

ORIGINAL DOCUMENTS IN SAFE

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Case No. 381Date of filing: 6. July 88

\*\* AWARD - Type of Award \_\_\_\_\_  
 - Date of Award \_\_\_\_\_  
 \_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* DECISION - Date of Decision \_\_\_\_\_  
 \_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* CONCURRING OPINION of \_\_\_\_\_  
 - Date \_\_\_\_\_  
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\*\* SEPARATE OPINION of \_\_\_\_\_  
 - Date \_\_\_\_\_  
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\*\* DISSENTING OPINION of \_\_\_\_\_  
 - Date \_\_\_\_\_  
 \_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* OTHER; Nature of document: Letter of Mr Mostafaei

- Date 6. July 88  
10 pages in English 9 pages in Farsi

CASE NO. 381

CHAMBER 1

AWARD NO. 375-381-1

UITERWYK CORPORATION,  
 JAN C. UITERWYK,  
 MARIA UITERWYK,  
 ROBERT UITERWYK,  
 HENDRIK UITERWYK,  
 JAN D. UITERWYK,  
 Claimants,

and

THE GOVERNMENT OF THE  
 ISLAMIC REPUBLIC OF IRAN,  
 THE MINISTRY OF ROADS AND  
 TRANSPORTATION,  
 PORTS AND SHIPPING ORGANIZATION,  
 IRAN EXPRESS LINES,  
 SEA-MAN-PAK,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دیوان دآوری دعاوی ایران - ایالات متحده
ثبت شد - FILED	
Date	6 JUL 1988 ۱۳۶۷ / ۴ / ۱۵
No.	381



LETTER OF MR. MOSTAFAVI  
 TO MR. BÖCKSTIEGEL DATED 3 JUNE 1988

In the Name of God

3 June 1988

Re: CASE NO. 381

Mr. President :

On 24 April 1988, I received your Memorandum dated 3 March 1988 [sic: should be 4 March/14 Esfand], together with six copies of what is stated to be the final Award in Case No. 381. In that letter, you warned me that you and the American arbitrator would sign the "Award" if I did not sign and return the said copies by 31 March 1988. It would appear that the Tribunal's eagerness to pay the Claimants over \$16.5 million, plus interest at more than 10%, from monies belonging to the Government of the Islamic Republic of Iran has made it disregard the extraordinary force majeure situation resulting from Iraq's bombardment of Tehran by missiles. I have not received the slightest information on the status of the proceedings in this Case for the past year and a half. And aside from two Orders, copies of which I received from the Agent of the Government of the Islamic Republic of Iran, I have not seen any draft version of the Award, such that I might now be asked merely to either sign the Award or write a dissenting opinion thereto, and that if I do neither, I shall be deemed to have refused to sign the Award. Apparently, your intention was to attempt in this way to give the "Award" the semblance, at least, of being justified.

In the face of your insistence on continuing with a proceeding which is unjust and in violation of the rules of arbitration, and which results in a flagrant deprivation of the rights of one of the arbitrating Parties in the present Case, I feel compelled to set forth the following points, and to request once again that the arbitral proceedings herein comply with the express terms of Article 13, para. 2 of the Tribunal Rules, which is the only

deviate from my policy and knowingly adjudicate the claim of the Claimants, who had come to the Tribunal with unclean hands, without requiring additional documentation. I therefore stated that I would not take part in this Case, and that you should note that so far no deliberations had taken place. On the following day, I was asked to discuss this issue so that a solution could be found. In that discussion, you commented that we should arrive at a compromise, so that we could commence the deliberations. I stated that there was no half-way solution on this point; the documents should be requested and made available to the Respondent, and a decision taken once we had seen his response. It was decided that we would each think over all aspects of this issue again on our own, and then meet together once more an hour later to give our views. Those discussions did not bear results either, since I held that by nature, the matter admitted of no solution other than to demand the original copies of the documents. From that time on, for the past year and a half, the Tribunal has not provided me with any information relating to the proceedings in this Case. Therefore, first of all, it is improper to portray these discussions as deliberations on the Case, or to state that I "took part in three sessions of oral deliberations"; and in the second place, this issue does not conform to Article 32, para. 4 of the Tribunal Rules, and the two arbitrators who have drafted and prepared the Award in the absence of the third arbitrator cannot, therefore, invoke that rule as grounds for signing their "Award".

2. My reasons for refusing to participate in the deliberations and to continue with the proceedings in the Case were totally justified.

As you are aware, I have performed the duties entrusted to me with the utmost of good will throughout my tenure with the Tribunal. Without exception, I took part in the hearings and deliberative sessions in all of the cases being adjudicated, and I cooperated fully in all of the other work of the Tribunal

and this Chamber. Furthermore, after resigning from my position as arbitrator, I satisfactorily carried out my duties in connection with the cases assigned to me on the basis of Article 13, para. 5 of the Tribunal Rules. The sole exception was my refusal to participate in the deliberations in the Case at issue (No. 381). I feel I must hereinbelow briefly set forth the reasons in justification of that refusal, which I have already brought to your attention as well:

## 2.1. The Claim

2.1.1. In the main, the Claimants have based their claim for over \$30 million on three alleged contracts: the "Ship Management Contract," "General Agency Contract," and "Equipment Pooling Contract." The evidence relied on by the Claimants in support of the existence and authenticity of the said contracts, and of the expenses which they allegedly bore in carrying out those contracts, is limited to a number of affidavits prepared by certain members of the Uiterwyk family (the Claimants in the instant Case), and by several individuals associated with that family. Besides the affidavits in question, the Claimants have also submitted to the Tribunal a report by Price Waterhouse, an accounting firm, as evidence purporting to confirm their alleged expenses in carrying out the contracts in question. Lastly, the Claimants have also provided the Tribunal with a few container leasing agreements which they allegedly entered into with third persons on behalf of the Respondent.

2.1.2. In their pleadings, the Respondents have denied the existence and authenticity of the contracts at issue, and have traversed the affidavits filed by the Claimants; and they have at all stages of the proceedings asked the Tribunal to require the Claimants to submit the ledgers, documents, and other financial records of Iran Express Lines (one of the Respondents in this Case, whose ledgers and financial records were prepared by the Claimants and are in their possession).

2.1.3. At the Hearing in the Case, which was held on 12 and 13 November 1986, the Respondents introduced a witness named Mr. Paksima, who had worked for years in partnership with the Claimants as a partner in, and the managing director of, Iran Express Lines, and who had settled in the United States after leaving Iran. Mr. Paksima, who had broad and exclusive information on all of the transactions and commercial relations between the Claimants and Iran Express Lines by virtue of his capacity with that company, stated in his testimony that:

- a) The Claimants have written the alleged contracts referred to in section 2.1.1. hereof (supra) unilaterally, fraudulently, and without the knowledge of Iran Express Lines, and solely for the purpose of justifying their spurious claims before this Tribunal; and they have falsely represented that these contracts were drawn up in 1978, with the knowledge of Iran Express Lines. In his testimony, Mr. Paksima added that Iran Express Lines had never concluded any such contracts with the Claimants; nor had it authorized the Claimants to enter into any such contracts.
  
- b) The report by Price Waterhouse does not include certain items of Iran Express Lines' income; moreover, a number of the expense items included in that report have been inflated and overstated for no reason. Mr. Paksima submitted examples of the income items which were not included in the report:
  - 1) income from the strike insurance policy, amounting to \$3,381,727.50;
  - 2) income from domestic porterage fees received by Uiterwyk Corporation;
  - 3) income from a number of voyages, inter alia income from a voyage by the ship "Aqa-Warna," amounting to \$315,000; and

- 4) The capital of Iran Express Lines, which Uiterwyk Corporation has held in its possession from the time the former was established, and down to the present.
- c) Iran Express Lines does not owe the Claimants anything; on the contrary, it is the Claimants who are indebted to Iran Express Lines.

As Mr. Paksima stated at the Hearing, his testimony on the above matters was based entirely upon Iran Express Lines' financial statements, which the Claimants prepared in 1978 and 1980 and placed at Mr. Paksima's disposal. He stated that he was prepared, if so requested by the Tribunal, to provide it with the documents relating to all these financial statements.

- d) In 1978, the Claimants sold the Pishtaz, one of Iran Express Lines' two vessels, without the knowledge or permission of the latter, and took possession of the proceeds from the sale though they had no authorization to do so.
- e) Since Mr. Paksima informed the Respondents of the above matters only one day prior to the Hearing, the Respondents had no opportunity to acquaint the Tribunal with the subject matter of his testimony before the Hearing.

2.1.4. As proof of his statement that the affidavits which the Claimants had submitted to the Tribunal in support of their claims were invalid, Mr. Paksima presented the Tribunal with a letter whereby certain members of the Uiterwyk family undertook, and promised Mr. Paksima, that they would pay him 50% of the total amount awarded if he would give false testimony in the Claimants' favor. Mr. Paksima submitted the aforementioned letter, along with a proposed deed of assignment drawn up by the Claimants, to the Tribunal and the Parties to the claim. At

the Hearing, Claimants confirmed the authenticity of this letter and proposed deed of assignment.

## 2.2 My reasons for refusing to participate in the deliberations

2.2.1 As you are aware, at the initial session which was held in connection with preliminary procedural matters following the Hearing in the Case, I stated that in view of the developments at the Hearing, especially the crucial points raised in Mr. Paksima's testimony, it was the Tribunal's duty to question the veracity of the statements made by the other witnesses in this Case; nor should it dismiss the possibility that the Claimants had misled Price Waterhouse, their accountants. For this reason, I stated that until we received accurate and reliable evidence, we could not possibly take up and decide the claims. Unfortunately, having apparently already decided to deprive the Respondents of justice, you disregarded all these disquieting facts and, most astonishingly, you compared Mr. Paksima's testimony, which was based on evidence whose authenticity the Claimants had themselves confirmed at the Hearing, to "theatrics". Furthermore, you rejected this testimony without giving any consideration to its contents or its ramifications upon the nature and scope of the proceedings, or upon the evidence relied upon by the Claimants. Indeed, you even went further, and rejected the financial records which Mr. Paksima had invited the Tribunal to examine in order to confirm his testimony, even though these records (consisting of Iran Express Lines' financial statements) had all been prepared by the Claimants and given to Mr. Paksima in 1978.

2.2.2. Given your unreasonable reaction on the above points, and since you were not even prepared -- notwithstanding the new developments at the Hearing -- to accept the Respondents', and my, reasonable proposal that the Claimants be required to submit other relevant evidence and financial records, I had no recourse other than to state that I refused to take part in the deliberations in this Case. On the strength of my thirty years'

experience on the bench, my professional and judicial conscience would not permit me to express an opinion, before obtaining further evidence, in connection with a claim based primarily upon a few affidavits prepared by the Claimants, ie. the interested party -- the very claimants who had admitted that they were prepared to engage in bribery and to resort to other fraudulent devices, in order to present a spurious claim.

3. Upon a declaration of refusal to participate, further proceedings in the Case can take place only in accordance with the procedure provided for in Article 13, para. 2 of the Tribunal Rules.

3.1. As noted above, both the way you treated the facts in the Case and your unwillingness to respect recognized principles of equitable proceedings, necessarily and justifiably compelled me, by virtue of my duty to the arbitrating Parties, to refuse to participate any further in the proceedings in this Case. However, it is also clear that even if this refusal were found to be unjustified, the provisions of Article 13, para. 2 of the Tribunal Rules will still apply to this issue. That paragraph deals with the matter directly, and provides that:

"In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply."

3.2 It will be noted that the above paragraph covers both justified and unjustified cases of refusal to perform an arbitrator's functions, and applies both to a current arbitrator and to an arbitrator who has resigned but is still "considered a member of the Tribunal" pursuant to Article 13, para. 5 of the Tribunal Rules. Surely you will not deny that throughout our discussions, I repeatedly and explicitly stated that I was not willing, without examining the original copies of the documents, to take part in that kind of an arbitral process where I saw that the

Claimants had resorted to deception and to presenting false witnesses, and to bribery and other fraudulent devices, and where the Tribunal was nonetheless failing to react to any of this. The fact that the Tribunal did not send me any draft versions of the Award in the Case in question also indicates that it was fully aware of my position on the subject. Otherwise, given that we used to exchange drafts in other cases as a matter of course, both while I was in The Hague and after I returned to Iran, why wasn't I sent any of the draft "Awards" in this instance, if the Tribunal considered me a member of the Tribunal for the purposes of this Case? Indeed, the terms of Article 31, para. 2 of the Tribunal Rules, providing that "The arbitral tribunal shall deliberate in private. Its deliberations shall be and remain secret," were carried out to the letter with respect to me, even though I was supposedly considered an arbitrator in this Case, because I was absolutely unaware and uninformed of what was going on in the deliberative proceedings!

4. The rule set forth in Article 13, para. 5 is totally irrelevant to my status in the instant Case.

4.1. As I wrote in my letter of 10 April 1988, there is no way that Article 13, para. 5 of the Tribunal Rules -- which has been repeatedly invoked for the purpose of establishing that I am still a member of the Tribunal for the purpose of this Case -- can be construed as requiring and compelling me to serve in that capacity. Furthermore, the Tribunal's records on the process whereby this paragraph was approved clearly demonstrate that the Tribunal's members were not intent on applying a dictatorial rule. Rather, they expressly limited its application to cases where a request that a resigned arbitrator continue to serve in that function would not infringe upon his individual human rights, and where such a request was deemed to be appropriate in view of the special circumstances of the particular case. Owing to my present duties, and given that I have been kept totally out of touch with the proceedings in this Case during the past year and a half, I am unable to serve as an arbitrator therein, even if the Tribunal were to accept my earlier proposal that it demand original copies of the case documents. On the contrary, I

believe that any requirement that I participate in further proceedings constitutes an invasion of both my rights and, naturally the rights of the Respondents. However, the more fundamental and important point which I insist be kept in mind in this connection, is that even supposing that one were to reject my abovementioned assertion -- that is, supposing that Article 13, para. 5 were held to be binding in this instance -- all that the said paragraph will, in the end, indicate is that my resignation on 1 April 1987 did not affect those cases in which I was serving as an arbitrator at the time that I resigned, and in the hearings in which I participated before my resignation. With respect to the instant Case it is clear, first of all, that I announced my refusal to participate on 17 November 1986; and by applying the provisions of Article 13, para. 2 with respect to that same date, the issue of whether to apply the rule set forth in para. 5 of that same Article has been altogether extinguished. Second, and more important, Article 13, para. 2 deals with an arbitrator's refusal to perform his functions; and applying Article 13, para. 5 in connection with any particular case will, in the end, lead to only one conclusion -- namely that notwithstanding his resignation, a resigned arbitrator is considered an arbitrator in respect of that particular case.

4.2. In view of the foregoing, I believe that it is a violation of the rules of arbitration, and even of my individual rights, to name me in this draft "Award" as an arbitrator therein. I therefore request that you delete my name from the "Award", and that you decide the matter at issue in accordance with Article 13, para. 2 of the Tribunal Rules.

Mohsen Mostafavi

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(signature)

cc.: Agent of the Government of the Islamic Republic of Iran  
to the Iran-United States Claims Tribunal.