

ORIGINAL DOCUMENTS IN SAFE

Case No. 11491



Date of filing: 14 مهر '90

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\*\* DECISION - Date of Decision \_\_\_\_\_  
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\*\* CONCURRING OPINION of \_\_\_\_\_  
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحدہ



CASE NO. 11491

CHAMBER ONE

AWARD NO. 475-11491-1

ALI ASGHAR,  
a claim of less than U.S.\$250,000  
presented by  
the UNITED STATES OF AMERICA,  
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,  
Respondent.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داوری دعاوی ایران - ایالات متحدہ
FILED	ثبت شد
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SEPARATE OPINION OF HOWARD M. HOLTZMANN

I.

1. The Award in this Case fails to respect the basic holding of every other Tribunal award that has dealt with the obligations of Iranian banks to their foreign depositors. In dismissing a claim for funds that were placed in a time deposit in an Iranian bank, the Award inexplicably goes out of its way to disregard Tribunal practice, finding that the bank had no duty to assist the Claimant in transferring deposited funds to a foreign bank in foreign currency. No fewer than four Tribunal precedents expressly affirm the duty of depository banks to render such assistance. The majority's willingness to ignore this settled Tribunal practice is particularly disconcerting because the Award could easily -- and correctly -- have denied the claim

solely on the ground that the time deposit was not mature when the Claimant sought to withdraw his funds.

2. The claim before us is not unusual. Mr. Ali Asghar, a United States national who was once employed in Iran, put some of his money in a time deposit at Bank Melli. After the Islamic Revolution, he requested Bank Melli to transfer the funds in foreign currency to an account outside Iran. However, the central bank of Iran ("Bank Markazi") had issued a circular directing Iranian depositary banks -- all of which had been nationalized and were under government control -- not to make such transfers abroad without the central bank's permission. This circular, known as Circular No. 11600, has been considered in four other Tribunal cases. In each of those cases, the Tribunal has held that the circular places upon each depositary bank the legal obligation to seek permission from the central bank to make foreign transfers that are requested by depositors. Where a depositary bank fails to seek such permission from the central bank, the Tribunal cases uniformly hold that the depositary bank has not fulfilled its duty to its depositor and is therefore liable for damages in the amount of the deposit, plus interest. The Tribunal's holding in these prior cases is clear and unequivocal.

3. In the earliest case deciding this point, the Tribunal found that it was "incumbent on Bank Mellat to seek [approval of the central bank] pursuant to the circular" and held the depositary bank liable for damages because it failed to prove that it had requested such approval. Benjamin R. Isaiah and Bank Mellat, Award No. 35-219-2, p. 14 (30 March 1983), reprinted in 2 Iran-U.S. C.T.R. 232, 239. Following the same reasoning, the Tribunal subsequently held that another depositary bank, Bank Tejarat, was obligated to pay damages because it "adduced no evidence that it had requested permission to transfer from Bank Markazi . . . ." Ronald S. Koehler and Islamic

Republic of Iran, Award No. 223-11713-1. para. 35 (15 April 1986), reprinted in 10 Iran-U.S. C.T.R. 333, 345. A third case re-emphasized the same point:

the Respondent banks had the burden of showing that they had in fact sought such approval [of the central bank], as they were required to do by the relevant regulations. [Citing Isaiah, supra.] This they have not done, so Bank Tejarat and Bank Mellat must be deemed to have violated their obligation to seek that necessary approval and thus to have withheld the funds improperly.

Computer Sciences Corporation and Government of the Islamic Republic of Iran, et al., Award No. 221-65-1, p. 42 (16 April 1986), reprinted in 10 Iran-U.S. C.T.R. 269, 302.

4. Most recently, the Tribunal reaffirmed this holding in Stanwick Corporation, et al. and Government of Islamic Republic of Iran, et al., Award No. 467-66-1 (31 Jan. 1990), reprinted in \_\_\_ Iran-U.S. C.T.R. \_\_\_. The facts in Stanwick are particularly noteworthy because the depositary banks had told the Claimant to seek Bank Markazi's approval for a funds transfer on his own. When Claimant undertook to do so, Bank Markazi did not grant permission for the transfer. Notwithstanding the Claimant's own failure to secure permission, the Tribunal held the depositary banks liable for the amount Claimant sought to transfer. "[T]he Tribunal does not consider that [Claimant's] attempt [to secure permission from Bank Markazi] relieved Bank Mellat and Bank Tejarat of their independent obligation to seek approval." Award No. 467-66-1 at para. 39, reprinted in \_\_\_ Iran-U.S. C.T.R. at \_\_\_.

5. It is undisputed in the present Case that Mr. Asghar requested his depositary bank, Bank Melli, to transfer funds from his time deposit to an account abroad. It is also undisputed that Bank Melli offered no proof that it had sought the central bank's permission to make the transfer. Instead, Bank Melli instructed Mr. Asghar to seek approval

on his own from the central bank. Bank Melli, which had a duty itself to approach the central bank on behalf of its depositor, cannot divest itself of that duty or discharge its legal obligation by telling Mr. Asghar to knock on the door of the central bank -- to whom he was a stranger and with whom he had no relations. The fact that it is not for the depositor to approach the central bank is underscored by the Tribunal award in Blount Brothers Corporation and Islamic Republic of Iran, et al., Award No. 216-53-1 (28 Feb. 1986), reprinted in 10 Iran-U.S. C.T.R. 95.<sup>1</sup> In that Case, the Claimant did go to the central bank but got no satisfaction. The Tribunal denied his claim, holding that he had never made a proper demand for his money because he should have made his request to his depositary bank, not to the central bank.

6. In view of the unwavering line of Tribunal awards cited above, I find quite inexplicable the statement in the present Award that "Bank Melli was not the bank to be contacted with a request for an exchange transaction." (Award at para. 18.) Such a statement is particularly incompatible with the decision in Blount Brothers. Such blatantly inconsistent results undermine the Tribunal's process.

7. I find equally inexplicable the Award's incorrect holding that Bank Melli could relieve itself of its responsibility to Mr. Asghar by instructing him to obtain central bank approval. All other Tribunal cases teach that the task of seeking such approval was the legal duty of Bank Melli itself, not its depositor. This is not merely a technical nicety; it is a recognition of the practical fact that a formal request from a depositary bank, to whom Bank

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<sup>1</sup>See, also Dissenting Opinion of Richard M. Mosk, Blount Brothers, supra.

Markazi's circular was addressed, was likely to be more effective than a random request from an individual unknown to the central bank. As the Tribunal noted in Stanwick, "[t]he fact that [Circular No. 11600] is addressed to [depository banks] further indicates that it was the duty of the commercial bank whose customer requests a sale of foreign exchange to seek Bank Markazi's approval." Award No. 467-66-1 at para. 38, reprinted in \_\_ Iran-U.S. C.T.R. at \_\_\_\_.

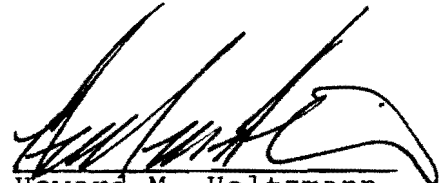
8. It is ironic that the Award makes these errors when it could have reached the result of denying Mr. Asghar's claim for funds in his time deposit without having to trample on the Tribunal's established jurisprudence. Mr. Asghar sought on 28 September 1979 to withdraw funds from a time deposit that, on its face, states that it did not mature until almost four months later. Mr. Asghar has not borne his burden of proving, by evidence either of contract or of banking practice, that he had a legal right to withdraw funds from this time deposit before its maturity date. He therefore has failed to demonstrate that he made a valid request for payment before 19 January 1981 and, consequently, that he had an outstanding claim on that date as required by Article II of the Claims Settlement Declaration, which limits the Tribunal's jurisdiction. I would for that reason -- and that reason only -- deny Mr. Asghar's claim for the funds in his time deposit at Bank Melli. The Award itself notes this as an independent, additional ground for denial of this part of the claim but, for reasons it does not explain, is not content to rely solely on this ground. (Award at para. 20.)

9. For the reason stated above, I must respectfully dissent from paragraphs 18 and 19 of the Award.

II.

10. The Award also denies claims by Mr. Asghar for funds in a current account held with his wife in Bank Melli and in two current accounts in Bank Saderat. I concur in the denial of those claims.

Dated, The Hague  
14 March 1990



Howard M. Holtzmann