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ORIGINAL DOCUMENTS IN SAFE

Case No. 11377

Date of filing: 25. May 88

** AWARD - Type of Award _____
 - Date of Award _____
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** DECISION - Date of Decision _____
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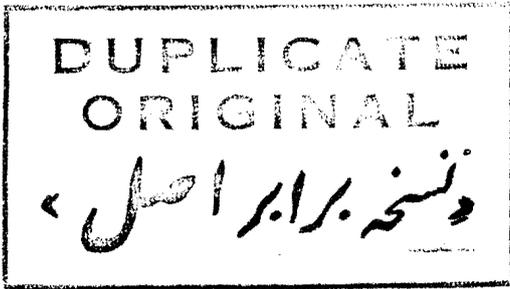
** CONCURRING OPINION of _____
 - Date _____
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** SEPARATE OPINION of Judge K. Khabiliani
 - Date 25. May 88
10 pages in English 10 pages in Farsi

** DISSENTING OPINION of _____
 - Date _____
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In the Name of God

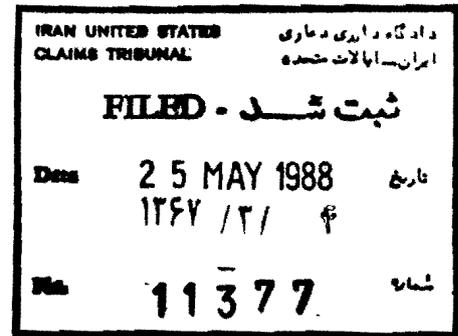
CASE NO. 11377
 CHAMBER TWO
 AWARD NO. 363-11377-2

OPAL H. SETHER,
 a claim of less than U.S.\$250,000
 presented by
 THE UNITED STATES OF AMERICA,
 Claimant,

and

TAVANA INSURANCE COMPANY (formerly
 IRAN-AMERICA INTERNATIONAL INSURANCE
 COMPANY), BANK MELLAT (as successor
 to the BANK OF TEHRAN),

Respondents.



SEPARATE OPINION OF JUDGE KHALILIAN

1 - Even though this Award is insignificant in terms of the amount of the claim involved, it deserves close study from the viewpoint of legal analysis. In issuing this Award the majority has committed several errors, as a result of which I can find no justification for joining with the majority in numerous aspects of the present Award. For this reason, I have prepared the present Separate Opinion.

means of leaving Iran was made available to her, and although she acknowledges that for more than two months she and her husband had been counting the minutes until they could leave Iran, she nonetheless alleges that they left Iran so precipitously that they forgot to take her insurance policy and claims forms with them.

Back in the United States, Mrs. Sether wrote to the Head Office of the Tehran American School in Virginia. Thereupon, in May 1979, she received a letter accompanied by a check for rials 116,168 in settlement of her claim, from the Superintendent of the American School, who had come to the United States. This check had been issued by the insurance company for the purpose of settling Mrs. Sether's claim. She deposited the check with the Bank of America, for collection thereon.

- (c) In June 1979, the check was returned unpaid because of a problem with the signature, and not because of lack of funds or a refusal by the Bank to transfer foreign currency. Mrs. Sether took no steps to recover on her claim for the dishonored check from that date until 19 January 1982, when she brought the dishonored check before this Tribunal and identified only the Bank of Tehran as her actual debtor. While Mrs. Sether alleges that she took steps for the purpose of recovering on her claim following the return of the check, she has not only failed to produce any evidence in proof of this allegation, but she is not even able to state what kind of steps she took. As a result, five years passed from the time the check was returned, until the claim was specifically, and for the very first time, directed against Tavana Insurance Company in the Supplemental Statement of Claim. Supplemental Statement of Claim filed on 3 July 1984, Doc. No. 9. It was on this date that Tavana first learned that Mrs. Sether's check had been returned by the Abbasabad Branch of the Bank of Tehran five years earlier. (Tavana had its account in the Daryaye Nour Branch, rather than in the Abbasabad Branch).

- 5 - The Respondents take the position that Mrs. Sether's account of the facts constitutes no more than an allegation on her part. These unsubstantiated events, the only evidence of which is the testimony of the interested party

herself, have even been narrated in such a manner, and under such conditions, that the Respondents have had no opportunity to prepare evidence in rebuttal. Bank Mellat was never acquainted with Mrs. Sether's insurance agreement, and so far as it is concerned, the matter begins and ends with the fact that a check bearing unauthorized signatures was sent to it for collection, and that it had no right, according to law, to make payment thereon. And as far as Tavana is concerned, it seems self-evident that every respondent has a natural right to the opportunity to seek clarification or assistance from the Tribunal, in order to remove any ambiguities surrounding the evidence relied upon against him. See No. 9, below.

Regrettably, the Tribunal not only disregarded the Respondent's request, but accepted Mrs. Sether's bare allegations precisely as set forth in the affidavit prepared on her own behalf. In paragraphs 3 and 5, the Tribunal confidently describes Mrs. Sether's account as "credible," where she states that she left her evidentiary documents in Tehran due to pressure of time, and thus no longer had access to her insurance policy and claims forms.

- 6 - Let us not forget that Mrs. Sether has brought no claim with respect to items left behind when she left Iran. This signifies that she had collected all of her belongings and property during the two months while she was ready to depart, and that she did not leave anything behind. Wouldn't one assume that she should have saved and gathered her claims documents like any reasonable person, just as she did for her other valuable or less valuable belongings?! What, it must here be inquired, is the principle on whose basis the majority has unquestioningly accepted Mrs. Sether's unsupported contentions? Are her allegations woven from the fabric of proved and established truths which simply cannot be held up to doubt? Or is it that the Respondent has confirmed her contentions as well? (2)

If Mrs. Sether was on such familiar and friendly terms with her insurance agent that he telephoned to tell her, in late December or early January, that he

(2) "The category of facts which need not to be proved before an international tribunal includes facts of notoriety, and facts admitted by the other party." V. S. Mani, International Adjudication, Nijhoff 1980 p. 209.

was going to bring her the check personally, how is it that she did not receive the check over the next 50 days, while she was still in Iran? Furthermore, the date of the check indicates that Mrs. Sether was still in Iran when it was issued. Thus, in view of this intimate relationship with her insurance agent, and given that she continued living in Tehran for at least two weeks after the check was issued, why didn't she refer to the Bank in person in order to cash the check? Statement of Defence of Tavana Insurance Company (Doc. No. 40), p.3.

III.

- 7 - Grounds for the Claim : The majority bases its Award in this Case on an indebtedness on the part of Tavana to Mrs. Sether for her medical expenses, whereas it could only, at the very most, render the Award on the basis of a dishonored check. (3)
- 8 - The allegation of a claim against Tavana in this Case was unsupported by any evidence. There is no principle whatsoever, according to which the affidavit prepared on her own behalf by Mrs. Sether (who, according to the Tribunal, is the Claimant) can be regarded as evidence in proof of the claim. Regardless of the form in which she presents it, what the Claimant says on her own behalf will be nothing more than a reiteration of her claim -- a claim which has already been set forth in the Statement of Claim, under a different rubric. According to Flores (Anglo-Mexican Claims Commission), the statements of a claimant can at most be regarded as an "admission," and an admission is of

(3) It is worth noting, incidentally, that in reciting the grounds for the claim, the majority has quoted virtually verbatim a portion of Article II, paragraph 1 of the Claims Settlement Declaration, in writing that "It is ... not disputed that the claim ... arises out of debt, contract, expropriation or other measures affecting property rights..." Article II, paragraph 1 of the Claims Settlement Declaration enumerates the grounds on which claims are admissible before the Tribunal, in order to specify the bases of the Tribunal's jurisdiction. However, in each Case, it is up to the Tribunal to specify to which basis for its jurisdiction, as set forth in the said paragraph, the grounds of the claim conform. The majority has merely quoted a portion of Article II, paragraph 1 virtually verbatim, without even taking the trouble to specify which of the aforementioned jurisdictional bases applies to the present claim.

probative value only in matters where someone makes a statement against himself, and not where he makes them in his own interest. Decision & Opinions, vol. 33 (1931), pp. 124, 127-8. This theory has also been affirmed, albeit in a different respect, by the International Court of Justice in its Judgment in the Case relating to Military and Para-military Activities in and against Nicaragua (Nicaragua v. United States of America). International Court of Justice, Judgment of 27 June 1986, paragraph 70.

Nor has the Iran-United States Claims Tribunal regarded the unsupported affidavits of interested parties to a claim as per se constituting proof thereof. See, eg., Morrison - Knudsen Pacific and The Ministry of Roads and Transportation, Award No. 143-127-3, reprinted in 7 Iran-U.S. C.T.R., p. 79; Schering Corporation and Iran, Award No. 122-38-3, reprinted in 5 Iran-U.S. C.T.R., p. 367; Morgan Equipment Company and Iran, Award No. 100-280-2, reprinted in 4 Iran-U.S. C.T.R., p. 276. See also Sandifer, Evidence Before International Tribunals, 1975, pp. 351-54.

- 9 - It is therefore astonishing that in its Award the majority supposes, on the basis of Mrs. Sether's affidavit, that Tavana's liability has been established. The only other evidence submitted by Mrs. Sether is the expenses worksheet dating back to June, 1977, which has been stamped "paid" (the date thereof is illegible).

No matter how we look at the matter, it is highly unlikely that Mrs. Sether would have waited 18 months before obtaining reimbursement on her medical claim, especially considering that she was not in very good physical condition and was under continual medical care. See Section II, supra.

This unreasonable delay and unjustified negligence on Mrs. Sether's part, together with the fact that the worksheet was stamped "paid," gave Tavana serious doubts as to whether there really was a debt. It requested, in order to clarify the matter, that the Tribunal issue an Order directing Mrs. Sether to file with it her insurance policy, the original copy of the expenses worksheet, and any other evidence which might help to establish Tavana's liability. Tavana's Statement of Defence, p.1. However, the Tribunal paid no attention

to this request; on the contrary, it accepted in their entirety the contentions which Mrs. Sether set forth in her own self-serving affidavit. And yet, may I repeat, every respondent has a natural right to the opportunity to seek clarification or assistance from the Tribunal, in order to remove any ambiguities surrounding the evidence relied upon against him; otherwise, he will not have been given a "full opportunity" of presenting his defence. What is more, here the Tribunal has played an effective part in depriving the Respondents of that opportunity, and in so doing it has taken an inappropriate step, whereby it has violated one of the most fundamental principles enshrined in its own Rules. Tribunal Rules, Article 15 (1).

- 10 - In evaluating the evidence, the Tribunal should have treated the Parties with equality. Tribunal Rules, Article 15 (1). Instead, however, the Tribunal's unequal treatment in assessing the Parties' evidence is crystal clear from its tone in paragraph 3 of the Award:

"... Bank Mellat responded that the problem had not been with Mrs. Sether's signature, but with the signatures for Iran America which, it alleged, did not conform to that company's instructions to the bank. Mrs. Sether did not submit in evidence copies of the insurance policy or of the claims forms she and her doctors submitted to Iran America, and she stated that her copies of the papers had been left in Tehran when she and her husband left in February 1979." (emphasis added)

The Respondent submitted a number of analogous documents as proof that the signatures on the check were unauthorized, and the Claimant did not dispute any of them. Nonetheless, the majority was still not satisfied, and thus refers [to Bank Mellat] in doubtful terms, using the word "alleged" (ie., "asserted without reason"). Three lines further on, however, it employs the expression "she stated," in referring to Mrs. Sether. What is more, in paragraph 5 it characterizes her explanation as "credible," whereas we have seen that Mrs. Sether did not submit, in support of her allegation, a single piece of evidence which would be given weight in any valid proceeding. Moreover, her recitation of the facts casts a shadow of ambiguity and uncertainty over her contentions. See No. 6, above.

* * *

- 11 - Given that it cannot be proved, in the circumstances pertaining in this Case, that Tavana is liable to Mrs. Sether for reimbursement of her medical expenses, the sole documentary evidence supporting a finding against the Respondent is a dishonored check which has not been denied by it. That is to say, certain employees of the insurance company signed the check, even though they were not holders of authorized signatures with the Bank, and this is the only basis on which the Tribunal was able to render its award.

Here, there are still several points which need to be noted :

- 12 - First, negligence in demanding payment of the debt: Why didn't Mrs. Sether seek recourse to the Respondent earlier, if she had the intention of recovering on her claim, given that the Bank dishonored the check in June 1979? The fact is that she took no action whatsoever until three years later, when this Tribunal was established. It was then, for the first time and without having earlier sought recourse against the drawer of the check, that she brought a claim based on this check, through diplomatic protection by the Government of which she is a national. Statement of Claim of the Government of the United States of America On Behalf and for the Benefit of Opal H. Sether, filed on 19 January 1982.
- 13 - Second, interest : Initially, the claim in question was brought against the Bank of Tehran (now "Bank Mellat"), and not against Tavana. In fact, then, it was in 1984, when the Supplemental Statement of Claim was filed, that Tavana was for the first time brought into the proceedings in the claim against it. The Respondent has every right to contend that it was not informed for approximately five years -- ie. from 1979, when the check was dishonored, until 1984. According to principles of law, Mrs. Sether's negligence should at least deprive her of those rights earlier allowed her by this Tribunal. She should not, for instance, have any right to interest (4); or at least the interest

(4) In Isaiah and Bank Mellat, Award No. 35-219-2, the Tribunal stated that it was refraining from awarding interest, since there was before it no evidence that the Respondent had intentionally deprived the Claimant of access to his money. 2 Iran-U.S. C.T.R., p. 239.

Award should be assessed at a very low rate (Espahanian and Bank Tejarat, No. 31-157-2, reprinted in 2 Iran-U.S. C.T.R., p. 169), and from the date that the Supplemental Statement of Claim was filed (3 July 1984) (5), whereas the majority has taken the date on which the Statement of Claim was filed, as the basis for its computation of interest. This is because it believes that Tavana should have been aware of the existence of the dishonored check at that date -- which is yet another unrealistic assumption made by the majority in reaching its decision.

- 14 - Third, the exchange rate : The dishonored check was denominated in rials. One of the consequences of Mrs. Sether's negligence in failing to seek recourse against the drawer of the check within a reasonable time (ie., in the second half of 1979) ought to be, that the dollar equivalent thereof should be computed at the rate in force as at the date when the Respondent was informed of the existence of the check, and yet refused to honor it.

In converting rials to dollars, the majority has accepted the 1979 exchange rate -- that is, the rate proposed by Mrs. Sether -- without noticing the error involved in this decision. For the same reason that she is not entitled to interest from 1979 on, she cannot conceivably be entitled to receive the foreign exchange equivalent of this concealed claim at the 1979 rate, either.

Based on the reasons set forth above, I do not join the majority in numerous aspects of the Award.

Dated, The Hague,

4 Khordad 1367 / 25 May 1988



Seyed Khalil Khalilian

(5) In Reliance Group, Inc. and The National Iranian Oil Company, the Tribunal awarded interest calculated from the date on which the Statement of Claim was filed, because the Claimant did not submit its invoices prior thereto. Award No. 315-115-3, para. 68. (It will be recalled that in the instant Case, the claim against Respondent Tavana was brought for the first time in the Supplemental Statement of Claim). See also : McCullough and Ministry of Post, Telegraph and Telephone, Award No. 225-89-3, para. 104.