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ORIGINAL

Case No. 458

Date of filing: 26 June 85

** AWARD - Type of Award ITL
- Date of Award 26 June 85
12 pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
- Date _____
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** OTHER; Nature of document: _____

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CASE NO. 458

CHAMBER THREE

AWARD NO. ITL 53-458-3

BURTON MARKS and HARRY UMANN,

Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	26 JUN 1985 تاریخ
	۱۳۶۴ / ۶ / ۵
No.	458 شماره

INTERLOCUTORY AWARD

I. THE PROCEEDINGS, FACTS AND CONTENTIONS

Claimants, BURTON MARKS and HARRY UMANN, filed on 18 January 1982 a Statement of Claim against Respondent, ISLAMIC REPUBLIC OF IRAN ("Iran"), seeking payment of a debt alleged to have been owed by Iran to Gourgen Mkrtich Yanikian ("Yanikian") and later assigned by him to Claimants.

The debt claimed upon arose out of a 1944 arbitration award issued in Iran in favor of Yanikian against Iran's Ministry of Roads, arising, it later appeared, out of a 1939 contract "to build a portion of the Tehran - Azerbaijan railroad." This award was incorporated in a judgment of an Iranian court entered on 5 September 1944. Apparently, the 1944 award and judgment stipulated that payment thereunder was to be made by 26 November 1944, but the Ministry of Roads failed to pay the award until 15 August 1948. Yanikian then sought to recover damages in Iran for the delay in payment, obtaining, on 14 October 1948, a "Document of Execution" (No. 130-28/1) in Iran against the Ministry of Roads in the amount of 2,198,504.10 rials, representing 12 percent interest on the original award, as specified in the award and judgment. Claimants calculated this to be the equivalent of \$68,170.67.¹

This amount, Claimants allege, was never collected. Yanikian later emigrated to the United States and on 25 April 1976 assigned his claim against the Ministry of Roads

¹ Claimants used a rate of 32.25 rials/dollar, asserted to be the "exchange rate in effect from 1943 through 1955."

to Claimants.² Four years later, on 30 June 1980, Claimants obtained in the Superior Court of California, County of Los Angeles, United States, a "foreign money judgment" against "The Imperial Government of Iran, et. al." for the principal sum of \$68,170.67, plus prejudgment interest of \$2,384,597.16 (also at a rate of 12 percent) and costs of \$51.00, for a total of \$2,452,818.83. On 30 July 1980 the same California court issued a writ of execution based upon this foreign money judgment and specifying a rate of "7% per year" as "daily interest" to be collected "from date of writ to date of levy."

The Statement of Claim filed here sought \$2,452,818.83, plus interest from 31 July 1980, relying alternatively on the 1948 Iranian "judgment" and the 1980 California judgment as the basis for the claim and on 12 or 7 percent, respectively, as the appropriate rate of such interest.

As an addendum to their Statement of Claim, Claimants, on 23 February 1982, filed a Statement of Nationality, asserting that Claimants are both "United States citizens by birth," while Yanikian "was formerly an Iranian citizen but is now a naturalized citizen of the United States."³

² The text of the assignment is as follows:

I, GOURGEN MKRTICH YANIKIAN, hereby attest that I have assigned all rights, title and interest in my just and valid claim against the Ministry of Roads of the Government of Iran and the Shah of Iran to Harry M. Umann and Burton Marks. This assignment was verbally made prior to the Superior Court's imposition of the sentence under which I am presently incarcerated.

The Statement of Claim further specifies that Yanikian "can be reached in care of his attorneys (Claimants)."

³ A statement of Yanikian dated 29 April 1982 and filed with the Tribunal on 30 September 1982 affirms that he is "a naturalized citizen of the United States of America." A letter of Claimant Marks filed with the Tribunal on 30 November 1982 gives 1955 as "the year of [Yanikian's] naturalization." Claimants' filing of 10 May 1984 notes that Yanikian "has resided in the United States since 1946."

On 30 September 1982, Claimants filed a First Amended Statement of Claim in which they increased more than tenfold the amount claimed, to \$25,851,440.40 as of 1 May 1982. In part, the increase was due to substitution of an exchange rate of 10 rials/dollar alleged to be "the exchange rate in 1948 and at the time the [Claimants'] lawsuit was instituted in the United States" for the previously asserted rate of 32.25 rials/dollar (see supra note 1). Claimants appeared to have abandoned the 1980 California judgment as a basis for their claim, seeking instead a total of \$9,536,170.40 as of 1 May 1982 based on the 1948 "Writ of Execution."⁴

The bulk of the increase in the amount claimed, however, was accounted for by the specification of two further items of claim, which apparently were not included in the 1948 Execution, and thus were also not reflected in the 1980 California judgment: (1) a claim for unreimbursed arbitrators' fees and costs of arbitration, stemming from the 1944 award, in the amount of 561,180 rials, plus interest at 12 percent, for a total as of 1 May 1982 of \$4,023,539.50; and (2) a "Balance Due as of January 16, 1945" of 3,436,189.75 rials, which balance allegedly accrued under the 1939 contract after the 1944 arbitration award, plus interest at a contract rate of 10 percent, for a total, as of 1 May 1982, of \$12,366,499.98.

Respondent filed its Statement of Defense on 24 January 1983. Essentially it alleged that Yanikian had already been paid in full, submitting as evidence a document acknowledging receipt of payment allegedly executed by Yanikian on

⁴ Thus Claimants now sought \$219,850.40 as the value of the 1948 Execution (2,198,504 rials at 10 rials/dollar), plus interest at 12 percent of \$9,316,320 (93,163,200 rials at 10 rials/dollar).

5 September 1948.⁵ Respondent did not raise any jurisdictional defenses.

On 10 May 1984, Claimants requested a summary award, contending that Respondent's Statement of Defense failed to raise a defense to the claim.

By order dated 4 June 1984, the Tribunal requested memorials on the question whether the claim is a "claim of a national" within the meaning of Article VII of the Claims Settlement Declaration, with special reference to the issue of continuous ownership of the claim. The Tribunal also informed the Parties of its intention to decide the jurisdictional issue on the basis of written submissions.

Claimants filed their memorial on 4 September 1984. Claimants averred that Respondent effectively conceded that the Tribunal had jurisdiction over the claim by failing to challenge Claimants' nationality in its Statement of Defense, as required, Claimants argued, by Article 21(3) of

⁵ The document, however, refers to a different date (9 November 1944), identification number (321/23) and amount (4,925,746.50 rials) of a "Writ of Execution" than those reflected in the "Document of Execution" upon which Claimants rely. By letter filed with the Tribunal on 18 April 1983, Claimants challenged the genuineness of this document. By letters filed 7 June 1983 and 20 June 1983, Respondent and its "Ministry of Roads and Transportation" both agreed to produce the original document at any Prehearing Conference. Respondent has failed, however, to respond to the Order of the Tribunal of 6 October 1983 to advise the Tribunal by 30 November 1983 "if, and to what extent, it is prepared to provide" certain documents requested by Claimants, including "Writ of Execution No. 321/23." It appears from their filing of 10 May 1984 that Claimants contend that any payment to Yanikian reflected in the 5 September 1948 acknowledgment and related documents was for the principal of the 1944 arbitration award rather than for interest in respect of its late payment.

the Tribunal Rules.⁶ Claimants also contended that, under the doctrine of merger of judgments, the 1980 California judgment, obtained in their name, created a new claim distinct from the 1948 Iranian Execution. Claimants argued that as to such claim the continuous ownership requirement of the Claims Settlement Declaration was fulfilled because Claimants have at all times been United States nationals.⁷

Respondent filed its memorial on 31 October 1984. Respondent argued that Yanikian had not relinquished his Iranian citizenship under Iranian law and that his claim retained Iranian nationality, regardless of any assignment, thereby depriving the Tribunal of jurisdiction. Respondent also raised various other defenses, but did not specifically address the issue of continuous nationality.

On 17 December 1984, Claimants requested permission to file a Second Amended Statement of Claim "for the purpose of setting forth more fully the factual basis for the Tribunal's jurisdiction" In particular, Claimants sought to elaborate on the 1980 California judgment and on undescribed "acts of the Iranian Government giving rise to a claim in international law in 1957 at the time . . . YANIKIAN was a United States citizen."

⁶ Article 21(3) provides: "A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence"

⁷ This argument, of course, applies only to the claim as originally pleaded and not to the further items of claim set forth in the First Amended Statement of Claim.

II. REASONS FOR AWARD

Under the Claims Settlement Declaration a claim may be brought against Iran only if it has been owned continuously by a national of the United States from the date on which it arose to the date on which the Claims Settlement Declaration entered into force, 19 January 1981.

Article II(1) sets forth the scope of the Tribunal's jurisdiction, in pertinent part, as follows:

An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States

Article VII(1) defines a "national" of Iran or of the United States, in pertinent part, as "a natural person who is a citizen of Iran or the United States." Article VII(2) defines "claims of nationals" of Iran or the United States as

claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state

In light of Claimants' admission that their assignor became a naturalized United States citizen -- and thus a national of the United States -- "in 1955," the threshold jurisdictional question is whether the elements giving rise to the claims in this case arose before 1955. See Alexander Lyons Lianosoff and Government of the Islamic Republic of Iran, Award No. 104-183-1 at 4-5 (20 Jan. 1984).

Clearly, the two claims added in the First Amended Statement of Claim -- the claim for arbitrators' fees and costs and the claim for amounts owed for contract services -- arose in 1944 and 1945, respectively, well before Yanikian was naturalized as a United States citizen in 1955.

These claims, therefore, were not claims of a U.S. national at their inception and are not within the competence of this Tribunal.

Similarly, the original claim, for late payment of the 1944 arbitration award, must be dismissed for lack of continuous nationality, except to the extent that a new claim arose upon the entry of the 1980 California judgment in favor of Claimants. At all other potentially relevant times, e.g., the date payment of the 1944 arbitration award was due and the date of the Iranian "Document of Execution," the claim was owned by Yanikian, who was not then a U.S. national.

To sustain the proposition that a national court judgment of a State Party can create a claim justiciable under the Claims Settlement Declaration independent and distinct from the claim underlying that judgment would require this Tribunal to hold that such judgment itself separately establishes a "claim" arising out of a debt or contract within the meaning of Article II(1) of the Declaration. The Tribunal declines so to hold.

Article II(1) of the Claims Settlement Declaration, as noted above, establishes the Tribunal "for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States," and further limits the Tribunal's jurisdiction, inter alia, to "claims and counterclaims" that "arise out of debts, contracts . . . , expropriations or other measures affecting property rights"

We do not doubt that a judgment is widely regarded as a form of debt. Under United States law, for example, judgments have been held to be debts enforceable as such. See 49 C.J.S. Judgments §6 (1947). Having due regard,

however, to the requirement that "ordinary meaning [should] be given to the terms of the treaty in their context and in the light of its object and purpose," Art. 31, Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, U.N. Doc. A/Conf. 39/27 (entered into force 27 Jan. 1980), reprinted at 8 Int'l Legal Mat'ls 679 (1969),⁸ the Tribunal must consider the terms "claim," "debt," "contract" and "judgment" in the special framework of the Claims Settlement Declaration and the companion Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration"), dated 19 January 1981.

An analysis of these Accords compels the conclusion that they contemplate no differentiation between a claim and a municipal judgment entered thereon. Both the purpose of the Accords and the practice of the States Parties in respect of their execution reveal that a municipal court judgment cannot be treated as a distinct debt or contract cognizable as a claim before this Tribunal. General Principle B of the General Declaration records "the purpose of both parties . . . to terminate all litigation as between the government of each party and the nationals of the other" in favor of binding arbitration by the Tribunal, which was granted jurisdiction over claims arising before 19 January 1981. Principle B further iterates the specific agreement of the United States to "terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, [and] to nullify all attachments and judgments obtained therein" (Emphasis added.)

⁸ This Convention has been applied consistently by the States Parties to the Algiers Accords. See, e.g., Islamic Republic of Iran and United States of America, Decision No. 32-A18-FT at 14-15 (6 Apr. 1984).

In implementing this Declaration the United States has in fact suspended the execution of judgments obtained against Iran as well as unresolved judicial actions pending against it. See Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981) (in which the President "suspended" "[a]ll claims which may be presented to the . . . Tribunal" and provided that such claims "shall have no legal effect in any action now pending in any court of the United States . . .") and implementing regulations, 31 C.F.R. §535.222, 46 Fed. Reg. 14,335 (1981). See also Electronic Data Systems Corp. Iran v. Social Security Organization of Iran, 651 F.2d 1007 (5th Cir. 1981) (suspending judgment entered against Iran prior to signing of the Algiers Accords and requiring judgment creditor to pursue its claims before Tribunal). In suspending judgments as well as pending proceedings, the United States has recognized that a judgment has no distinct status under the Accords independent of the claim on which it is based.⁹ We agree.¹⁰

This conclusion is buttressed by the observation that this Tribunal was "established for the purpose of deciding claims," Art. II(1), Claims Settlement Declaration (emphasis added), and not simply to grant summary enforcement through the medium of the Security Account of judgments rendered by national courts. Cf. Bendone-Derossi Int'l and Government of the Islamic Republic of Iran, Interim Award No. 40-375-1 at 5 (7 June 1984) (concluding that the Algiers Accords cannot reasonably be interpreted to permit the Tribunal to

⁹ We do not, by reciting this history of United States implementation of the Accords, express any opinion on the merits of Case A15.

¹⁰ Because we conclude that a judgment cannot be the basis of a claim within the jurisdiction of the Tribunal, the status of that judgment under municipal law (i.e., whether presently enforceable, suspended or vacated) is not relevant to the holding in this Award.

act as a court issuing exequatur or otherwise enforce arbitral awards rendered by other tribunals).¹¹

In this connection, Claimants' argument that Respondent has waived its jurisdictional objections by not raising them is unavailing. Article 21(3) of the Tribunal Rules does not purport to preclude the Tribunal from raising jurisdictional issues on its own motion. Moreover, the Claims Settlement Declaration alone delimits the Tribunal's jurisdiction. These jurisdictional boundaries, established by the Governments of the United States of America and the Islamic Republic of Iran in adhering to the Claims Settlement Declaration, are absolute and cannot be waived or modified unilaterally by an arbitrating party or parties. The Tribunal's power to adjudicate claims derives from the Claims Settlement Declaration, not from the consent of individual parties to cases.

III. INTERLOCUTORY AWARD

For the foregoing reasons, THE TRIBUNAL AWARDS AS FOLLOWS:

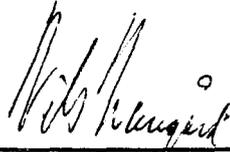
The Tribunal holds that it lacks jurisdiction over any items of the claim as presently pleaded. These claims

¹¹ We note that in no other case decided by the Tribunal has a Claimant who had previously obtained a municipal court judgment sought to rest its claim wholly on such judgment independent of the underlying rights on which it was based. E.g., American Int'l Group, Inc. and Islamic Republic of Iran, Award No. 93-2-3 at 4, 10 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 98, 102; Dames & Moore and Islamic Republic of Iran, Award No. 97-54-3 (20 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 212 (U.S. judgment noted in Dames & Moore v. Regan, 453 U.S. 654, 666 (1981)); Electronic Data Systems Corp. and Government of Iran, Award No. 152-772-SC (17 Dec. 1984) (agreed terms) (U.S. judgment noted in Electronic Data Systems Corp. Iran v. Social Security Organization of Iran, 651 F.2d 1007, 1009 (5th Cir. 1981)).

therefore are dismissed, without prejudice, however, to submission of an amendment to the Statement of Claim within 45 days of the date of this Award.¹²

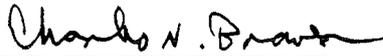
Dated, The Hague

26 June 1985



Nils Mangård
Chairman
Chamber Three

In the name of God



Charles N. Brower



Parviz Ansari Moin
Concurring

¹² Any such amendment must be limited as set forth in Claimants' request of 17 December 1984. Since the Tribunal in this Award has definitively rejected the 1980 California judgment as a basis for jurisdiction, any such amendment could only allege "acts of the Iranian Government giving rise to a claim in international law in 1957." Under Tribunal Rule 20 the Tribunal will be bound to reject any such amendment if it "considers it inappropriate . . . having regard to the delay in making it or prejudice to the other party or any other circumstances." Considering the history of this case and the fact that any such amendment would be the second one and would be filed more than forty months after filing of the Statement of Claim, Claimants would bear a heavy burden in seeking to satisfy the Tribunal that such amendment would not be inappropriate. It is also pertinent to note that reliance on "acts . . . in 1957" for amendment of a Statement of Claim previously based on acts occurring in 1944, 1948 and 1980 necessarily would raise an issue as to whether such "amendment" actually "amends" or "supplements" the Statement of Claim, as contemplated by Tribunal Rule 20, or instead constitutes "the filing of a new claim" after the filing deadline of 19 January 1982 established by the Claims Settlement Declaration, which the Tribunal would be required to reject as it did in Re Refusal to Accept Claim of Raymond Int'l (U.K.) Ltd., Decision No. 18-Ref 21-FT at 3 (8 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 394, 395.