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IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داورى دعاوى ايران - ايالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 172

Date of filing 10 May 1983

____ AWARD. Date of Award _____

____ pages in English. ____ pages in Farsi.

____ DECISION. Date of Decision _____

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____ ORDER. Date of Order _____

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____ CONCURRING OPINION of _____

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✓ DISSENTING OPINION of Judge Holtzman

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Case No. 172

Chamber One

Award No. 37-172-1

QUEENS OFFICE TOWER ASSOCIATES,

Claimant,

and

IRAN NATIONAL AIRLINES CORP.,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه د ایری د عاری ایران - ایالات متحدہ
ثبت شد - FILED	
Date	۱۳۶۲ / ۲ / ۲۰
10 MAY 1983	
No. 172	۱۷۲

DISSENTING OPINION OF HOWARD M. HOLTZMANN

I regret that I must dissent from the portion of the Award in this case which dismisses the claim of a New York landlord against Iran National Airlines ("Iran Air") for failure to make payments under a lease for office space. I concur in the portion of the Award dismissing the counter-claim of Iran Air against the landlord, Queens Office Tower Associates ("QUOTA").

In my view the Award dismissing the claim ignores history, defies reality and has no basis in international law.

I.

The relevant facts in this case are quite simple. Prior to the armed attack on the United States Embassy in Tehran and the taking of 52 United States nationals as hostages, Iran Air conducted airline services to and from New York City. In that connection, it entered into a lease of office space in a building in the neighborhood of Kennedy Airport. Following the signing of the lease on August 14, 1979, the landlord, at its own expense, began constructing the interior space of the building in accordance with Iran Air's architectural plans designed to meet the airline's particular needs. As soon as this interior construction was completed, Iran Air moved into its new offices, taking possession of the leased premises on November 24, 1979. The parties agreed that the lease commenced on that date.

The hostage incident occurred in Tehran on November 4, 1979, shortly before Iran Air moved into its new offices. In an effort to bring pressure on Iran to release the hostages, the President of the United States issued various Executive Orders imposing economic sanctions on Iran.* These counter-measures made conduct by Iran Air of its operations in the United States increasingly difficult, and

* Exec. Order No. 12170 (November 14, 1979); Exec. Order No. 12205 (April 7, 1980); and Exec. Order No. 12211 (April 17, 1980). Pursuant to these Executive Orders, the Secretary of the Treasury of the United States issued various Iranian Assets Control Regulations. See 31 CFR §535.101 et seq.

by May 1, 1980 it was substantially impossible for it to continue. Iran Air vacated the leased premises on June 30, 1980.

Iran Air did not pay rent beyond the first month's rent, which was paid in advance at the time of signing the lease.* QUOTA, however, was able to recoup all but \$512 of the rent for the months Iran Air occupied the premises by drawing on a letter of credit which Iran Air had been required to establish as security in the landlord's favor pursuant to the lease. The letter of credit was, however, not sufficiently large to pay all of Iran Air's obligations under the lease.

QUOTA claims before this Tribunal the amounts due to it under the lease, which provides that in the event of default in the payment of rent Iran Air is obligated inter alia to pay: (i) all rent for the period it was in possession; (ii) rent thereafter until a new tenant could be found; (iii) the landlord's costs of re-leasing the premises, including brokerage fees; and (iv) the landlord's costs for interior renovation necessary to convert the premises which had been specially designed for Iran Air into space usable by the new

* When Iran Air repeatedly failed to pay rent, the landlord, in April, 1980, commenced a suit in the Civil Court, New York (Queens County). On April 24, 1980 the Court ordered Iran Air to vacate the leased premises unless it paid the rent.

tenant. The uncontested evidence before the Tribunal is that QUOTA promptly began seeking a new tenant and that it found one who took possession on March 12, 1981, after QUOTA had spent a substantial amount rebuilding the interior of the premises for the new tenant.

Iran Air filed a counterclaim demanding return of the amounts which QUOTA had been able to use for rent under the letter of credit.

II.

This real estate transaction took place entirely within New York, and thus is governed by the law of that state. The real estate law of New York recognizes that a tenant may be discharged from its obligations under a lease if the purpose of the lease is frustrated or if performance becomes impossible. 119 Fifth Ave. v. Taiyo Trading Co. 190 Misc. 123 (N.Y. Sup. Ct. 1947) aff'd, 87 N.Y.S. 2d 430. This rule, however, also includes the indispensable requirement that "[t]he event or circumstance which produces the frustration [is] not attributable to the fault of the party alleging frustration." McNair and Watts, The Legal Effects of War 180 (1966) (cited from an earlier edition in 119 Fifth Ave., supra) (emphasis added).

The Award states the rule of frustration of purpose and impossibility of performance and correctly acknowledges that the rule includes the requirement that a party whose fault causes the events creating the frustration/impossibility cannot rely on those events to relieve it of its contractual obligations. Having reached those legal conclusions, one would have supposed that the majority would have recognized that the fault of Iran's illegal act in holding the hostages in Tehran was the root cause of the difficulties that its national airline encountered in conducting operations in New York.* Instead, the majority loses sight of that basic reality and holds that it was not the hostage-taking but, rather, the economic counter-measures by the President of the United States in an effort to free the hostages which frustrated the purpose of the contract. The reality is

*The classic cases which express the principle of frustration of purpose are the "Coronation Cases" in England. See, e.g., Krell v. Henry, 2 K.B. 704 (1903). In those cases tenants leased space from which to view the coronation procession of King Edward VII. When the procession was cancelled because of the King's illness, the tenants were relieved of their obligation to pay rent because the purpose of the leases had been frustrated. The distinction between the Coronation Cases and the instant case is, of course, that in the Coronation Cases the tenants did not cause the King's illness. As counsel for QUOTA aptly observed during oral argument, to relieve Iran Air of its obligations when its problems in the United States arose because of the hostage-taking, would be like relieving the tenants in the Coronation Cases of their lease obligations if the procession had been cancelled because the tenants had kidnapped the King.

that the hostage crisis triggered the counter-measures. To paraphrase the recent and sensible holding of Chamber Two of this Tribunal, the purpose of the Lease

would not have been destroyed . . . if the fifty-two U.S. nationals had not been seized and detained. The cause and effect relation is clear.

Haji-Bagherpour v. United States of America, Award No. 23-428-2 (26 January 1983).

The majority has constructed a novel theory that the chain of causation which began with the illegal hostage-taking was somehow severed by the legitimate economic counter-measures taken by the United States. The Award expresses this unique concept as follows:

The free exercise by a State of one of its options in the international sphere is an independent cause of the events which ensue therefrom, regardless of the acts of another State which may have triggered such a response.

This theory is not supported by any precedent nor does it evolve by analogy from any principle of international law. The majority cites no authority for its position and does not explain the genesis of its novel theory.

In view of the decision of the International Court of Justice in the Hostages Case, there can be no doubt that taking and holding the hostages -- which the Court held became acts of state of the Islamic Republic of Iran -- were illegal under international law generally, and specifically

violated the Treaty of Amity between the two Governments.
Case Concerning United States Diplomatic and Consular Staff
in Tehran [1980] I.C.J. Rpts. 4, 36.

On the other hand, the economic counter-measures taken by the United States in an effort to secure release of the hostages were entirely legal under international law, which recognizes that where one state violates its international obligations to another, the injured state has the right to take proportional counter-measures. McNair, The Law of Treaties 570-578 (1961); 12 Whiteman Digest of International Law 311 ff. (1971); Vienna Convention on the Law of Treaties, Art. 60, (1969); Sardino v. Federal Reserve Bank of New York, 361 F.2d 100, 111 (2d Cir.) (Friendly, J.), cert. denied, 385 U.S. 898 (1966). The illegal conduct of Iran provided the necessary predicate for the economic counter-measures taken by the United States. As was stated by a distinguished United States-France Arbitral Tribunal in the Case Concerning Air Services Agreement:

Under rules of present-day international law....
[i]f a situation arises which, in one state's view, results in the violation of an international obligation by another state, the first state is entitled...to affirm its rights through "counter-measures".

Arbitral Award of Dec.9, 1978, para. 81, reprinted in Digest of United States Practice in International Law 778 (1978).
The same Tribunal noted the generally accepted rule of

international law that counter-measures must be "proportional" to the violation, and cease to be legal if excessive in scope or severity in relation to the breach. Id. para. 83. The imposing of economic sanctions was no more than a proportional response to the physical violence of attacking the Embassy and holding diplomatic personnel hostages for an extended period -- indeed, it was a quite mild response.*

The basic flaw in the majority's position arises, in my view, from a failure to recognize sufficiently that under international law the hostage-taking was illegal whereas the economic counter-measures were entirely legitimate. Because its acts were illegal, Iran was at fault. Iran, therefore, cannot invoke the doctrine of frustration to avoid its obligations under the lease, for, as explained above, that defense is not available where the circumstances are "attributable to the fault of the party alleging the frustration". McNair and Watts, supra (emphasis added). A state which violates international law and breaches its treaty obligations must foresee the likelihood that the injured state will take permissible counter-measures and must accept responsibility for the consequences of those counter-measures. Thus, the majority is incorrect when it broadly

* Compare, Article 51 of the Charter of the United Nations which permits even military intervention in the event of "an armed attack," with the Hostages Case, supra at p. 29, where the International Court of Justice characterized the hostage seizure as "an armed attack."

states that counter-measures are "an independent cause of the events which ensue therefrom." A legal response cannot break the chain of causation put in motion by an illegal act.

III.

Finally, I must reach the question of whether Iran Air, an instrumentality all of whose shares are owned by its Government, can invoke the technical fact that it is a separate corporate entity as a shield against liability for the consequences of the hostage-taking. In the particular context of the Algiers Declarations, by which the Islamic Republic of Iran has undertaken financial responsibility for the liabilities of its instrumentalities, it would be quite remarkable if an instrumentality such as Iran Air could easily rely on its corporate status in order to distance itself from its Government.* Iran Air is exactly what its formal name states: it is the Iran National Airlines Corporation.

Even apart from the question of its status as a governmental instrumentality, it is not Iran Air which would pay an Award in this case, but rather its owner Government. As

* Cf., Brief for the United States as Amicus Curiae in Support of Petitioner 21-22, First National City Bank v. Banco Para el Comercio Exterior, 658 F.2d 913 (2d Cir. 1981), cert. granted, ___ U.S. ___ (1982) (No. 81-984).

Chamber Two stated in Esphahanian and Bank Tejarat, Award No. 31-157-2 (29 March 1983): "By guaranteeing the debts of juridical persons not part of the government itself, the two Governments have assumed responsibility for private as well as public law duties." The circumstances are therefore distinct from cases involving sovereign immunity, in which the separate incorporation of instrumentalities like Iran Air has been respected primarily for reasons of attachment and enforcement jurisdiction.*

IV.

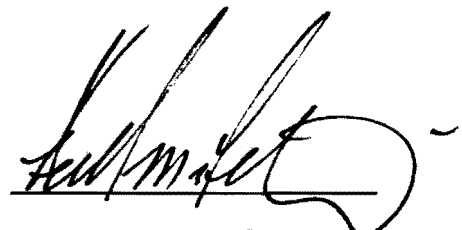
For the foregoing reasons I would hold Iran Air liable for the full damages to which the landlord was entitled in the event of default under the lease, together with interest on those damages from the date of the default to the date the Escrow Agent instructed the Depositary Bank to pay the Award. Likewise, I would hold that Iran Air, having defaulted, should bear QUOTA's reasonable costs in this arbitration pursuant to Articles 38 and 40 of the Tribunal

* See, e.g., Upton v. Iran National Airlines Corp., 75 Civ. 6084 (S.D.N.Y., Oct. 27, 1978), aff'd, No. 78-7599 (2d Cir., April 6, 1979); Chas. T. Main Int'l Inc. v. Khuzestan Water and Power Authority, 651 F.2d 800 (1st Cir. 1981).

Rules. In conclusion, it is to be noted that the Award is based on the unique facts of this particular case, and, if it has any precedential value at all, it is limited to those specific facts.

Dated, The Hague

10 May 1983

A handwritten signature in black ink, appearing to read 'H. M. Holtzmann', written over a horizontal line. The signature is stylized with a large, sweeping flourish at the end.

Howard M. Holtzmann