

880-128

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Case No. 880

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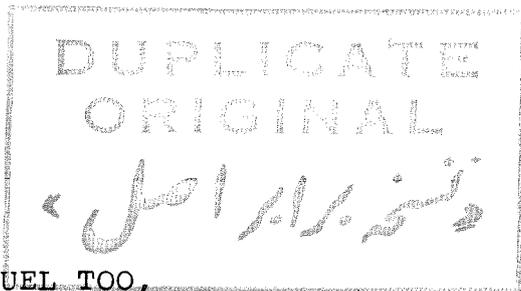
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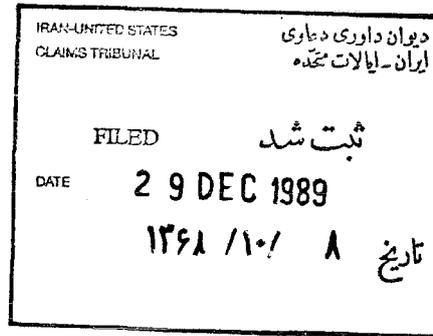


CASE NO. 880
CHAMBER TWO
AWARD NO. 460 -880- 2

EMANUEL TOO,
Claimant,

and

GREATER MODESTO INSURANCE
ASSOCIATES, and THE UNITED
STATES OF AMERICA,
Respondents.



AWARD

Appearances:

For the Claimant: Emanuel Too,
Claimant.

For the Respondent: Michael F. Raboin,
Deputy Agent of the United
States.

Also present: Ali H. Nobari,
Deputy Agent of the Islamic
Republic of Iran,

M. Asbaghi,
Legal Assistant to the Agent,

Timothy E. Ramish,
Agent of the United States.

1. Emanuel Too (the "Claimant") has brought a claim against Greater Modesto Insurance Associates ("GMIA") and the United States of America. The Claimant seeks (1) the proceeds of an insurance policy, written by GMIA, for commercial property allegedly owned by the Claimant in Turlock, California, which was destroyed by fire, and (2) compensation for acts of the United States, allegedly including (a) the cancellation of the Claimant's visa, (b) the failure to protect his property, (c) the expropriation, by the State of Arizona, of a van owned by the Claimant, and (d) the sale, by the Internal Revenue Service ("IRS"), of the Claimant's hotel business, liquor permit, and home, along with a lien placed against a bank account held by the Claimant.

I. FACTS¹

2. The Claimant has shown that he is an Iranian citizen by birth. He held a multiple-entry visa for the United States, issued at the United States Consulate in Tehran on 13 December 1978, and valid until 12 December 1982. The Claimant was an international businessman, engaged in a number of different enterprises. Among these, he alleges he was the owner of a fifty-room motel and restaurant, known variously as Paul's Hotel, the Dixie Pancake House, Sabrina's or the Golden Knight, located in Turlock, California. The ownership of this commercial property is subject to some uncertainty, which will be dealt with in Section III, infra.

¹More detailed consideration of certain facts is given, as appropriate, in connection with the jurisdiction and merits of the Claim, set forth in Parts III and IV below.

3. On 17 November 1979, the Claimant took out an insurance policy for his commercial property. The writer of this policy was GMIA. The actual insurer was the New Hampshire Insurance Company. According to the Declaration of John R. Kirk, the insurance agent, GMIA is owned solely by him and is "itself . . . not an insurance company." The policy provided for U.S.\$425,000 of coverage for the motel, and U.S.\$350,000 worth of coverage for the restaurant and bar. In an amendment issued on 11 January 1980, coverage at the restaurant was increased by U.S.\$135,000. The policy included no less than four mortgage clauses, naming as beneficiaries the previous owners of the complex, a private creditor of the Claimant's, and the Bank of America.

4. On 16 March 1980, the restaurant was all but destroyed by fire. The cause of the fire was immediately identified as arson. The Claimant contends that he had been previously threatened, and believed that the structure was destroyed by "unknown prejudiced Americans." The police and fire departments in Turlock subsequently investigated the incident without arriving at any final conclusions, and the case has remained open.

5. The New Hampshire Insurance Company apparently did not pay out the proceeds of the insurance policy to the Claimant. On 4 March 1981, Claimant brought a suit against GMIA and the New Hampshire Insurance Group in Stanislaus County Superior Court in California. This suit was, it seems, later dismissed for lack of prosecution. On 7 August 1981, the New Hampshire Insurance Company interpleaded into the same court the proceeds of the insurance policy. The stated liability under the policy, which was interpleaded into the court, was U.S.\$133,344. This same pleading mentioned that the mortgage holders on the property had either foreclosed or placed liens against it.

6. The Claimant alleges that the motel-restaurant was the subject of a forced sale, an act that the Claimant attributes to the United States. The Claimant's home, located in Modesto, California, was sold when a commercial United States bank foreclosed on it. The Claimant alleges, however, that this was a government confiscation. A liquor permit, held by the Claimant's corporation, was sold at public auction by the IRS and the proceeds used to pay a portion of overdue employment taxes owed by Sammy Joseph, Inc., the Claimant's company for the operation of the motel-restaurant. The Claimant seeks the recovery of this license and also argues that a bank account was expropriated, but he has not elaborated on this other Claim.

7. The Claimant contends that he traveled to Europe in early March 1980, prior to the fire. He also alleges that he was unable to investigate and act upon the loss of this property in California because he was denied re-entry into the United States. The United States had ceased honoring visas issued in Tehran, unless they had a subsequent endorsement, apparently because of concerns that the visa plates were being used by unauthorized individuals after the embassy in Tehran was seized in November 1979. The Claimant apparently made no attempt to seek an endorsement for his visa, although he states that he tried unsuccessfully to obtain a new visa while in Europe. The Claimant has acknowledged that he ultimately obtained a tourist visa and returned to the United States on 25 December 1980.

8. Another business that the Claimant was engaged in was the importation and sale of cold storage vans. He alleges variously that either six or eight of these vans were expropriated by the United States. The documentary evidence supports the existence of some of the vans. One of the vans located in Turlock, California, was apparently the subject of yet another arson. The only documentation that the Claimant provides concerning an expropriation are communications from the Arizona Department of Motor Vehicles with

respect to one trailer that was abandoned in that State. Arizona authorities discovered the trailer in early December 1979. Sammy Joseph Co., Ltd., the registered owner, was sent communications from the Arizona DMV, Abandoned Vehicles Section. No reply was made, and it is unclear whether the Claimant ever received them. The Claimant has not alleged that he made any attempt to recover his property. The notices that were returned unanswered provided that

[i]n the event the vehicle is not claimed and is sold at public auction any surplus occurring from said sale, after deducting costs arising from the sale of such vehicle i.e., towing, storage, advertising, and selling same, will be held for the owner for a period of thirty (30) days after such sale, thereafter to be disbursed according to law.

On 4 November 1980, the trailer was, in fact, sold at public auction. The total sale price was U.S.\$5.00.

9. The Claimant seeks U.S.\$2,000,000 from GMIA "for losses caused by the motel fire, and cold storage van as well as loss of delay in payment from the date of the fire upto [sic] the time of affecting payment for the losses incurred" and U.S.\$2,500,000 from the United States for losses "caused by the sale and auctioning of the Claimant's burnt building of the motel and his six vans." In a subsequent pleading, filed on 13 July 1983, the Claimant added an additional ground for recovery that the United States had failed to protect his property in Turlock. In an even later filing, on 9 January 1984, he added an altogether new claim that the Internal Revenue Service had expropriated his home, liquor license, business, and bank account, property together valued in excess of a half million dollars. Finally, the Claimant has requested attorneys' fees, prosecution costs and traveling expenses in the amount of U.S.\$500,000.

10. The Respondents have replied with a number of defenses. GMIA chiefly relies on the fact that it is a private

commercial entity, not controlled by the Government of the United States, and that a claim against it is, therefore, outside of the jurisdiction of this Tribunal. It alternatively argues that it was a broker, not an insurer, and was not responsible for providing the Claimant with the proceeds of his insurance policy, and, at any rate, such proceeds were properly interpleaded into a court in the United States by the insurer. The United States also relies on jurisdictional grounds concerning the claim that the suspension of the Claimant's visa prevented his return to the United States and the protection of his property. But the United States also asserts that the Claimant's travel was not seriously hindered by that restriction, and, at any rate, State responsibility would not attach for failure to honor the visa. Likewise, the United States denies that a State is responsible under international law for the sale of abandoned property carried out according to its laws and regulations or tax foreclosures against the Claimant. Nor would the United States be responsible, it argues, for the foreclosures on the Claimant's business and home by private parties. The United States denies any knowledge of a bank account allegedly expropriated by the IRS. Finally, the United States argues that it fulfilled its duty to protect the Claimant's property in California. No counterclaims have been presented in this case.

11. A Hearing was held on 30 May 1989.

II. ADMISSIBILITY OF CLAIMS

12. The Claimant substantially added to his claim after its date of filing. Both on 13 July 1983 and 9 January 1984, the Claimant articulated additional grounds for relief and included the United States Internal Revenue Service as an entity responsible for the alleged expropriation of his property.

13. Amendments of claims are governed by Article 20 of the Tribunal Rules of Procedure:

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that it falls outside the jurisdiction of the arbitral tribunal.

The Tribunal has previously held that this provision affords wide latitude to a party who seeks to amend a claim and the Tribunal's practise is in accord with this liberal approach. See International Schools Services Inc. and The Islamic Republic of Iran, et al., Award No. ITL 57-123-1, at 10-11 (30 Jan. 1986), reprinted in 10 Iran-U.S. C.T.R. 6, 12. In view of its decision on the merits, infra, the Tribunal, however, need not reach a final decision as to whether the amendments made in this Case are permissible under Article 20 or should be construed as new claims, which would thus render them inadmissible.

III. JURISDICTION

A. Nationality of Claim

14. There is no dispute that Emanuel Too is an Iranian national. There is, however, some uncertainty about the extent of his property interest in the motel-restaurant in Turlock, California, and the four cold-storage vans. The record shows that the motel-restaurant was deeded to Sammy Joseph, Inc., a California corporation created on 7 May 1979 by the Claimant. The evidence in this Case does not precisely indicate the extent of the Claimant's interest in this entity. The Claimant has provided a stock certificate for Sammy Joseph, Inc., but the number of shares allocated to him is not shown. The certificate does, however, bear

the number 3 in sequence, thus implying that there might be other shareholders. Another entity with the same name was created under Iranian law on 17 May 1978. The capital of this corporation was rials 20,000,000, of which the Claimant provided all but rials 1,000,000. The Claimant's signature appears on all significant documents relating to both of these concerns.

15. Although the Claimant has not conclusively shown his ownership interest in this California company, it does seem manifest that he was either the sole shareholder or the majority owner, and the United States does not contest this. The Tribunal notes that the Claimant's signature appears on the Articles of Incorporation for this entity, the Board resolution authorizing the purchase of the motel-restaurant, the sales agreement for that purchase, and the individual grant deed. As for Claimant's ownership interest in the cold storage vans, these were apparently owned by an Iranian corporation called Samy Joseph Co. Ltd., established 17 May 1978. The Claimant owned a 95 percent interest in this entity. The Tribunal therefore holds that the Claims in the present Case are claims of an Iranian national.

B. Identity of Respondents

16. This Tribunal has already determined that it does not have jurisdiction over direct claims against United States nationals. Iran and United States, DEC. A/2-FT, reprinted in, 1 Iran-U.S. C.T.R. 101, 104 (13 Jan. 1982). The Claimant is thus obliged to prove that Greater Modesto Insurance Associates is an "agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof." Claims Settlement Declaration, Art. 7, para. 4. He argues that "GMIA is reinsured with U.S. Government insurance Agencies, and is therefore ultimately included in the U.S. Government budget." John R.

Kirk, sole proprietor of GMIA, disputes this assertion and notes that Greater Modesto is not even an insurance company, only an insurance broker. He says that he is "in no way employed by or affiliated with the Government of the United States and in operating my business have never acted as an agent or representative of the Government of the United States. Furthermore, Greater Modesto Insurance Associates is in no way insured through the Government of the United States." Likewise, the United States denies that it "reinsures" GMIA, and suggests that even if such a contractual relationship were present, it would not rise to the level of "control" as required by the Claims Settlement Declaration.

17. The Tribunal holds that the Claimant has failed to show that GMIA is an entity controlled by the Government of the United States. None of the indicia of control, as articulated in past decisions of the Tribunal, are presented in this case. GMIA was not administered by persons appointed by some public authority. Cf. Ray Go Wagner Equipment Co. and Star Line Iran Co., Award No. 20-17-3, at 5-6 (15 Dec. 1982), 1 Iran-U.S. C.T.R. 411, 413 (1982); Rexnord Inc. and Islamic Republic of Iran, Award No. 21-132-3, at 7-8 (10 Jan. 1983), 2 Iran-U.S. C.T.R. 6, 9-10 (1983); DIC of Delaware Inc. and Tehran Redevelopment Corp., Award No. 176-255-3 (26 Apr. 1985), 8 Iran-U.S. C.T.R. 144 (1985). Nor was the stock of GMIA owned entirely, or in controlling part, by the government. Cf. Ultrasystems Inc. and Islamic Republic of Iran, Award No. 27-84-3, at 8-9 (4 Mar. 1983), 2 Iran-U.S. C.T.R. 100, 105-06 (1983); Blount Brothers Corp. and Ministry of Housing & Urban Development, Award No. 74-62-3, at 11-12 (2 Sept. 1983), 3 Iran-U.S. C.T.R. 225, 230-31 (1983); Time, Inc. and Islamic Republic of Iran, Award No. 139-166-2, at 3-4 (29 June 1984), 7 Iran-U.S. C.T.R. 8, 9-10 (1984). Finally, there was no evidence that GMIA's operations were supervised or controlled by the government. Cf. Hyatt Int'l Corp. and Islamic Republic of Iran, Award No. ITL 54-134-1, at 27-31 (17 Sept. 1985), 9

Iran-U.S. C.T.R. 72, 91-94 (1985); DIC of Delaware, 8 Iran-U.S. C.T.R. at 155. The Tribunal has, therefore, no jurisdiction over GMIA.²

18. There is no dispute that the State of Arizona, the entity responsible for the alleged expropriation of one of the Claimant's vans, is a "political subdivision" of the United States and therefore is included in the term "United States" as defined in Article VII, paragraph 4, of the Claims Settlement Declaration.

C. Subject Matter of Claims

19. The Respondent argues that the Tribunal lacks jurisdiction over the claim that the suspension of the Claimant's entry visa into the United States resulted in a property loss. The Respondent argues that claims of this sort were explicitly excluded in Article 2, paragraph 1 of the Claims Settlement Declaration, by its reference to "claims arising out of the actions of the United States in response to the conduct described in" paragraph 11 of the General Declaration of 19 January 1981. The Tribunal has already held that it lacked jurisdiction over actions taken by the United States in response to such conduct, including an Iranian national's claim for damages relating to his expulsion from the United States pursuant to the Presidential Order of 17 April 1980, the date on which the U.S. broke diplomatic relations with Iran. See K. Haji-Bagherpour and United States of America, Award No. 23-428-2, at 3 (26 Jan. 1983), 2 Iran-U.S. C.T.R. 38, 39-40 (1983); and Mohammad Moussavi and United States of America, Award No. 163-949-3, at 6 (31 Jan. 1985), 8 Iran-U.S. C.T.R. 24, 26-27 (1985).

²Hereinafter, the United States shall be referred to as "the Respondent."

20. It seems clear that the United States suspended visas issued in Tehran in application of the Presidential Order issued in response to the seizure of its embassy. Consequently, the Tribunal holds that the suspension of the Claimant's visa was an act which arose directly "out of the actions of the United States in response to the conduct described in" paragraph 11 of the General Declaration, namely the seizure of the United States embassy in Tehran. Therefore, the Tribunal has no jurisdiction over this claim.

IV. MERITS

A. Auction of Motel-Restaurant

21. The Claimant argues that the Respondent is obliged to pay U.S.\$2,500,000 for "losses caused by the sale and auctioning of the Claimant's burnt-building of the motel" However, the Respondent did not auction this structure. Instead, the private mortgagees on the property foreclosed. Plainly, the Claimant had financed the purchase of the motel-restaurant partly with a loan from the original owners. This loan was secured by a mortgage on the property. When he failed to meet his payments, they foreclosed. Because the Claimant can prove no attribution of this foreclosure to the Respondent, this claim must fail.

B. Failure to Protect Claimant's Property

22. The Claimant argues that the Respondent failed to protect his property in Turlock, California, from the depredations of anti-Iranian Americans. The Claimant suggests that a State is responsible for injuries resulting to a foreign national or his property from the State's failure to provide police protection. Nevertheless, the State cannot guarantee the safety of an alien or of alien

property. Responsibility is incurred only when police protection falls below a minimum standard of reasonableness. See Kennedy Case (U.S. v. Mex.), Opinions of Commissioners 289 (1927), 4 R. Int'l Arb. Awards 194 (1927). What constitutes reasonable police protection depends on all the circumstances, including the State's available resources. Ordinarily, the standard of police protection for foreign nationals is unreasonable if it is less than is provided generally for the State's nationals. See International Law Comm'n, Revised Draft on Responsibility of the State for injuries caused in its territory to the persons or property of aliens, art. 7, para. 1, U.N. Doc. A/CN.4/34/Add. 1 (11 Dec. 1961), reprinted in [1961] 2 Y.B. Int'l L. Comm'n 46, and in F.V. Garcia-Amador, L. Sohn & R. Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens 130 (1974); see also Almaquer Case, (U.S. v. Mex.), Opinions of Commissioners 291 (1929), 4 R. Int'l Arb. Awards 523, 525 (1929).

23. By these standards, the Claimant has failed to show that local police and fire authorities failed to exercise due diligence in the protection of his property. By the Claimant's own admission, local police authorities investigated a number of instances where he had made a complaint. These included occasions where he had complained of vandalism, embezzlement, and the arson of one of his vans. In each case, the police authorities investigated and, in one instance, began a prosecution which was later dropped when the Claimant declined to press charges. Nowhere does the Claimant contend that he requested special protection from the local authorities in Turlock. Nor does he suggest that such protection would have been denied because of his Iranian nationality. Finally, the circumstances surrounding the arson of the motel-restaurant were investigated by the Turlock Fire Department. Indeed, the local fire chief noted that "this presumed arson case has been investigated as thoroughly as any other case [he had] been involved with in

. . . 19 years with the Turlock Fire Department." The Claimant has failed to prove that local authorities failed to exercise due diligence in protecting his property or investigating the circumstances under which it was destroyed. Consequently, the Tribunal rejects this claim.

C. Claims Against the IRS

24. The Claimant argues that the Internal Revenue Service ("IRS") of the United States wrongfully expropriated his liquor license, his home in Modesto, California, and a New York bank account. The Respondent replies that the IRS indeed auctioned the Claimant's liquor license, in order to satisfy a tax levy amounting to U.S.\$70,157.17. Proper public notice was given, and communications made with the Claimant and his attorney, and the license was sold for U.S.\$19,026.00. As for the foreclosure on the Claimant's home in Modesto, the Respondent has submitted documentation that this property was foreclosed upon by a mortgagee, the Bank of America National Trust and Savings Association. This apparently resulted when the Claimant failed to make payments on the home. The Respondent denies any knowledge of a bank account expropriated by the IRS, and the Claimant has not identified this account or given any evidence of its expropriation.

25. The Tribunal holds that the Respondent was not responsible for the foreclosure on the Claimant's home. No attribution to the Government of the United States can be shown for that act. The bank account claim must also be rejected for failure of proof.

26. With respect to the liquor license, the Respondent has conceded that the IRS did, in fact, seize the Claimant's California general eating place liquor license in order to satisfy over U.S.\$70,000 worth of overdue withholding taxes.

Nevertheless, a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price. See 2 Restatement (Third) of the Foreign Relations Law of the United States §712, comment g (1987); Kügele v. Polish State, 6 Ann. Dig. 69 (1931-32) (Upper Silesian Arb. Trib. 1930) (dismissing a claim that a series of license fees imposed by Poland had forced the claimant to close his brewery, and that Poland had therefore taken that property); Brewer, Moller & Co. Case (Ger. v. Ven.), 10 R. Int'l Arb. Awards 423 (1903) (taxes legally levied and without discrimination may not be recovered).

27. The IRS's action was a result of the Claimant's failure to pay taxes withheld by him on his employees' salaries. Nowhere does the Claimant suggest that this tax levy was imposed against him because he was an Iranian national. Nor has the Claimant proved that the IRS deliberately intended to cause him to abandon the property to the State or to sell it at a distress price. It appears that, under United States law, the Claimant could have repurchased the license for its auction price. Also, a letter signed by a Revenue Officer was mailed on 8 December 1980, to the Claimant in Zürich and to his attorney in the United States about the auction. The letter stated in fine that if the district director did not hear from him within 5 days from the date of the letter, it would be assumed that he agreed with the established minimum bid price. No answer seems to have been made to this letter. This claim is dismissed because the Claimant has failed to show that the IRS's action was anything other than a lawful levy for overdue taxes, for which there is no State responsibility.

D. The Abandoned Van

28. The only cold-storage trailer with respect to which the Claimant has provided evidence of a taking was the one found in the State of Arizona. That the trailer was sold at auction by the State of Arizona is uncontested. It is also uncontested that the trailer in question had been abandoned in Arizona, that the Arizona authorities made efforts to inform the owner of that fact and of its impending auction, and that the Claimant made no efforts to recover the trailer prior to its auction. It is uncertain whether the Claimant was aware of the location of the trailer. The letter sent by the Arizona Department of Transportation was returned, and the Claimant contends that the address given on the envelope was incorrect. There is no question that the disposition of abandoned property is commonly accepted as a lawful action within the police power of States, again provided that such a disposition does not discriminate against aliens.

29. There is no evidence that the regulations of the State of Arizona for the handling of abandoned motor vehicles discriminated against the Claimant, or that the Arizona Department of Transportation acted contrary to its established regulations when it made all necessary arrangements for the sale of the van. As noted above, the Claimant does not assert that he made any efforts to recover the trailer during the eleven months between its discovery by the Arizona authorities and its auction, although the Claimant was evidently in the United States at least three of those months. Finally, and most importantly, the Claimant has failed to rebut the Respondent's contention that the property was abandoned in Arizona. The Claimant has provided no explanation of how the trailer came to be left in Arizona and why he failed to make an attempt to search and locate it. Without proof by the Claimant that the property was abandoned owing to events beyond his control, the Tribunal

need not decide whether adequate notice was given or whether the sale price of the trailer was justified. This claim is also rejected.

V. COSTS

30. Each of the Parties shall bear its own costs of this arbitration.

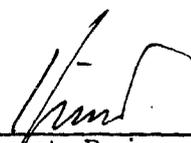
VI. AWARD

31. For the foregoing reasons,

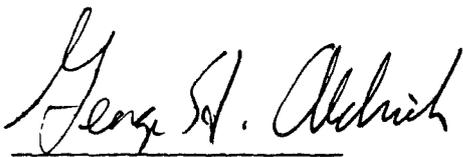
THE TRIBUNAL AWARDS AS FOLLOWS:

- (a) The Claim against GREATER MODESTO INSURANCE ASSOCIATES is dismissed for lack of jurisdiction.
- (b) The Claim against the United States for the suspension of the Claimant's visa is dismissed for lack of jurisdiction.
- (c) The remainder of the Claims are dismissed for failure of proof.
- (d) Each Party shall bear its own costs of arbitration.

Dated, The Hague
29 December 1989



Robert Briner
Chairman



George H. Aldrich

In the name of God



Seyyed K. Khalilian
Separate Opinion