REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Frank Haron Hillel Case—Decision No. 7

23 July 1960

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the amount previously set forth in the prior part of this Decision not later than one year from the date of this Decision.

2. If after the expiration of that period, all or a part of an award remains unpaid, interest shall be paid at the rate of five per cent per annum on the unpaid balance commencing from the day marking the expiration of that period until payment has been made in full.

3. The present Decision settles all claims or demands incidental or related to the present claims of the Government of Japan against the respective claimants on whose behalf this Decision is rendered as well as all similar claims and demands of the claimants against the Government of Japan.

This Decision is definitive and binding and its execution is incumbent upon all of the parties hereto.

SIGNED in the City of Tokyo on this 20th day of July 1960.

Torsten SALÉN
Third Member

Lionel M. SUMMERS
United States Member

Kumao NISHIMURA
Japanese Member

FRANK HARON HILLEL CASE—DECISION No. 7 OF 23 JULY 1960

Compensation for war damage—Nationality of claimant—Time limit for filing of claim—State responsibility—Compulsory sale of property effected pursuant to orders issued by government—Measure of damages.

Indemnisation pour dommage de guerre — Nationalité du réclamant — Délai pour la présentation de la réclamation — Responsabilité de l'Etat — Vente forcée effectuée par ordre du gouvernement — Détermination du montant de l'indemnité.

The United States-Japanese Property Commission established pursuant to the "Agreement for the Settlement of Disputes Arising Under Article 15 (*a*) of the Treaty of Peace with Japan" and composed of Mr. Lionel M. Summers, Counsellor of Embassy and Consul-General, Member of the Commission appointed by the Government of the United States of America; Mr. Kumao Nishimura, Member of the Permanent Court of Arbitration and former Ambassador of Japan to France, Member of the Commission appointed by the Government of Japan; and Judge Torsten Salén, president of the Supreme Restitution Court for Berlin, Third Member of the Commission chosen by

mutual agreement of the Governments of the United States of America and of Japan,

Having considered the Petition and Reply as well as the additional evidence filed with the Secretariat by the Agent of the United States, Mr. Arnold Fraleigh, on June 12, 1959, December 9, 1959 and June 29, 1960 respectively, and the Answer and Counter Reply filed with the Secretariat by the Agent of the Government of Japan, Mr. Tatsuo Sekine, on September 8, 1959 and March 7, 1960 respectively, in the above entitled case; and

Having heard testimony at an oral hearing held in Kobe, Japan, on July 18, 1960 relating to certain aspects of the dispute; and

Having determined that the Commission has jurisdiction over the dispute, has reached the following conclusions:

PRESENTATION OF CLAIM:

The claim is presented on behalf of Frank Haron Hillel who became a national of the United States of America by naturalization on February 16, 1945 and who, according to the Petition and Reply filed by the Agent of the United States of America, was a national of Iraq at the time of the commencement of the war. Compensation is requested pursuant to Article 15 (*a*) of the Treaty of Peace with Japan and the Draft Allied Powers Property Compensation Law referred to in that Article, hereinafter referred to as the "Compensation Law".

THE QUESTION OF NATIONALITY:

Article 15 (*a*) of the Treaty of Peace with Japan confines itself on the question of nationality to a reference to "each Allied Power and its nationals". The Compensation Law, on the other hand, contains a number of provisions concerning nationality. Those provisions are found in Article 3, paragraphs 1, 2 and 4 which read respectively as follows:

> If the property owned in Japan by the Allied Powers or their nationals at the time of the commencement of the war has suffered damage as a result of the war, the Japanese Government shall compensate for such damage, provided that, with regard to the properties of Allied nationals, such nationals either (*a*) were nationals of a country declared by the Japanese Government to be an enemy country in accordance with the provisions of the Enemy Property Custody Law, or (*b*) were subject to apprehension, internment or detention or to the seizure, disposal or sale of their property during the war.
>
> 2. In cases other than those mentioned in the preceding paragraph, if property owned in Japan at the time of the commencement of the war by Allied individuals who were not physically present in Japan or Allied corporations which were not in operation in Japan during the period of hostilities, has suffered the damage mentioned in Article 4, paragraph 1, item (1) or (5), the Japanese Government shall compensate for such damage.
>
> . . .
>
> 4. Those who may claim the compensation mentioned in paragraph 1 or 2 shall be those who had and shall have the status of Allied nationals at the time of the commencement of the war and at the time of the coming into force of the Peace Treaty.

It will be noted that under paragraph 4, a person, in order to be eligible to maintain a claim, must be an Allied national at the time of the coming into force of the Treaty of Peace.

Iraq was one of the signatories to the Treaty of Peace with Japan which it

ratified on August 18, 1955 and is, therefore, an Allied Power within the meaning of Article 25 of the Treaty of Peace, and paragraph 1, Article 2 of the Compensation Law. Needless to say, the United States of America is also an Allied Power. Hence, the claimant, whose American nationality is not disputed, partake of the quality of a national of an Allied Power, that is, have the status of an Allied national within the meaning of the Treaty of Peace and the Compensation Law, if it should be established that he was in fact an Iraqi national at the commencement of the war as alleged in the Petition and Reply.

The circumstances that he may have been a national of one Allied Power at the commencement of the war, and a national of another Allied Power at the time of the coming into force of the Treaty of Peace is not material, and has not been raised as an issue by the Agent of the Government of Japan.

The evidence submitted by the Agent of the Government of the United States of America with the pleadings concerning the Iraqi nationality of the claimant consists of a letter from N. A. Oldi of the United States Department of Justice to the American Consul in Tokyo submitted with the Reply as Exhibit T. That letter, including its letterhead, reads as follows:

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

70 Columbus Avenue
New York, 23, New York
November 20, 1959
NYC 76/95.9
HILLEL, FRANK Haron III

American Consul
American Consulate
Tokyo, Japan
Re: War Loss Claim of Frank Haron Hillel

Dear Sir,

We have been requested by Frank Haron Hillel of Park Drive South, Rye, New York, to furnish verification of his Iraqian nationality from December 7, 1941 until the day he obtained United States citizenship on February 16, 1945, in connection with his War Loss Claim against the Japanese Government. He stated he is represented by Mr. Arnold Fraleigh, Agent for the United States American Embassy, Tokyo, Japan.

The records of this service show that one Efraim (Frank) Hillel, an Iraqian National, then residing at 4 Manor Lane, Woodmere, New York, submitted an Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention on August 15, 1941. When he submitted an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization on January 20, 1944, he stated that he was born January 1, 1905 in Bagdad, Iraq, and that he was Iraqi National. At the time he submitted his Immigrant Identification Card which showed his nationality on August 15, 1938 as Iraqian.

Very truly yours,

(Signed) N. A. OLDI, *Chief*

*Record Administration
and Information Section*

On the basis of a request filed by the Agent of the Government of the United States of America on June 15, 1960, permission was given by the Commission on June 28, 1960 to file an affidavit by Hillel concerning his Iraqi nationality and an identification card issued by the United States Coast Guard on November 29, 1942. On that identification card, it is stated that Hillel was born in Bagdad on January 1, 1905 and that he was an Iraqi national.

In his own statement of claim executed in October 1953, Hillel says:

> I am informed and verily believe that I was not considered to be a national of Iraq on December 7, 1941.

Nevertheless in the affidavit submitted pursuant to the above-mentioned request, Hillel asserts that he was in error in making that statement and that, in fact, he was an Iraqi national until his naturalization in the United States of America.

The Commission has also examined the Iraqi Nationality Law of October 9, 1924 and the "Ordinance No. 62 of August 15, 1933 for the Cancellation of Iraq Nationality." While that legislation provides for expatriation under certain conditions, it does not appear that any of these conditions operated to divest the claimant of his Iraqi nationality.

Moreover the Coast Guard identification card issued after December 7, 1941 states that Hillel was then an Iraqi national.

In view of the foregoing, the Commission concludes that Hillel was an Iraqi national on December 7, 1941.

TIME LIMIT FOR FILING OF THE CLAIM:

The original claim on behalf of Hillel was filed with a note from the American Embassy in Tokyo on October 28, 1953, to the Ministry of Foreign Affairs of the Government of Japan.

In a letter of December 9, 1953, from the Claims Officer at the American Embassy addressed to the Chief, Fourth Section, International Cooperation Bureau, Ministry of Foreign Affairs, Tokyo, referring to the claim on behalf of Hillel, it was stated that, after an investigation had been made, it was disclosed that Hillel did not have the status of an Allied national on December 7, 1941, that the Government of the United States did not consider it appropriate to espouse his claim and that therefore, the Embassy requested that the claim be returned.

Thereupon, in a *note verbale* of December 16, 1953, the Ministry of Foreign Affairs notified the Embassy that the claim for compensation by Hillel was returned in accordance with the Embassy's note of December 9th.

In a letter of March 18, 1954, Mr. Martin Evans of New York City, attorney for Hillel, submitted the claim directly to the Ministry of Finance of the Government of Japan explaining that in December 1941, Hillel had been a resident of the United States for some time, that in August 1941 he had applied for American citizenship and that "Although his application for citizenship had been entered prior to December 1941, he was a national at that time of Iraq. Therefore, I have no other means to make application in this connexion except directly to the Finance Department".

In a *note verbale* of June 1, 1954, the Ministry of Foreign Affairs notified the American Embassy of the claim submitted directly on behalf of Hillel explaining that his claim did not come "under the cases for re-examination provided in paragraph 1, Article 18 of the Allied Powers Property Compensation Law, nor under any of the other claims provided in that Law" and that the written claim had been returned directly to Mr. Martin Evans.

With a note of May 4, 1956, the American Embassy resubmitted the claim originally filed on October 28, 1953 on the grounds that Iraq had in the meantime ratified the Treaty of Peace.

In a *note verbale* of October 1, 1957, the Ministry of Foreign Affairs advised the Embassy that the competent office of the Government of Japan had found that the present claim for Hillel could not be considered to have been filed within the time limit prescribed in paragraph 1, Article 15 of the Compensation Law. It was pointed out that although the claim had been filed by the closing date for the filing of claims by American nationals, i.e., October 28, 1953, it had been withdrawn by the Claims Officer of the Embassy.

In its note of April 4, 1958, the Embassy informed the Ministry of Foreign Affairs that the Government of the United States of America referred the claim to the Commission for final determination.

In his pleadings, the Agent for the Government of Japan maintains that the first claim is null and void as having been withdrawn and that the renewed filing of the claim occurred after the time limit for the filing of claims on behalf of American nationals.

The Agent for the Government of Japan bases his contention on Article 15, paragraphs 1 and 3, of the Compensation Law, which reads as follows:

Article 15

A claimant shall file a written claim for payment of compensation with the Japanese Government through the Government of the state to which he belongs within 18 months from the time of the coming into force of the Peace Treaty between such state and Japan.

. . .

3. If a claimant fails to file a written claim for payment of compensation within the term mentioned in paragraph 1, he shall be regarded as having waived the claim for payment of compensation.

In the consideration of this question, Article 3, paragraph 4, of the same law is also important. It reads as follows:

Article 3

. . .

4. Those, who may claim the compensation mentioned in paragraph 1 or 2 shall be, unless they are the Allied Powers, those who had and shall have the status of Allied nationals at the time of the commencement of the war and at the time of the coming into force of the Peace Treaty.

Further, Allied nationals are defined in Article 2, Paragraph 2, of the Compensation Law, to include individual persons who are nationals of Allied Powers. The same Article, paragraph 1 defines the Allied Powers to mean the "Allied Powers as provided for in Article 25 of the Treaty of Peace with Japan". That Article 25 provides in its turn that the Allied Powers shall be "The States at war with Japan . . . provided that in each case the State concerned has signed and ratified the Treaty".

From these provisions it is clear that, in order to be able to assert a claim, a claimant must show, *inter alia*, that on December 7, 1941, he was a national of an Allied Power which had ratified the Treaty of Peace.

Such a showing is not possible before the ratification has actually taken place. Hence it would be incorrect to consider that in a case like the present one where the claimant has changed his nationality, he should lose his rights because of the fact that the state of which he previously was a national had not ratified the Treaty of Peace before the closing term for the filing of claims

relating to persons belonging to the state which later granted his naturalization.

Consequently, the time limit of eighteen months stipulated in Article 15, paragraph 1, of the Compensation Law for the submission of claims must be considered to begin to run only from the time of the ratification of the Treaty of Peace by the Government of Iraq. That action took place on May 18, 1955 and the renewed claim was duly filed within eighteen months from that date.

The objection to the claim as having been filed too late is therefore rejected.

THE SUBSTANCE OF THE CLAIM:

In the pleadings of the Agent for the Government of the United States of America, it is explained that Hillel was a partner with a one third interest in each of two partnerships doing business in Japan jointly but under the two names of F. H. Hillel and Company and Capelouto and Ashkenazi. The other two partners were Capelouto and Ashkenazi. None of the partners were present in Japan during the war. They had entrusted the management of their office and commercial goods to a Japanese national named Takiichi Okuda. They had not corresponded with him after the outbreak of the war.

Actually the evidence is not entirely consistent with the pleadings as the evidence shows that the two partnerships were merged into one partnership. Nevertheless, apparently for business reasons, the new partnership operated under the names of the former partnerships. In fact, statements are made that property was owned by one of the old partnerships, when it is manifest that it was owned by the new combined partnership. For convenience and in order to conform to the pleadings, the Commission will follow the same practice.

The first item in the Petition relates to the destruction by bombing of certain furniture belonging to the partnership valued by the claimant at $2,320.00 or 835,200 yen, apparently as of April 28, 1952.

The furniture in question, consisting of 38 items, had been located in the office of the partnership at the Nippon Building, 29 Kyo-machi, Kobe, Japan. Later however, the office was moved to 105 Naka Yamatedori, 2-chome, Kobe-ku, Kobe, a fact that is admitted by the Agent for the Government of the United States of America. The new location was apparently the residence of one of the partners. According to the oral testimony received by the Commission in Kobe from an official of the Hyogo Prefectural Government, the latter address was destroyed in the bombing of Kobe. Hence the furniture was presumably lost as a result of the war.

The only question left for decision therefore is the question of valuation.

In paragraph (6) of the Reply, the Agent of the Government of the United States of America has stated:

> With respect to the amount of office furnishings owned by the partnerships at the commencement of the war, the respondent Government has admitted in paragraph (21) of the answer that furniture and fixtures owned by the partnership of F. H. Hillel and Co. at the outbreak of the war had a replacement cost in 1953 of 528,632 yen, while the claimant has stated that the furnishings owned by both partnerships, F. H. Hillel and Co. and Capelouto and Ashkenazi, at the outbreak of the war had a replacement cost in 1952 of 835,200 yen. The respondent Government has assumed in paragraph (22) of the answer that the furnishings reported to have been owned by F. H. Hillel and Co. included also the furnishings owned by Capelouto and Ashkenazi. The respondent Government believes that such an assumption is not justified and that the difference between the figures of the respondent Government and that of the claimant Government is due to the failure of the respondent Government to take into account office furnishings owned by the partnership of Capelouto and Ashkenazi.

In paragraph 6 of the Counter Reply, the Agent for the Government of Japan has stated:

> The claimant Government contends that the difference in views between the claimant Government and respondent Government with respect to the kind and quantities of office furniture and fixtures has arisen from the fact that the respondent Government did not take into account the office furniture and fixtures owned by Capelouto and Ashkenazi. However, as we mentioned in paragraph 3, F. H. Hillel & Company and Capelouto and Ashkenazi were not separate partnerships, but were merely two firm names of one partnership. Accordingly, it is inconceivable that in addition to the property owned by F. H. Hillel & Company, there should have existed the property owned by Capelouto and Ashkenazi. Moreover, according to the statements made in Exhibit "V" of the Reply, it is unthinkable that there were separate offices respectively under the above-mentioned two firm names. In fact, it is clear by Exhibit "C" of the Petition that the office of Capelouto and Ashkenazi had also been situated in the Nippon Building, 29 Kyo-machi Kobe-ku, Kobe. Therefore, it is natural to assume, as the respondent Government asserted in paragraph 22 of its Answer, that the furniture and fixtures reported as the office furniture and fixtures owned by F. H. Hillel & Co. constitute the entire office furniture and fixtures of the company in this case.

From the foregoing it would appear that the Agent of the Government of Japan has admitted that the furniture had a valuation of 528,632 yen in 1952. Taking into consideration the valuation placed on some of the items by the claimant, which seem to be very high such as $300.00 for a telephone, the figure of 528,632 yen appears to correspond more closely to the realities of the situation. Moreover the Commission agrees with the Agent of the Government of Japan that there was not any distinction between the furniture attributed to F. H. Hillel & Co. and that attributed to Capelouto and Ashkenazi as the partnerships had been merged. In fact paragraph 6 of the partnership agreement provided that "that capital with which the partnership shall begin business shall amount to Japanese Yen one hundred thousand (100,000.00 yen) *representing all of the net assets of the aforesaid two consolidated firms*" (italicizing supplied).

Since 1952 prices have not changed appreciably, the valuation placed on the property in 1952 would still be approximately correct. Hence the claimant is entitled to receive one third of 528,632 yen or 176,211 yen for the loss of the furniture in question.

The next item of claim concerns textile goods owned by F. H. Hillel & Co. packed in 88 crates which had been placed on a ship that was recalled to Japan prior to December 7, 1941. On the return of that ship, the goods were unloaded in Japan. In the Petition it is alleged that sometime between December 7, 1941 and September 1943, those goods had been purchased through a compulsory sale by the Japan Textile Export Association (Nippon Memshi Fu Yushutsu Kumiai) which, in fact, was a government institution. The value of those goods was at the time 57,196.80 yen.

It is further alleged in the Petition that at the outbreak of the war on December 7, 1941, Capelouto and Ashkenazi owned certain textile goods valued at 12,813.90 yen which also had been the object of a compulsory purchase by the Association between December 7, 1941 and September 1943. They were packed in two sets consisting respectively of 26 and 19 crates.

The cost of replacing those goods on April 28, 1952 was alleged to be 200 times the cost of the goods in 1941 or 11,439,360 yen for the goods owned by

F. H. Hillel & Co. and 2,562,780 yen for those owned by Capelouto and Ashkenazi.

The Agent for the Government of Japan asserts that the Japan Textile Exporters Association was an association formed among merchants and exporters of Japanese Textile goods established according to the provisions of Article 9 of the Trade Association Law of 1932. It was a kind of guild formed with the object of exercising voluntary control and providing facilities for its members. The purchase of cotton textile goods from the members by the Association was made in the interest of the members according to the provisions of the above-mentioned law and of the by-laws of the Association. The Association could not be considered as having the power to exercise official authority as an agency of the Government of Japan.

The partnerships in which Hillel held an interest were members of that Association. In order to stabilize the market, prevent dumping and to relieve the financial situation of the members rising out of the difficulties owing to the war, the prohibition of transportation from Japan and the freezing of foreign accounts order of July 1941 instituted by certain foreign countries as well as by Japan, the Association took emergency measures. Those measures provided for the making of loans to members of the Association on the security of the goods—title of which was transferred to the Association and which were in the language of the pleadings "shelved". The transfer to the Association of the 88 cases belonging to F. H. Hillel & Company and of the 26 cases belonging to Capelouto & Ashkenazi originally took place under that shelving system. The transactions were initiated before the outbreak of the war and in any event the shelving was not made under compulsion.

As to the 19 other cases belonging to Capelouto and Ashkenazi, the Agent of the Government of Japan admits that they were purchased by the Association in April 1942 in pursuance of a decision of the Board of Directors to purchase the goods shelved and to effect a compulsory purchase of all goods owned by the members, a decision taken in conjunction with the execution of the "Essential Goods Mobilization Plan under National General Mobilization Law".

As has been indicated, the Commission considers that the shelving of the goods contained in the 88 and 26 cases was carried on voluntarily on the part of the Administrator of the partnerships. Consequently, such shelving did not generate any responsibility on the part of the Government of Japan. Furthermore the shelving was effected in the form of a sale with a result that the partnerships divested themselves of the title of the goods and transferred ownership thereof to the Association. Therefore when those goods were definitely purchased according to the above mentioned directives, the partnerships did not hold title to the goods. Hence a claim for the loss of the property cannot be made. On the other hand, the partnerships acquired a pecuniary claim to the remainder of the purchase price, since, at the shelving, they had only received 60% of the value of the goods. The payment of the part of the price relating to the goods owned under the name of F. H. Hillel and Company is shown by the fact that in the reports presented by the manager of the firm of Hillel & Company, Masaharu Takeda, a sum of 34,318.14 yen is listed as a "loan from the Japan Cotton Textile Exporters Association". The remainder of the price can be assumed as having been paid and accounted for through the entry in the F. H. Hillel and Company's account with the Yokohama Specie Bank, Kobe office, of the amount of 14,868.68 yen on November 20, 1942 which is approximately equivalent to the unpaid balance of 40%. The difference in figures can be explained by the interests, storage, insurance and other costs. In effect that payment terminated the transaction voluntarily initiated by the partnerships at the period prior to the war.

The fact that in the reports of Takeda relating to F. H. Hillel and Company merchandise for 52,196.90 yen apparently corresponding to the goods in the 88 cases, was listed as assets of that firm and the money received at the shelving as "loan "cannot alter the fact that under the conditions for the transaction, the title was transferred to the Association. The ownership was never recovered by F. H. Hillel and Company or Capelouto and Ashkenazi respectively.

The price paid for the 26 cases shelved under the "second purchase" and held by Capelouto and Ashkenazi is shown as being 8,428.40 yen. That figure represents apparently 60% of the full price. The Commission has no doubt that the amount as well as the additional 40% of the full price have been paid at the time according to the directives of the Government of Japan although through the destruction of documents, the actual act of payment cannot be shown.

In accordance with the reasons set out above the Commission holds that no compensation is due for the goods contained in the 88 and 26 cases respectively.

Concerning the goods contained in the 19 cases it has been shown that they were purchased under the so-called "third purchase" which, for the reasons stated in the case of *The United States of America* ex rel *Frank Sassoon* vs. *Japan* (Case No. 18), was a compulsory sale effected pursuant to orders issued by the Government of Japan. Hence the Government of Japan is under obligation to pay compensation for those goods.

The purchase price of those goods at the time of purchase (1942) was 4,335.50 yen. As shown in the decision in case No. 18 the magnification factor of 162.01 should be applied to bring the value up to the price level for the goods in 1952. Consequently the compensation in 1952 prices amounts to 702,131.45 yen less 4,335.50 yen, which is assumed to have been paid. Of this sum Hillel is entitled to one third or 229,795.95 yen.

DETERMINATION OF THE COMMISSION:

In view of the foregoing the United States-Japanese Property Commission determines that the Government of Japan should pay the claimant the sum of 229,795.95 yen for the purchase from the claimant of certain cotton textiles in which the claimant has an interest and the sum of 176,211 yen for the destruction of certain furniture in which the claimant had an interest or the total sum of 406,006.95 yen.

This decision shall be definitive and binding and its execution incumbent upon the Government of Japan.

Signed in the City of Tokyo on this 23rd day of July, 1960.

Torsten SALÉN
Third Member

Lionel M. SUMMERS
United States Member

Kumao NISHIMURA
Japanese Member