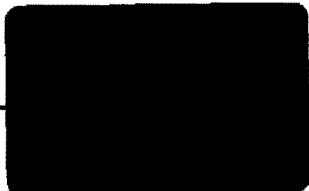


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ORIGINAL DOCUMENTS IN SAFE

Case No. 11491



Date of filing: 14 Feb 1990

** AWARD - Type of Award Final
 - Date of Award 14 Feb 1990
15 pages in English 17 pages in Farsi

** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____
 - Date _____
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** SEPARATE OPINION of _____
 - Date _____
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 - Date _____
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CASE NO. 11491

CHAMBER ONE

AWARD NO. 475-11491-1



ALI ASGHAR,
a claim of less than US\$250,000 presented
by the UNITED STATES OF AMERICA

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داورى دعاوى ایران - ایالات متحدہ
FILED	ثبت شد
DATE	14 MAR 1990
	تاریخ ۱۳۶۸ / ۱۲ / ۲۲

AWARD

Appearances:

For the Claimant:

Mr. Michael F. Raboin,
Deputy Agent of the
United States of America
Mr. Dennis J. Gallagher,
Director of CLTD's of the
Department of State.

For the Respondent:

Mr. Ali Nobari Heyrani,
Deputy Agent of the
Government of the Islamic
Republic of Iran,
Mr. Mohammad Hasan Bordbar,
Legal Adviser to the
Agent,
Mr. Ali Kamayestani,
Assistant to the Legal
Adviser.

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A. PROCEDURAL HISTORY

1. On 19 January 1982, the United States of America filed a Statement of Claim presenting a claim of less than U.S. \$250,000 of ALI ASGHAR ("Asghar") against THE ISLAMIC REPUBLIC OF IRAN. A Supplemental Statement of Claim was filed on 15 December 1986. The Claimant is seeking payment of U.S.\$18,523.84 representing the balance of four bank accounts with Bank Melli Iran and Bank Saderat Iran. The claim was expressed to be based on breach of contract, or alternatively on unjust enrichment and expropriation.

2. Bank Melli and Bank Saderat each filed a Statement of Defense on 16 March 1987.

3. Following a Reply filed by the United States on 3 September 1987 and further briefs filed by the Government of the Islamic Republic of Iran and Bank Saderat and Bank Melli on 1 March 1988, a Hearing in this Case was held on 15 May 1989.

B. FACTS AND CONTENTIONS

4. In the Supplemental Statement of Claim, Asghar states that he was born in Pakistan and became a naturalized United States citizen in 1966. He claims to have been at all times relevant to the claim a citizen of the United States. From 1973 to 1974 he worked in Iran as an electrical engineer with Northrop Page Company, an American corporation. Asghar had an account with Bank Melli in the form of a certificate of deposit. Further, Asghar and his wife, Parveen Asghar, held one joint savings account, which they opened in 1976 with Bank Melli after they returned to the United States. Asghar further held two savings accounts with Bank Saderat.

The claim concerns the following bank accounts:

	<u>Bank</u>	<u>Account No.</u>	<u>Owner</u>	<u>Denomi- nation</u>	<u>Amount</u>
1.	Bank Melli Iran	800/068164	Asghar	Rials	R 1,141,257
2.	Bank Melli Iran	700645	Asghar and Mrs.Parveen Asghar	Rials	R 118,224
3.	Bank Saderat Iran	3012-468	Asghar	Rials	R 28,959
4.	Bank Saderat Iran	2611-1463	Asghar	Rials	R 8,229
	Total as of 30 September 1979				<u>R 1,296,669</u>

The existence and balances of the said accounts are not disputed.

5. In September 1979 Asghar attempted to have the funds held with Bank Melli transferred to his bank account in the United States. By a letter dated 28 September 1979, he requested Bank Melli to forward the balance of the savings account and the certificate of deposit, with interest, in United States dollars or in Pakistani rupees to an account with First American Bank, which Asghar jointly held with his wife. On 8 October 1979 Bank Melli wrote a letter in response, which in pertinent part reads as follows:

according to the new regulations we are not allowed to transfer the balance of your account without permission from Central Bank, please contact with them while sending your documents which indicate you have transferred the balance of your account from abroad.

6. Having made unsuccessful demands for his funds in accounts with Bank Melli, Asghar argues that he thought it would be fruitless to request his funds held by Bank Saderat. On 3 October 1982 he contacted Bank Saderat to inquire about the balance of his accounts. In response, the

Bank informed him by letter that he had 33,820 Rials in his account 3012-468 and 12,416 Rials in the account 2611 - 1463.

7. Asghar argues that he made a proper demand for the transfer of the funds prior to 19 January 1981. Asghar's main argument is that Bank Melli by failing to transfer the funds owed to him pursuant to the contracts of deposit has breached its obligations under those contracts. Asghar further takes the position that the Banks have been unjustly enriched by refusing to transfer and by retaining possession of the funds.

8. Asghar further argues that the exchange restrictions imposed by Iran violate the Treaty of Amity, Economic Relations and Consular Rights of 1955 between Iran and the United States, as well as the International Monetary Fund Agreement. At any rate, he argues that the exchange restrictions as applied to his bank accounts constitute a taking under international law and, therefore, give rise to compensation under customary international law as well as the Treaty of Amity.

9. The Respondents, the Government of the Islamic Republic of Iran, Bank Melli Iran and Bank Saderat Iran, deny the Tribunal's jurisdiction over the claim. First, they contest the Claimant's United States nationality so as to give the Tribunal jurisdiction. They state that his original nationality is Pakistani in which capacity he opened savings accounts with Bank Saderat by presenting his Pakistani passport and identity card. The Respondents contend that even if Asghar's United States nationality is established, he is subject to the rules of dual nationality and, taking into account his reliance on his Pakistani nationality, his dominant nationality is Pakistani.

10. Secondly, the Respondents argue that the claims for the transfer of bank funds were not outstanding on 19 January 1981. Bank Melli takes the position that there was no dispute before the said date with respect to the savings account. According to the Bank, Asghar should have used and completed special forms relating to the procedure of withdrawal from a bank account. This he should have done together with his wife since the savings account was a joint one.

11. Regarding the request for withdrawal of funds from the fixed deposit account no.800/068164, Bank Melli argues that Asghar should have returned, together with the request, the original certificate of deposit; the enclosure of a copy of the certificate is not sufficient and does not comply with the banking practice. Bank Melli relies for its Defense on its letter dated 9 October 1977 in response to Asghar's request, in which the Bank advised Asghar to contact the Central Bank for permission to transfer the balance of the account. The Bank adds that Asghar can seek his funds at the Bank in Rials and that the funds are available to him in Rials.

12. Bank Saderat emphasizes the lack of any demand for the withdrawal of Asghar's funds before the jurisdictional deadline of 19 January 1981 and concludes, therefore, that the Tribunal lacks jurisdiction over the claim against it.

13. The Respondents deny that the accounts were taken or confiscated. They argue that the exchange restrictions in Iran did not allow the exchange and transfer of the funds in the absence of permission by the Central Bank of Iran, and, therefore, Bank Melli could only make payment in Rials. The Respondents contend that the exchange regulations are valid under international law and do not violate either the Treaty of Amity or the regulations of the International Monetary Fund.

14. The Respondents further deny any liability under the depository agreement and argue that the Bank's duty as a trustee was to retain and pay the same currency (Rials) deposited with them. They argue that the Bank had no obligation to embark on a completely different transaction by selling the Claimant foreign currency.

C. REASONS FOR AWARD

1. Jurisdiction

1.1 The Claimant's nationality

15. The Tribunal first has to determine whether Asghar was at the crucial dates, from the time the claim arose until 19 January 1981, a national of the United States, or, of both the United States and Pakistan. It is clear from the record that Asghar, a born Pakistani national, became a naturalized American citizen in 1966. It is also clear from the record that since then Asghar retained his United States nationality. Furthermore, no proof has been submitted that he still possesses Pakistani nationality or that he has been using a Pakistani passport. To the contrary, there is proof that the Pakistani authorities considered Asghar a United States national, as Asghar had to obtain a visa when traveling to Pakistan and he needed also to complete alien registration forms with the Pakistani police. The fact that in 1979 Asghar was constructing a home at Islamabad in Pakistan, as mentioned in his letter of 28 September 1979 to Bank Melli, cannot be regarded as sufficient proof of his Pakistani nationality. It is also clear from the same letter that Asghar had a residence in the United States. Further, as it appears on the basis of the documents submitted as evidence, Asghar presented his American passport No. z1814212 when opening his two savings accounts with Bank Saderat and also his identity card issued by his

American employer, Northrop Page Communications Engineers, Inc. no. Z1819212. The latter number is almost identical to the number submitted by Bank Saderat, as Ashghar's identity card number; the number on Ashghar's United States passport is very similar to the number 21614212 presented by Bank Saderat as his Pakistani passport number. At any rate, the translation of the Persian text of the last Exhibit to Bank Saderat's Statement of Defense reveals that the number of Asghar's passport issued at Frankfurt, Germany is Z1814212, which corresponds with the number of the United States passport submitted by Asghar in evidence. The Tribunal is convinced, on the basis of the evidence provided, that both Asghar and Bank Saderat are referring to the same document, that is the United States Passport. Since it has been satisfactorily proved that Asghar possessed United States nationality since 1966, and there is no proof that since that time he retained his Pakistani nationality, there is no need for the Tribunal to determine, for purposes of its jurisdiction, the dominant and effective nationality of Asghar at the relevant time in accordance with the findings in Case No. A18, Decision No. DEC 32-A18-FT, p. 25 (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 251, 265.

1.2 The Outstandingness of the Claims

16. The second jurisdictional question is whether the claims for the bank funds were outstanding on 19 January 1981 within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. The Tribunal has previously held that a mere right to payment from a bank account is not a "claim" within the meaning of the Claims Settlement Declaration; rather, to qualify as an outstanding bank claim, a demand for payment from the account must have been made prior to 19 January 1981. See Harza Engineering Company and Islamic Republic of Iran, Award No. 19-98-2, pp. 8-9 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 499, 504; Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA

Consulting Engineers of Iran, et al., Award No. 141-7-2, p. 7 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 223; Computer Sciences Corporation and Government of the Islamic Republic of Iran, et al., Award No. 221-65-1, p. 39 (16 Apr. 1986), reprinted in 10 Iran-U.S. C.T.R. 269, 299-300; Training Systems Corporation and Bank Tejarat, et al., Award No. 283-448-1, para. 24 (19 Dec. 1986), reprinted in 13 Iran-U.S. C.T.R. 331, 337.

1.2.1 The Claim against Bank Melli

The Certificate of Deposit (No.800/068164)

17. There is no dispute that the account in the form of a certificate of deposit in rials existed. Nor is it disputed that since 1974, the year in which the certificate was purchased, Asghar renewed it several times. He did this for the last time on 13 January 1979 for a period of 366 days at an annual interest rate of 10 percent, as is evidenced by the receipt of Bank Melli dated 13 January 1979. As stated above, supra, para 5, on 28 September 1979 Asghar requested Bank Melli to release the funds in his certificate of deposit account and to transfer them in U.S. dollars, or in the equivalent amount in Pakistani rupees, to an account in the United States held by Asghar and his wife, Parveen Asghar. He enclosed a copy of the original certificate and added in a post-scriptum that this was done to avoid loss of the original; upon demand, the original would be forwarded. As was clarified by Asghar in his pleadings, he had on another occasion in 1978 lost a certificate of deposit with Bank Melli by sending the original. Bank Melli has made the argument in the proceedings that it was not obligated to return Asghar's funds because he should have enclosed the original certificate of deposit, and, having failed to do so, did not follow the proper procedure for making a request of withdrawal. The Tribunal notes that, although Bank Melli did not request the original certificate in its letter of 8

October 1979, Asghar himself recognized that he was obligated to send the original. However, the Tribunal feels that the enclosure of only a copy of the certificate should not be solely decisive for the question of the Tribunal's jurisdiction over the claim.

18. What is important is that in its letter of 8 October 1979, Bank Melli mentioned that Asghar should contact the Central Bank of Iran, without whose permission, according to the new banking regulations, Bank Melli could not allow a transfer. At the Hearing it was clarified by Bank Melli that the 'new banking regulations' to which it referred were those published in Bank Markazi's Circular 11600, dated 4 November 1978. In a list attached to that circular item 14 states that "[t]he sale of commercial foreign exchange for purposes other than those specified above shall in all cases, be subject to prior authorization by Bank Markazi Iran." The Circular indicates that the exchange of Rials into foreign currency was permissible, subject to approval by Bank Markazi. The Circular does not provide an answer to the question whether the individual client or the commercial bank concerned has an obligation to ask for the permission. However, it is clear on the basis of the wording of the Circular that Bank Markazi Iran was the entity in Iran authorized to grant permission for exchange transactions. The Tribunal feels that in view of the factual circumstances in this Case, Asghar, when instructed by Bank Melli in its letter of 8 October 1979 to contact Bank Markazi Iran, then had an obligation to do so in order to obtain permission for the transfer. Bank Melli was not the bank to be contacted with a request for an exchange transaction. However, Asghar chose not to follow Bank Melli's instructions and has at no time, and certainly not before the Tribunal's jurisdictional deadline of 19 January 1981, contacted Bank Markazi. He contacted Bank Melli in respect of his certificate of deposit account by a letter dated 3 October 1982, in which he asked for an update of the total amount including interest in his accounts, to which Bank Melli answered by its

letter dated 26 October 1982, giving the information required. In the view of the Tribunal, there was no proper demand for the transfer of the deposit before the jurisdictional deadline. Also, in the opinion of the Tribunal, the response dated 9 October 1979 by Bank Melli cannot be construed as a refusal to transfer the deposit; it was only an instruction from the Bank to contact Bank Markazi which, as the Central Bank of Iran, has the authority to give the permission for an exchange transaction in accordance with Circular 11600.

19. In the same letter of October 1979, Bank Melli advised Asghar to send to Bank Markazi his documents indicating that at the time he had opened his account at Bank Melli he had transferred foreign currency from abroad to that account. The fact that dollars had been transferred from abroad was mentioned by Asghar in his letter of 28 September 1979. It was clarified by Bank Melli at the Hearing that if Asghar could have shown this to the Central Bank, it would have facilitated obtaining the permission for the exchange transaction. Since Asghar did not take any steps in order to obtain Bank Markazi's approval, as instructed by Bank Melli, it appears that there was no proper demand for the exchange and transfer of the certificate of deposit account before the jurisdictional deadline of 19 January 1981.

20. The finding that the Tribunal has no jurisdiction is also arrived at in view of lack of proof concerning Asghar's right to demand the balance of his certificate of deposit account before the maturity date, which was, as noted above, supra para 17, 366 days after the renewal on 13 January 1979. Asghar has not borne his burden of proving that the certificate of deposit contained any provision that permitted withdrawal before maturity. The certificate, on its face, requires payment only on a fixed maturity date that had not yet been reached when Asghar made his request for payment. For this reason, in addition to the reasons set forth in paragraphs 18 and 19, supra, the Tribunal concludes that it has no jurisdiction over this part of the claim.

The Joint Savings Account, No. 700645

21. In the same letter dated 28 September 1978 Asghar demanded the transfer of the balance of the savings account, which he had opened in Rials together with his wife, Mrs. Parveen Asghar. However, Mrs. Asghar is not a Claimant in the proceedings before the Tribunal in this Case. In her affidavit, dated 20 May 1987, she states that her husband has filed the claim before the Tribunal "... with my consent ..." and "... my husband had my consent, cooperation and total authorization throughout the period from 1975 to present to act on my behalf and do whatever is necessary to collect funds from Iran." The Tribunal observes that Mrs. Asghar's statement appears to be in the nature of a power of attorney, by which Asghar is given the right to act on behalf of his wife, with respect to his wife's interest in the savings account. In this context the Tribunal notes that two individuals possessing a nationality in accordance with Article VII, paragraph 1 of the Claims Settlement Declaration, with a joint interest in one account, have the right to file a claim before the Tribunal. This is even more justified taking into account that previously the Tribunal has recognized the right of partnerships to file claims, where over fifty percent of the interests in the partnership is owned by nationals referred to in Article VII(1) of the Claims Settlement Declaration. See Walter W. Arensberg, et al. and Ministry of Housing and Urban Development of the Islamic Republic of Iran, Award No. 213-61-1, p. 11 (27 Feb. 1986), reprinted in 10 Iran-U.S. C.T.R. 37, 44; Touche Ross & Company and Islamic Republic of Iran, Award No. 197-480-1, p. 11 (30 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 284, 292; Queens Office Tower Associates and Iran National Airlines Corp., Award No. 37-172-1, p. 2 (15 Apr. 1983), reprinted in 2 Iran-U.S. C.T.R. 247, 248.

22. Assuming that pursuant to Mrs. Asghar's power of attorney, Iranian law allows Mr. Asghar to claim all of the funds in the bank account, see generally Housing and Urban Services International, Inc. and Government of the Islamic Republic of Iran, Award No. 201-174-1, p. 22, n. 10, (22 Nov. 1985), reprinted in 9 Iran-U.S. C.T.R. 313, 329, n.14, the next issue then to be addressed in order to establish jurisdiction over Mrs. Asghar's part of the Claim is Mrs. Asghar's nationality. In her affidavit Mrs. Asghar submits that she is a permanent resident of the United States of America and that a green card was issued to her in November 1962. However, no proof has been presented in evidence regarding her nationality. Therefore, the Tribunal lacks jurisdiction over Mrs. Asghar's part of the Claim.

23. Asghar and his wife had a joint interest in the savings account. Since the Tribunal has concluded that it has no jurisdiction over the portion related to Mrs. Asghar's interest, the question needs to be answered to what extent Asghar is entitled to the funds in the account. In this respect reference is made to Housing and Urban Services International, Inc. and Government of the Islamic Republic of Iran, et al., Award No. 201-174-1, pp. 26-28, (22 Nov. 1985), reprinted in 9 Iran-U.S. C.T.R. 313, 329-333, where it was held that a partner in a partnership which has no separate legal personality is entitled to bring an individual claim for his pro rata share of the partnership's claim, if independent and readily distinguishable from a claim by the partnership. In that case, however, the respective identifiable shares of the two partners were established by the documents in evidence. In contrast, in the present Case Mrs. Asghar's affidavit refers to the account as "our funds", and there is no evidence to show the proportion of the funds that belonged to her as distinct from the part that was the property of her husband. This is thus a situation of commingled funds, owned jointly by a United States national over whom the Tribunal has

thus a situation of commingled funds, owned jointly by a United States national over whom the Tribunal has jurisdiction and a person who is not a Claimant, and over whom it appears that the Tribunal has no jurisdiction. In such a situation, unlike the circumstances in Housing and Urban Services International, the Tribunal cannot determine the amount of the interest of Mr. Asghar over whom it has jurisdiction as compared with that of Mrs. Asghar who may, indeed, have a right to the entire amount of the account. In these circumstances, without the need to rely on its findings mentioned in paragraphs 18 and 19 above, the Tribunal denies the claim for lack of sufficient evidence of the amount of Mr. Asghar's interest.

1.2.2 The Claim against Bank Saderat

24. Asghar is also claiming for the funds he held with Bank Saderat in the accounts no. 3012-468 and 2611-1463. In his affidavit, Asghar states:

Due to my unsuccessful attempt to have the funds from my accounts with Bank Melli transferred to me, and after Iranian Embassy personnel in Sudan informed me that the Central Bank would not approve the transfer, I concluded that it was useless to request Bank Saderat to transfer the funds from this account. On 3 October 1982, I sent a letter to Bank Saderat to inquire about my balance.

As noted supra, para. 16, the Tribunal has held previously that for a bank claim to be outstanding, a demand for payment from the account must have been made prior to 19 January 1981. It is clear on the basis of the pleadings and, particularly, of Asghar's own statements in his affidavit that no such demand has been made. Therefore, the Tribunal concludes that it has no jurisdiction in respect of the portions of the claim for the funds held in the two accounts with Bank Saderat.

25. At the Hearing it was stated on behalf of both Bank Melli and Bank Saderat, that Asghar can make use of his funds at the Banks in rials.

2. Costs

26. The Respondent the Government of the Islamic Republic of Iran is awarded costs of arbitration in the amount of U.S.\$1,500.

D. AWARD

27. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(a) The Claims against the Islamic Republic of Iran and Bank Melli Iran and Bank Saderat Iran are dismissed.

(b) The Claimant Ali Asghar is obligated to pay the Government of the Islamic Republic of Iran costs of arbitration in the amount of U.S.\$1,500.

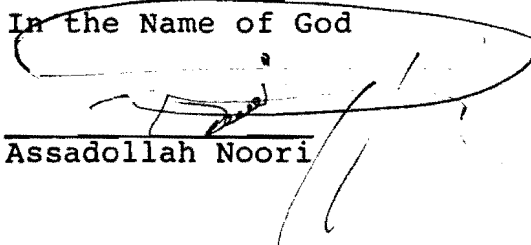
Dated, The Hague

14 March 1990



Bengt Broms
Chairman
Chamber One

In the Name of God



Assadollah Noori



Howard M. Holtzmann

Concurring, except dissenting as to the reasoning in paragraphs 18 and 19. See Separate Opinion.