

ORIGINAL DOCUMENTS IN SAFECase No. 11713Date of filing: 18 APR 86

** AWARD - Type of Award _____
 - Date of Award _____
 _____ pages in English _____ 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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** DISSENTING OPINION of Mr Moslaferi
 - Date 18 APR 86
5 pages in English 4 pages in Farsi

** OTHER; Nature of document: _____

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DUPLICATE ORIGINAL
 و نسخه برابر اصل

In the Name of God

Case No. 11713
 Chamber One
 Award No. 223-11713-1

RONALD STUART KOEHLER
 a claim of less than \$250,000 presented
 by the UNITED STATES OF AMERICA,
 Claimant,
 and
 THE ISLAMIC REPUBLIC OF IRAN,
 Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL
 دادگاه داری و جاری ایران - ایالات متحده
 ثبت شد - FILED
 Date 18 APR 1986 تاریخ
 ۱۳۶۵ / ۱ / ۲۹
 No. 11713 شماره

DISSENTING OPINION OF MOHSEN MOSTAFAVI

There are a number of portions of this Award with which I do not concur. However, since I have previously stated my general position on costs of arbitration and interest, I do not deem it necessary to reiterate them here, and shall therefore address myself only to the following points with respect to the present case:

1. The Claimant alleges that he received neither that portion of his salary payable to him in dollars for the months of Farvardin (21 March-20 April 1979) and Ordibehesht (21 April-21 May 1979), nor the accrued vacation pay due him. In response to this assertion, the Respondent states that it settled its accounts with the Claimant pursuant to a document dated May 1979, and that it had no remaining liability in that connection. As set forth in the text of the Award:

"16... To prove that the Claimant was paid the amounts claimed by him in respect of his salary for the months of Farvardin and Ordibehesht and of accrued vacation

pay, the Respondent relies on a document dated May 1979 bearing the description, 'payment in favour of Mr. Koehler for settlement of account with the company as under' and signed by the Claimant. At the Hearing, The Respondent produced the original of the document. The Respondent asserts that while a sum of 300,000 rials, payable in rials, was paid by a cheque, the sum of 328,024 rials, the equivalent of which was stated in this document as being payable in dollars, was paid to the Claimant in cash. Reasoning that a person holding the Claimant's position would not have signed a document of this nature unless he had received all the amounts due him, the Respondent argues further that this document is also evidence of the fact that the Claimant had previously received the portion payable in dollars for the month of Farvardin."

However, the majority does not find this argument, or the document of settlement of accounts, convincing, because in the majority's opinion:

"33... The Respondent, which bears the burden of establishing that it paid these amounts to the Claimant, asserts that the document signed by the Claimant in May 1979 constitutes a settlement of accounts by the Claimant with IEI and proves that the Claimant received these amounts. The Tribunal does not construe this document in the manner suggested by the Respondent. The Claimant's signature appears to acknowledge receipt only of the cheque for 300,000 rials constituting the rial component of the salary and other amounts payable for the month of Ordibehesht, and is fully consistent with an expectation that the amount of money stated on the document as payable in dollars would be transferred to his account in New York in accord with IEI's usual practice with the dollar portion of the Claimant's salary. No other evidence has been furnished by the Respondent to prove that this sum was paid to the Claimant in cash..."

By this interpretation, the Chamber disregards the express terms and clear intent of the document, ie. settlement of accounts, and requires that the Respondent prove that the dollar portion was deposited to the Claimant's New York account in accordance with [IEI's] usual practice. Since the authenticity of the document is not in question, its terms and language must serve to guide the Chamber in reaching its decision. The Parties had a variety of avenues available to them for settling their account, and they were

not bound in the least to adopt that method which the Chamber majority has in mind. Even though the Respondent states that the portion payable in dollars was paid in cash, there was not the slightest need that this exact amount be paid, or even that any payment be made at all, in settling the accounts. It very often happens, when settling accounts, that a portion of the monies due is waived. At this stage, whether payment was, or was not, made is not the issue. The point is, that a document was submitted to the Chamber as constituting a settlement of accounts, and the Chamber therefore has the duty to examine whether the document is authentic or fraudulent; if it be established that it is genuine, the Chamber is obliged to regard its provisions as applicable. Therefore, in view of the fact that the authenticity of this document is not held in any doubt, the Chamber may not set aside its provisions and meaning and raise an issue which is irrelevant to that at hand. Here, the majority has addressed itself to an issue not before it: [Prior] payment of salary was routinely and uniformly made, and examples thereof have been produced in the Parties' submissions; yet, the phrase "payment for settlement of account" is not found in any of them. For this reason, it is clear that this final payment was of a special nature, and the Chamber should not, therefore, have required the Respondent to prove that the salary had been paid in conformity to usual practice, thereby disregarding the phrase, "settlement of account." There can be no doubt that the Parties inserted that phrase in their document for a particular purpose. It is not necessary to include the words, "settlement of account" in a record of salary payments; rather, it was recorded here in order to declare that the account had been settled. Unfortunately, the majority has disregarded it and failed to accord it any signification or substance whatsoever.

2. There is another respect in which the majority has been guilty of error in interpreting this document. The document

explicitly states that the payment was made with respect to the salary for the month of May. But since payments of salary routinely took place on a monthly basis, it is clear that the salary for April had already been paid and was no longer at issue, whereas what was at issue was the month of May (Ordibehesht), the last month in which the Claimant was in the employ of the Iranian Government. Here, the majority's argument should be noted: "On its face, it purports to cover only the month of Ordibehesht, and the Respondent has not adduced any evidence to establish this payment." Yet, it also states, "Nor does this document constitute evidence that the Claimant had received the portion of his salary which was payable to him in dollars for the month of Farvardin." In this way, even though the majority has noted that the final document related to the salary for the month of Ordibehesht, it is nonetheless not satisfied that the salary for the preceding month (viz. Farvardin) had been paid, whereas it is abundantly clear that where the document refers to a settlement of account with respect to the salary for the month of Ordibehesht, this signifies that the salary for the preceding month, that is Farvardin, had already been settled in some way or another and that it was no longer at issue, in order for [the Parties] to have gone on to discuss the following and final month. Yet, the majority's reasoning should be noted here too:

"The Tribunal also notes that the two letters addressed to IEI officials by the Claimant, shortly after his departure from Iran, requesting the payment of these amounts, are indicative of the fact that the Claimant had not received these amounts." [emphasis added]

That is, the majority has treated the claim itself as evidence of the Claimant's entitlement. Even though the Respondent produced evidence of payment of the salary for Farvardin only at the Hearing conference, and because the majority did not accept its argument-- that it had refrained from submitting this document earlier as well, because of

the existence of the document setting forth the settlement of account and signed by the Claimant-- nonetheless, the protection of truth and justice requires that when a fact becomes manifest to the Tribunal, formalities should not be used as a veil to conceal the face of truth and justice. (1)

Date: 18 April 1986



Mohsen Mostafavi

(1) "both oral and written evidence may be submitted during the oral proceedings in the International Court of Justice after the time limits specified for such submission, but only as an exceptional measure." (Sandifer, Evidence before International Tribunals, 1975 ed., p.75). This exceptional reason can be, to discover the truth.