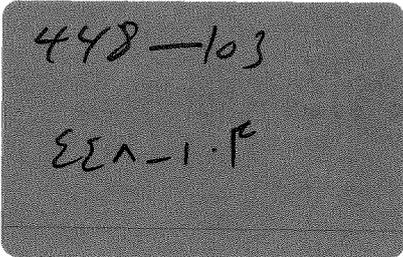


ORIGINAL DOCUMENTS IN CASE



Case No. 448

Date of filing: 19 Dec '86

** AWARD - Type of Award _____
- Date of Award _____
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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____

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** DISSENTING OPINION of Howard M. Holtzman

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** OTHER; Nature of document: _____

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_____ pages in English _____ pages in Farsi

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داری دعوی ایران - ایالات متحدہ

DUPLICATE
ORIGINAL
نسخہ برابر اصل

CASE NO. 448
CHAMBER ONE
AWARD NO. 283-448-1

TRAINING SYSTEMS CORPORATION,
Claimant,
and
BANK TEJARAT,
/ NATIONAL IRANIAN OIL COMPANY,
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعوی ایران - ایالات متحدہ
شیت ثبت - FILED	
Date	19 DEC 1986 تاریخ
	۱۳۶۵ / ۱۲ / ۲۸
No.	448 شماره

DISSENTING OPINION OF HOWARD M. HOLTZMANN
WITH RESPECT TO BANK ACCOUNT CLAIM

I dissent from that portion of the Award which dismisses the bank account claim of Training Systems Corporation ("TSC") on the ground that there was no "outstanding" claim as of 19 January 1981 as required by Article II, paragraph 1, of the Claims Settlement Declaration. I join fully, however, in all other parts of the Award.

I.

This Award is the latest of a series of Tribunal decisions that stem from a holding in Harza Engineering Company and The Islamic Republic of Iran, Award No. 19-98-2, pp. 8-9 (30 December 1982), reprinted in 1 Iran-U.S. C.T.R. 499, 504, that:

A mere right to payment from a bank account is not a "claim" within the meaning of the Claims Settlement Declaration, but a claim that the use of the account has been interfered with unreasonably or that the account has in some other manner been taken is such a claim.

From this holding, the Tribunal has developed the concept that a right to withdraw money from a bank account is not of itself a sufficient basis for our jurisdiction; there must also be evidence of an unsuccessful effort to withdraw the funds on or before 19 January 1981 in order for a claim to be considered "outstanding" as of that jurisdictional deadline.

It does not follow from this holding, however, that a claimant's effort to withdraw funds from its account in an Iranian bank must be evidenced by a written demand of any particular kind. Indeed, Harza indicates that "circumstantial evidence" of the effort to withdraw would suffice, but found that no such evidence had been offered. Id. p. 13; 1 Iran-U.S. C.T.R. at 507. In a later case the Tribunal indicated that it was prepared to accept a claimant's oral request to withdraw funds made to an employee in a branch office of his bank, although the Tribunal went on to find that the oral request was later countermanded by the claimant. Ronald Stuart Koehler and Islamic Republic of Iran, Award No. 223-11713-1, pp. 12-14 (16 April 1986).

These cases recognize the turbulent situation that existed in Iran during the immediate pre-Revolutionary and post-Revolutionary months when many United States nationals were hurriedly leaving the country, often in circumstances in which it was impossible, or at least very difficult, to put their banking affairs in order.¹ The situation was

¹For example, in Blount Bros. Corp. and Islamic Republic of Iran, Award No. 216-53-1 (6 March 1986), the Tribunal stated that:

[D]uring November and December 1978 and January 1979, . . . strikes, closures and demonstrations seriously disrupted [the Claimant's] normal
(Footnote Continued)

compounded by civil strife that included burning of some bank offices and temporary closing of others. It is apparent from the many cases before the Tribunal that few if any United States nationals were permitted to withdraw funds, sometimes the denials being based on hypertechnical pretexts, and sometimes being explainable only as the implementation of official policy to block all payments to United States nationals.

Given this state of affairs, the criteria for determining whether a claimant sought to withdraw its funds from a bank account must necessarily be flexible, realistic, and take fully into account the surrounding circumstances. First, the Tribunal should determine whether the Claimant made reasonable efforts under the circumstances to withdraw its money. In weighing the evidence the Tribunal should consider whether the claimant had any business reason to leave funds in Iran. If, for example, the Claimant was terminating its business in Iran, it is reasonable to infer that it would wish to repatriate funds. That inference adds to the credibility of evidence proffered by a claimant as to its efforts to withdraw funds. Second, the Tribunal should consider whether under the circumstances it would have been futile for the Claimant to have further pursued its efforts

(Footnote Continued)

banking practices. Even routine operations such as paying subcontractors became difficult when the banks were frequently closed. The witnesses told how, even when the banks were open, they were evidently suffering from shortages in the supply of cash with which to meet their customers' cheques, and shortages of staff to process even routine transactions.

Id. p. 6. See also Gould Marketing, Inc. and Ministry of National Defence of Iran, Interlocutory Award No. ITL 24-49-2, p. 11 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 147, 152-53 ("By December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic force majeure at least in Iran's major cities.").

to withdraw its funds. The Tribunal should not penalize a claimant because it did not continue or perfect its demand at a time when it was common knowledge that Iranian banks were deaf to such entreaties. Recognizing the circumstances of the Revolution and its aftermath, the Tribunal should not now look back and say that a claimant should have made further or different efforts to withdraw when any such efforts would have been futile at that time.

These criteria would help the Tribunal to identify cases in which the claimant ought to be able to reclaim its money. Failure to apply these criteria only results in leaving the banks in possession of funds that are not rightly theirs.²

II.

Applying the forgoing criteria to the present Case demonstrates that TSC has sufficiently shown that its claim for funds deposited in Bank Tejarat was "outstanding" on 19 January 1981, and that the Tribunal, accordingly, has jurisdiction over the claim.

In 1977, TSC opened a Rial account in Ahwaz with the Bank of Iran and the Middle East (known since its nationalization as Bank Tejarat). Deposits were made into this account by the Oil Service Company of Iran ("OSCO") and later by its successor in interest, the National Iranian Oil Company ("NIOC"), in payment for services rendered to them by TSC. TSC withdrew funds from this account in order to finance its day-to-day operations in Iran and periodically

²It is hardly an answer to this for the Iranian banks to say that funds are available to the claimants in Iran. The practical impediments to such use are so high as to preclude this being an effective solution. In this Case, as in others, this offer rings hollow.

converted a portion of the account into dollars for repatriation to its parent company in the United States.

TSC's personnel left Iran during the turbulent days of December 1978, and thereafter TSC ceased its operations in Iran. When TSC left Iran, it had expended all the funds in its account with Bank Tejarat. However, on 23 July 1979, NIOC credited Rials 9,582,789 to TSC's account in payment for certain invoices submitted to OSCO and NIOC. TSC was notified of this deposit in October 1979. The detention of the 52 United States hostages in Tehran began shortly thereafter, on 4 November 1979.

An examination of the circumstances of this Case clearly reveals that TSC made reasonable efforts to withdraw its funds for which it no longer had any business use in Iran. Because it had no employees in Iran and was not able to send executives there during the continuing hostages crisis, TSC asked its Iranian accounting firm to try to recover the funds on deposit. Mr. S. Noorbakhsh of the Iranian accounting firm of Hami & Co. went to Ahwaz on 16 December 1979 to attempt to withdraw the funds in the account on behalf of TSC. He considered the Revolutionary Public Prosecutor the correct person to approach with a request to withdraw funds from a bank that had been nationalized. Mr. Noorbakhsh was informed by the Revolutionary Public Prosecutor's office that all bank accounts belonging to foreign companies which were no longer doing business in Ahwaz had been closed. He was further informed that there was a general policy of not returning these accounts to their legal owners but, instead, of operating them for the benefit of the poor and oppressed people. Finally, Mr. Noorbakhsh was told that it would be necessary for TSC to send a company official to Iran and to file various documents, advice which seemed futile and contradictory in view of the policy to bar access of United States nationals to their accounts.

Seeking to find a solution, TSC also consulted its bank in the United States, which advised, in the light of its experience, that it would be virtually impossible to repatriate the funds. After receiving the report from Mr. Noorbakhsh and the advice of its bankers in the United States, and in light of the political and financial situation in Iran, TSC reasonably concluded that it would be futile for the time being to pursue further efforts to withdraw the funds.

In these circumstances, I would find that TSC's request in December 1979 to withdraw its funds on deposit with Bank Tejarat, as conveyed by its Iranian accountant, was sufficient to create a claim outstanding on 19 January 1981. Claimant was specifically informed by the Revolutionary Public Prosecutor of a policy not to permit withdrawals by United States nationals, and that policy was generally confirmed by TSC's bank in the United States. In such circumstances, I would find that TSC acted reasonably in not making further demands for its funds -- particularly in the light of the continuing hostage crisis which made normal business contacts impossible.

Accordingly, I would hold that the Tribunal has jurisdiction over TSC's bank account claim and I would proceed to consider the merits.

Dated, The Hague
19 December 1986


Howard M. Holtzmann