Mr. Dallal was not the owner of the two checks, the Award, on the basis of a sworn certificate of an officer of Chemical Bank, concludes that "the amount of the cheques was to be paid to an account held by Mr. Dallal." I agree with that conclusion.

majority, nevertheless, considers that mere "doubts" raised by the accusations of the Respondents are sufficient to shift the burden of proof back to Mr. Dallal who, they say, should have presented evidence to show that he was not involved in an illegal transaction. Elements of human drama emerged in the case because Mr. Dallal chose not to give details of the underlying transaction, explaining that he feared that disclosure of relations with him would endanger family members and former business associates in Iran. The majority thereupon dismissed his claim as unenforceable under the International Monetary Fund ("IMF") Agreement, holding 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."

Several legal and factual issues arise:

-- Does Bank Mellat have the burden of proving its defense that the checks were issued as part of a conspiracy to violate exchange control regulations? I think it does.

-- Can Bank Mellat shift the burden of proof to Mr. Dallal by making unproven accusations which merely raise "doubts"? I think it cannot.

-- Is there any factual basis for the so-called "doubts" raised by Bank Mellat's accusations? I think there is none and that analysis demonstrates that those accusations are shams and smokescreens.

-- Should the IMF Agreement govern the decision of this case? I think it should not. Further, were the Iranian currency regulations validly issued in conformity with the IMF Agreement, and are they enforceable in view of provisions of the Treaty of Amity? I think these are serious, complex and far-reaching questions which it is inappropriate for this Chamber to answer in this case, because they have not been briefed or argued before us by either party.

-- Has Bank Mellat been unjustly enriched, and was that issue raised too late to be considered by the Tribunal? I think there was unjust enrichment which the Tribunal should not ignore.

My reasons for these views are discussed below.

II.

New York law governs the two checks in this case: they were drawn in United States currency on one New York bank and are payable in New York to an account in another New York bank. Chamber Two of this Tribunal has in an earlier Award found that under the law of New York "a bank that draws a check is responsible to ensure that sufficient funds are available in the bank on which the check is written to cover the check. That is textbook law in New York, the place where payment was due. . . . It is also customary

international practice." Nasser Esphahanian and Bank Tejarat, Award No. 31-157-2 (1983). See McKinney's New York Uniform Commercial Code (hereinafter U.C.C.) §3-413.

While New York law governs, it is of interest to note that it leads to the same result as the law of Iran and international practice generally. See, Commercial Code of Iran, Article 313 ("A cheque must be paid on presentation.") (M. Sabi trans. 1976); Act Governing the Issuance of Cheques Approved on 16th Tir, 2535, Article 2 (stating that the drawer of a check must have and maintain funds sufficient for the payment of the check in the bank on which it is drawn) (M. Sabi trans. 1976). See, also Geneva Convention on Bills of Exchange of 1932, Uniform Law on Cheques, Art. 12 ("The drawer guarantees payment. Any stipulation by which the drawer releases himself from this guarantee shall be disregarded.").

Just as the duty to pay rests on the drawer of a check, the burden of proving a defense sufficient to avoid payment likewise rests on the drawer. This allocation of the burden of proof is stated explicitly in the law of New York: "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." U.C.C. §3-307(2).[2]

---

[2]The signatures upon the checks at issue must be taken as admitted: "Unless specifically denied in the pleadings each signature on an instrument is admitted." U.C.C. §3-307(1). Respondents have at no point in the proceedings put in issue the signatures appearing on the checks.

This same allocation of burden of proof also results from application of Article 24, paragraph 1 of the Tribunal Rules ("Each party shall have the burden of proving the facts relied on to support his claim or defence"). The same principle governs international practice:

> The broad basic rule of burden of proof adopted, in general, by international tribunals resembles the civil law rule and may be simply stated: that the burden of proof rests upon him who asserts the affirmative of a proposition that if not substantiated will result in a decision adverse to his contention. This burden may rest on the defendant, if there be a defendant, equally with the plaintiff, as the former may incur the burden of substantiating any proposition he asserts in answer to the allegations of the plaintiff.

D. Sandifer, Evidence Before International Tribunals 127 (rev. ed. 1975) (footnotes omitted; emphasis added). The Permanent Court of International Justice and the International Court of Justice have consistently held that a party asserting a fact has the burden of proving it, regardless of whether the party is the plaintiff or the defendant. See, e.g., Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J., ser. A/B, No. 53, at 49, 52 (Judgment of April 5); Mavrommatis Jerusalem Concessions (Greece v. U.K.), 1925 P.C.I.J., ser. A, No. 5, at 29 (Judgment of March 26); Temple of Preah Vihear Case (Cambodia v. Thailand), 1962 I.C.J. 6, 15-16 (Judgment of June 15).

Thus, Mr. Dallal, the holder of the checks,[3] is under New York law entitled to recover on them unless the Respondents carry the burden of proving a defense. As the majority's Award correctly concludes, the evidence presented by the Respondents does not prove their defense, and "the Tribunal is simply left in doubt." A doubt is not a defense.

If the Respondents had put forward proof of their contentions, the burden of presenting further evidence in rebuttal might have shifted to Mr. Dallal who would then have had to choose between speaking up further and thereby perhaps endangering relatives and business associates in Iran, or remaining silent and losing his case. Here, however, Mr. Dallal should not properly be faced with such a choice. Having established his case by proving his status as payee and holder of the two checks, Mr. Dallal is under no further burden to explain his dealings unless the Respondents first put in evidence facts that would establish a defense. This the Respondents have failed to do; rather, to

---

[3] Mr. Dallal is the "holder" of the two checks, being the "person who is in possession of . . . [the checks] drawn, issued or indorsed to him". U.C.C. §1-201(20). He has, however, not proven that he is a "holder in due course" because he has chosen not to present evidence sufficient to support his contentions that he took the checks "for value", a necessary element of that status. U.C.C. 3-302 (1)(a). A "holder," like a "holder in due course," is entitled to payment; the only difference between the two is that a "holder in due course" is subject to fewer defenses than a holder. Compare U.C.C. §3-305 with U.C.C. §3-306.

use the apt phrase of Judge Anzilotti in the Memel Territories Case, Respondents have only provided "vague indications, merely serving as material for conjecture." 1932 P.C.I.J., ser. A/B, No. 49, at 355 (Judgment of Aug. 11) (Dissenting Opinion).

III.

The majority's Award cites three "circumstances" which it holds "give rise to serious doubts as to the true character of the underlying transaction." It is therefore necessary to analyze those three circumstances.

The first circumstance upon which the majority states that it relies is that the Applications for Bank Drafts which were presented to the International Bank of Iran were signed by an individual named Freydoon Kamyab, who Mr. Dallal says was unknown to him, rather than by Lucky Company, which Mr. Dallal said owed him the money as a "finders fee" or "commission" for services he provided to it. There is nothing unusual about that, certainly nothing which indicates any violation of currency control regulations. Lucky Company may well in the ordinary course of business have sent to the bank an employee or agent who signed the application in his own name. The Respondents introduced no evidence that banking practice required that the application be signed in the name of the principal and not of an agent. No inference of illegality can arise from the fact that Mr. Dallal in New York did not know the name of the person whom

Lucky Company used as its employee or agent in Tehran. In any event, the bank accepted the application signed by Mr. Kamyab, which it would not -- and should not -- have done if the circumstances were suspicious.

The second circumstance upon which the majority states that it relies is that "doubts exist as to whether any company named Lucky Company existed at the time of the transaction in question." The evidence presented by the Respondents on this point is at best flimsy. In its post-hearing brief, Bank Mellat submitted copies of two pages from the "Registration Book" of the "Deeds and Landed Property Registration Organization," pertaining to the formation and dissolution of a "Locky" Company. An accompanying document, on the letterhead of the Deeds and Landed Property Organization and signed by the "Corporate and Patents Registration Bureau," stated that "no record was found in connection with Lokeed Corporation, but there was a company incorporated under the name of Locky which was dissolved in the year 1340 (1961/62)." (Emphasis added.) These documents, on their faces, do not refer to Lucky Company. The entry from the Registration Book indicates that the "company objective" of Locky Company was "establishment of recreational gardens, other lawful transactions and production activities." It thus appears that the company dissolved in 1961/62 had a different name and a different principal purpose than Lucky Company, which Mr. Dallal stated was an Iranian Company engaged in the yarn trade.

Moreover, the search for "Lokeed" or "Locky" Company appears to have been limited to the Deeds and Landed Property Organization. The Tribunal has no basis to conclude that this is the sole, or even the appropriate, registry in which to search for a company engaged in the yarn trade. The contrary appears to be the case. Article 6 of the Commercial Code of Iran (M. Sabi trans. 1977) distinguishes between the "Registrar of Companies" and the "Land and Deeds Registry," and prescribes registration in the latter only for companies operating in provinces that have no branch office of the Registrar of Companies. Article 1 of the Administrative Regulations Pertaining to the Registration of Companies Act (M. Sabi trans. 1976) provides that for "such Internal Companies which must be registered in Tehran a special bureau will be established in the General Registry under the name and style of 'The Bureau of Registration of Companies.'" (Emphasis added.) Other offices for corporate registration also appear to exist. See, e.g., Case No. 61, Statement of Defense of Ministry of Housing and Urban Development of the Islamic Republic of Iran, Exhibit 2 (Official Gazette notice by the "Office for Registration of Companies and Non-commercial Institutions"). The evidence thus does not support any inference that Lucky Company did not exist at the time of the transaction, and it indicates no violation of currency control regulations.

The third circumstance upon which the majority states that it relies as an element creating "doubt" as to whether a violation of currency regulations occurred is that "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." As noted above, Mr. Dallal stated that he feared that disclosure of the details of the transaction in which he performed services might lead to the identification and endangering of relatives and business associates who are in Iran. I find it somewhat callous and disingenuous for the majority to state that Mr. Dallal's

> 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.

At the Hearing, Mr. Dallal first preferred to stand on the advice of his counsel that, once having proved that he was the holder of negotiable instruments, he did not have to describe the underlying transaction in order to obtain payment. However, when questioned by the Tribunal he volunteered the information that he had performed services in promoting business for Lucky Company, which was in the yarn trade, and he had earned a finders fee or commission. No one asked him at the Hearing how much time or money he had spent on the project. That did not seem important to any member of the Chamber and it did not occur to Mr. Dallal to furnish the information. It seems unfair at the late moment

of writing the Award for the majority to indicate that Mr. Dallal is somehow suspect for not answering questions which were never asked.

I need not reach the question of whether Mr. Dallal has a basis for his concern over the safety of relatives and former business associates in Iran. However, two statements which appear in the post-hearing brief filed by Bank Mellat indicate some of what may have been the background for his fears. Because those fears are so central to the legal issues raised in this case, the statements by Bank Mellat cannot be ignored. First, in discussion of a point as to which nationality was entirely irrelevant, Bank Mellat refers to Mr. Dallal as an Iraqi.[4] Second, Bank Mellat refers not only to Mr. Dallal's former nationality but also comments on his religion. In the latter connection, it states that Mr. Dallal and two of his witnesses are members of the same religion, and that "It is the Respondent's considered opinion" that the fact that they are co-religionists "led them to give false testimony." The Deputy Agent of the Islamic Republic of Iran withdrew that statement after the Agent of the United States had protested that "Bank Mellat

---

[4]Passport evidence submitted to the Tribunal proves that Mr. Dallal is a national of the United States. He was formerly Iraqi and became a naturalized citizen of the United States in 1974.

has attempted to impeach the credibility of certain witnesses, and to abuse a private U.S. claimant, solely on the basis of religious prejudice."[5] Although the statement was withdrawn -- a welcome and responsible act by the Agent of Iran -- the fact that it was made at all is perhaps relevant and revealing with respect to Mr. Dallal's fears. In these circumstances, it seems to me to be unfair and unfeeling for the majority to conclude that Mr. Dallal's preference for silence "gives rise to serious doubts as to the true character of the underlying transaction."

---

[5]The full text of the letter, dated March 21, 1983 from Arthur Rovine, Agent of the United States of America to Asghar F. Kashan, Agent of the Islamic Republic of Iran, reads as follows:

"I wish to bring to your attention my Government's regret and concern regarding certain allegations contained in the Government of Iran's submission in Case No. 149, filed on February 22, 1983. I refer in particular to the passage at page 5, lines 8-14, a copy of which is enclosed.

In this submission, Bank Mellat has attempted to impeach the credibility of certain witnesses, and to abuse a private U.S. claimant, solely on the basis of religious prejudice. The passage contains statements and is based on assumptions which are offensive.

Such submissions are entirely out of place in this Tribunal, as they would be in any institution committed to the rule of law and basic decency. Conclusions concerning the honesty of testimony based upon the witnesses' religious affiliation can have no value, and there is thus no justification for invoking them. For religious prejudice to form any part of the Tribunal's business debases the institution and all who participate in its work. Moreover, such submissions are fundamentally incompatible with the purposes and protections of the United Nations Charter and numerous international human rights instruments.

Accordingly, we feel compelled to bring this matter to your attention. In the view of my Government, in order to maintain the Tribunal's standing as a body devoted to law and justice, the Government of Iran should correct the record by a resubmission. Failing this, we would ask the Tribunal itself to strike this passage from the record of the case."

As part of their effort to create an aura of irregularity about the transaction, the Respondents cited several other allegedly suspicious circumstances. The majority's Award notes those contentions, but quite correctly does not rely upon them as a basis for its conclusions. I mention those contentions here because they further demonstrate the character and weakness of the Respondents' case.

Concerning one of the alleged irregularities, the Award quotes the Respondents' assertion that the application forms submitted by Mr. Kamyab to the International Bank of Iran "contrary to normal practice, did not indicate the name and address of the receiver of the money." Actually, the receiver of the checks was Mr. Kamyab, whose name does appear; his address, which would have been needed if the checks were to have been mailed to him, was not necessary because it seems that the checks were handed to him across the counter. Moreover, the Respondents submitted no evidence of "normal practice." In any event, it is the Bank, whose successor is a Respondent here, which was responsible for accepting the application form. Mr. Dallal cannot be held responsible for any technical omission by the Bank in carrying out its own business procedures.

As to another alleged irregularity, the Award quotes Bank Mellat's assertion that

> 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.

Again, the Respondents submitted no evidence of any such "normal" banking practice, nor did they explain why the tested telex procedure would be necessary or appropriate in a situation where the bank delivered checks across its counter. Again, if there was a lapse by the bank in Tehran in following its own internal procedures, there is no reason to hold that against Mr. Dallal or Mr. Kamyab.

Finally, in its effort to cast suspicion upon Mr. Dallal, the Respondents noted that when he sought recovery on these same checks in an action in the Federal Court in New York he did so under the pseudonym "John Doe III."[6] There is nothing fraudulent or improper in a "John Doe" action in a Federal Court of the United States. Such an action is maintained by permission of the court, and serves precisely the purposes claimed for it by Mr. Dallal: the protection of the privacy or physical security of the anonymous party and those associated with him. These same reasons were expressed by Mr. Dallal before this Tribunal as explanation for his unwillingness to divulge further information about his business connections in Iran. It is interesting to note that Mr. Dallal is not the only plaintiff in a Federal Court action in New York who felt the need for anonymity in bringing a suit against Iranian defendants.

---

[6] John Doe III v. Islamic Republic of Iran and International Bank of Iran, 80 Civ. 3528 (S.D.N.Y., filed 23 June 1980).

The fact that his suit was captioned "John Doe III" indicates that in at least two other cases in the same court the plaintiffs were also given permission to proceed anonymously as "John Doe."

Thus it is obvious that the Respondents' contentions, including those upon which the majority's Award relies for its conclusions as well as those upon which the majority does not rely, constitute a concerted pattern of shams and smokescreens.

IV.

The majority's Award entirely ignores a major contention of the Respondents which is totally disproven and which exposes the sham of the defense in this case. The central argument of the Respondents is that the two checks were dishonored not because the International Bank of Iran had insufficient funds in its account at Chase Manhattan, but because International Bank of Iran stopped payment when it discovered the alleged conspiracy to violate exchange control regulations. As noted above, Chase Manhattan stamped the checks "Insufficient Funds". Also, the Tribunal has before it an affidavit by an officer of Chase Manhattan confirming that the checks were returned unpaid because of insufficient funds in the account of International Bank of Iran.

In an effort to rebut that very strong evidence, the Respondents submitted Chase Manhattan Bank account statements which they argued showed that International Bank of Iran had ample funds in its accounts at Chase Manhattan Bank. Therefore, they argued, the checks could not -- despite what Chase Manhattan said -- have been returned unpaid because of insufficient funds. Upon examination, however, those account statements show that the account of International Bank of Iran was overdrawn by $1,475,771 on February 16, 1979 when Mr. Dallal first presented his checks for payment and was overdrawn by $1,117,545 on March 6, which was about the time that Mr. Dallal presented the checks for payment a second time. Respondents seek to explain this by asserting that the International Bank of Iran had an overdraft facility at Chase Manhattan. Respondents, however, present no evidence whatsoever to indicate the amount of the alleged overdraft facility on the two relevant dates. The account statements hardly support the argument for which they are advanced by Respondents. To the contrary, they clearly suggest that on the dates of dishonor the International Bank of Iran had reached the limits of its credit with Chase Manhattan.

The fact that International Bank of Iran had no further overdraft facilities at Chase Manhattan Bank in January-February 1979 is borne out by statements of Bank Mellat itself in a case before Chamber Two of this Tribunal. In

that case Bank Mellat took the position that Chase Manhattan Bank had withdrawn the overdraft facilities of International Bank of Iran during the same period as is involved in this case. The Award by Chamber Two in the case of Isaiah and Bank Mellat states that Bank Mellat

> explained in its plea that the check was dishonored [on 10 January 1979] 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.

Award No. 35-219-2 (1983)(emphasis added). Bank Mellat cannot now argue before this Chamber that it had ample credit at Chase Manhattan for the payment of Mr. Dallal's checks, when it said exactly the opposite before Chamber Two.[7]

There is a further major gap in the Respondents' evidence which must be commented upon. If International Bank of Iran had, in fact, stopped payment on Mr. Dallal's checks because it had discovered that they were used as part of an illegal conspiracy, there must have been a stop order to Chase Manhattan Bank. Respondents have not provided any copy of a stop order or any written evidence whatsoever

---

[7] Bank Mellat said in the Isaiah Case that its predecessor International Bank of Iran had no further overdraft facilities at Chase Manhattan Bank on January 10, 1979. Mr. Dallal's two checks are dated January 15, 1979, only five days later.

substantiating that a stop order was ever issued. If there had been a stop order, such evidence would be in the files of International Bank of Iran. Moreover, if there had been a stop order, a Chase Manhattan Bank officer would not have sworn that the checks were returned unpaid because of "insufficient funds."

In addition, if International Bank of Iran had, in fact, discovered a conspiracy to violate currency regulations, one might expect that its files would include at least some record or memorandum of that discovery. Respondents have submitted none. If, indeed, employees of the Bank in Tehran issued checks in violation of currency regulations[8] which were addressed to the Bank and which the Bank had the responsibility to enforce, one would expect that the files of the Bank and the Public Prosecutor would contain a record of some action with respect to such employees, including the two bank officers who signed the checks drawn to Mr. Dallal. This is particularly so because Bank Markazi Circular Number NA/11600, dated November 14, 1978, which is the exchange control regulation invoked by

---

[8]The majority states that "[n]one of the Parties have alleged that Bank Markazi had confirmed or approved the monetary transaction at issue in this case." Such a statement is disingenuous, for it is likewise true that none of the parties contended that Bank Markazi refused its confirmation or approval. What Bank Mellat did allege, and had the burden of proving to sustain its defense, was that International Bank of Iran improperly failed to seek Bank Markazi's approval.

Respondents, refers explicitly to Article 42 of the Monetary and Banking Law of Iran, which prescribes severe monetary penalties for banks and their personnel that engage in unauthorized transactions of the type alleged by Respondents. Any such evidence is exclusively within the control of the Respondents, but they have failed to produce it.

V.

I must comment on the ill-advised reliance in the majority's Award upon Article VIII, Section 2(b) of the IMF Agreement. That provision states, in pertinent part, that

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. (Emphasis added.)

There are serious questions as to whether the Bank Markazi Circular Number NA/11600 ("the Circular") constitutes a valid exchange control regulation imposed in accordance with the IMF Agreement. Significant questions also arise as to whether the Circular is enforceable against a United States party in view of the terms of the Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, which was in force when the Circular was issued and continues in force. Case Concerning United States Diplomatic and Consular Staff in

Tehran (U.S. v. Iran), 1980 I.C.J. 3, 32, 36 (Judgment of May 24). These questions have been raised and argued in cases which are pending before other Chambers of this Tribunal.[9]

These complex and highly technical issues, involving both fact and law, were not raised by the parties in this case and the Chamber has not received any evidence or heard legal arguments concerning them. In these circumstances I think it would have been better for this Chamber to have refrained from relying on the IMF Agreement. Judge Sir Robert Jennings of the International Court of Justice, in his trenchant Cambridge-Tilburg Lecture, pointed out the serious questions which arise when an international tribunal

---

[9] The questions include whether the Circular required prior approval of IMF and, if so, whether such approval was given. As to the Treaty of Amity, the questions include whether the regulations meet the two tests established by Article VII, paragraph 1, of the Treaty of Amity which states:

> Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund.

Further questions arise as to whether, for purposes of application of the Treaty of Amity, any distinction can be drawn between "current" and "capital" transactions.

bases its decision on major points which the parties have not argued:

> The question I am asking, is whether it is right for a Court to surprise the parties with such a decision. . . .
>
> Admittedly there are difficulties in practice. Nevertheless, there is a point of principle. For what is the use of such lengthy written pleadings and oral argument . . . if the Court is then to have a sort of 'clean slate' rule in respect of its actual decision?

Jennings, What is International Law and how do we tell it when we see it?, The Cambridge-Tilburg Law Lectures, at 20 (Third Series 1980)(emphasis in original).

If the Circular is invalid under the IMF Agreement, then, of course, Article VIII, Section 2(b) of that Agreement is inapplicable. But even if the Circular were valid under the IMF Agreement, the provisions of Article VIII, Section 2(b) would not be applicable in the circumstances of this case. For it will be recalled that the provision relates only to the unenforceability of "exchange contracts which are contrary to exchange control regulations." In this case, the majority's Award, as noted above, correctly concludes that there is not sufficient evidence to prove that the transaction was contrary to Iranian currency

regulations. Accordingly, Article VIII, Section 2(b) does not apply here. I know of nothing in the text of the IMF Agreement, or in any decision or commentary relating to it, which supports the proposition that Article VIII, Section 2(b) applies to cases in which there is merely a doubt concerning the existence of a currency violation. Nor is there anything to support the concept that the IMF Agreement can be invoked to shift the burden of proof in any proceeding. The majority's Award cites no basis or precedent for its acrobatics in invoking the IMF Agreement to support shifting the usual burden of proof and, as a result, to assume the existence of a currency violation which, in turn, triggers the application of Article VIII, section 2(b) to deny enforceability.

The majority's Award ventures to conclude that the transaction involved in this case was a "capital" payment, rather than a "current" payment, thus avoiding the more stringent regulations of the IMF Agreement concerning the validity of controls on "current" payments. The Award, however, cites no evidence and provides no analysis to support its finding. The distinction between "capital" and "current" transactions is widely recognized as being highly technical. See, e.g., Evans, Current and Capital Transactions: How the Fund Defines Them, 3 Finance and Development 30 (1968). I find it inappropriate for the majority to express a conclusion on this complex subject without having

the benefit of argument by the parties. One can, however, take some comfort from the fact that the majority's Award is quite limited in scope on this point. It states that

> The Tribunal concludes that these regulations [in the Circular] at least in so far as they apply to mere capital transfers under Article VI Section 3 of the IMF Agreement are valid currency regulations within the meaning of Article VIII Section 2(b) of that Agreement. (Footnote omitted.)

The holding of the Award is thus limited to "capital" transactions; it does not cover payments for "current" transactions which, in practice, include most types of foreign trade.[10]

In addition, whatever the status of the Circular, it must be recalled that it was not published in the Official Gazette and, moreover, was directed to the International Bank of Iran in Tehran, not to Mr. Dallal in New York. Bank Mellat, the successor to the International Bank of Iran, cannot now refuse to pay Mr. Dallal on the ground that

---

[10] For example, in Article XXX(d) of the IMF Agreement the definition of what is to be considered a "payment for a current transaction" includes, inter alia, "all payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities," as well as "payments due as interest on loans and as net income from other investments."

the Bank itself failed to seek consent of Bank Markazi. The applicable principle is well described by Professor F.A. Mann, a leading authority on this subject:

> Art. VIII (2)(b) does not preclude liability for what certain Continental legal systems describe as culpa in contrahendo or 'faute quasi-délictuelle', i.e. liability for a party's failure to apply for such consent as may be necessary or to inform the other party of its absence so as to cause the latter to believe in the validity of the contract and to act accordingly. In English law the Misrepresentation Act, 1967, or the doctrine of estoppel or the tort of negligence or fraud may, in certain cases, justify a similar result without hindrance by Art. VIII (2) (b). (Footnote omitted).

F.A. Mann, The Legal Aspect of Money 381 (4th ed. 1982). That is an internationally-recognized principle of elemental fairness.

VI.

Finally, I must dissent from the majority's refusal to address Mr. Dallal's contention that Bank Mellat would be unjustly enriched if it is permitted to keep the $400,000 worth of Rials that its predecessor had contracted to pay to Mr. Dallal's account in New York. The majority treats Mr. Dallal's argument concerning unjust enrichment as a late attempt to amend his Statement of Claim and concludes, without further analysis, that such an amendment would be inappropriate.

I disagree for two reasons. First, the claim of unjust enrichment was an implicit part of Mr. Dallal's claim from the beginning. Second, analysis of the circumstances

leading up to Mr. Dallal's assertion of unjust enrichment require the conclusion that, even if it were considered to be an amendment to the Statement of Claim, it is entirely appropriate and should be allowed.

Mr. Dallal contended in his Statement of Claim that the dishonor of the checks held by him was "wrongful," and that he was therefore entitled to recover their face amounts. It is revealing that the majority's Award, when summarizing Mr. Dallal's position on this point, includes the argument that "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 appeal in this argument to the equitable concept of the prevention of unjust enrichment is apparent; that this formed an inextricable part of Mr. Dallal's claim is equally apparent.

Even if unjust enrichment were considered to be an amendment to the claim, the procedural history of this case is such that elementary fairness requires its acceptance. In the Statement of Defense the Respondents answered Mr. Dallal's claim with the assertion that "binding circulars" and "regulations" of Bank Markazi had prohibited the payment of the checks. This assertion was unsupported by citation to any circular or regulation whatever. However, at the

Hearing Respondents for the first time disclosed the regulation that they relied upon, Circular Number NA/11600, and presented a translation of it to the Tribunal. The Tribunal accepted this submission, although Respondents offered no explanation for their failure to give Mr. Dallal earlier notice of this fundamental element of their defense. While it must be recognized that Mr. Dallal's presentation at the Hearing was impaired by this surprise submission, it cannot be said that he was deprived of all opportunity to respond, because the Tribunal permitted both parties to submit post-hearing briefs. Having been confronted for the first time at the Hearing with evidence of the regulation's existence, in his post-hearing brief Mr. Dallal argued, inter alia, that the Bank's invocation of its own violation of the Circular would result in its unjust enrichment.[11] The Respondents were given two months in which to file their post-hearing brief in response. They failed to file their brief within the allotted time; instead, the day after the brief was due, they requested more time. This was granted. Finally, more than three months after Mr. Dallal's brief was filed -- and one day after the new deadline set by the Tribunal -- Respondents filed their brief, and the Tribunal accepted it. In their brief the Respondents did not object to Mr. Dallal's argument of unjust enrichment as a late

---

[11] The circumstances of Mr. Dallal's "late" legal argument concerning unjust enrichment are exactly paralleled by the Respondents' "late" factual argument concerning the non-existence of Lucky Company. Both are responses to matters raised at the Hearing. The majority rejects the former, while accepting and relying upon the latter.

amendment. They simply responded with counterarguments on this point. They may have thought, as do I, that unjust enrichment had been an implicit issue in the case from the beginning; alternatively, they may have realized that, given the history of the case, they were hardly in a position to advocate procedural severity.

In all events, Respondents did not object, and they did make use of their opportunity to respond. Under the circumstances, Mr. Dallal's amendment cannot be considered "inappropriate ... having regard to the delay in making it or prejudice to the other party." Tribunal Rules, Article 20. The same result would obtain under the standards applied by other international tribunals.[12]

It has taken some considerable space to explain why Mr. Dallal's argument of unjust enrichment should have been addressed; it will take much less space to explain why he should have succeeded with that argument. This Tribunal has

---

[12] See Société Commerciale de Belgique (Belg. v. Greece), 1939 P.C.I.J. Series A/B, No. 78, at 173 (Judgment of June 15); Mavrommatis Jerusalem Concessions Case (Greece v. Gr. Brit.), 1927 P.C.I.J. Series A, No. 11, at 11 (Judgment of Oct. 10); Chorzow Factory Case (Germany v. Poland), 1928 P.C.I.J. Series A, No. 17, at 7 (Judgment of Sept. 13); Case of Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 80-81 (Judgment of July 6) (Dissenting opinion of Judge Read); Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 3, 231-232 (Judgment of July 25) (Separate opinion of Judge Waldock); M. Hudson, The Permanent Court of International Justice 1920-1942 at 576-577 (1943); J. Simpson & H. Fox, International Arbitration 180-183 (1959).

previously recognized that "exchange regulations are not relevant to a claim for unjust enrichment." Isaiah and Bank Mellat, supra. Professor Mann has explained that even exchange control regulations valid under the IMF Agreement need not be enforced, Article VIII (2)(b) notwithstanding, when the result would be unjust: "There is nothing in the Fund Agreement that would compel the courts in a given case to reach decisions which are offensive to their sense of justice; they are precluded only from ignoring a member State's exhange control regulations as a matter of principle or of a priori reasoning." F.A. Mann, The Legal Aspect of Money, supra, at 376.

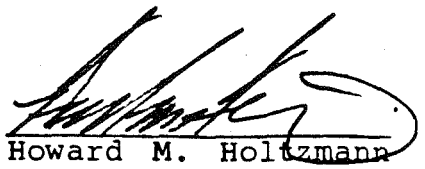
As noted above, Bank Mellat has stated in another case before this Tribunal that in January 1979 the International Bank of Iran lost its credit facilities at Chase Manhattan Bank; for that reason, Bank Mellat explained, a check drawn by the International Bank of Iran on Chase Manhattan Bank was dishonored on 10 January 1979. Five days later, notwithstanding its lack of adequate funds or credit facilities, International Bank of Iran accepted full payment in Rials for its issuance of checks drawn on Chase Manhattan Bank in the amount of $400,000 -- the checks held by Mr. Dallal. In view of these circumstances, it would be hard to characterize the Respondents' retention of these funds as anything other than unjust enrichment. Bank Mellat's cynical declaration that it is prepared, "provided there is

no legal bar thereto," to repay the Rials received to Mr. Freydoon Kamyab (not, as stated by the majority, to "the person entitled to them") does nothing to mitigate this inequity. Mr. Kamyab had the checks made out to Mr. Dallal; under internationally recognized legal principles, Mr. Dallal, not Mr. Kamyab, is "the person entitled to them." There is no legal basis for Bank Mellat's pretension to the right of determining who, other than the payee of the checks, is entitled to the funds. Bank Mellat's retention of the funds constitutes an unjust enrichment, which should have been recognized and remedied by this Tribunal.

VII.

For all of the foregoing reasons I would award U.S.$400,000 to Mr. Dallal, plus interest on that amount from February 16, 1979, the date the two checks were first dishonored, to the date on which the Escrow Agent instructs the Depositary Bank to pay the Award. I would also hold that the Government of Iran should bear Mr. Dallal's reasonable costs in this arbitration pursuant to Articles 38 and 40 of the Tribunal rules.

Dated, The Hague
27 July 1983



Howard M. Holtzmann