

CASE NO. 98
CHAMBER TWO

HARZA ENGINEERING COMPANY,
Claimant,

AWARD NO. 19-98-2

and

THE ISLAMIC REPUBLIC OF IRAN,

AWARD

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحده
ثبت شد - FILED	
Date	۱۳۶۱ / ۱۰ / ۹ 30 DEC. 1982
No.	98 41

Appearances:

For the Claimant: Mr. Jerry Anker
Mr. Mark N. Bravin
Wald Harkrader & Ross
Attorney

For the Respondent: Mr. Mohsen Mohebbi
Mr. Ali Aminpur
Mr. Akbar A. Kashan
Representatives of Bank Melli Iran
Mr. Mohammed K. Eshragh
Deputy Agent of the Islamic Republic
of Iran
Dr. Akbar Shirazi
Adviser to the Deputy Agent of the
Islamic Republic of Iran

DUPLICATE
ORIGINAL

نسخه برابر اصل

I. THE PROCEEDINGS

The Claimant, HARZA ENGINEERING COMPANY (hereinafter referred to as "HARZA"), filed a Statement of Claim on 18 November 1981, against the Government of Iran, including Bank MELLI and IRANIANS' Bank (whose successor of interest is Bank TEJARAT). The relief sought by the Claimant is the payment of US\$ 335,101.44 representing the value of the aggregate credit balance of the Claimant's allegedly expropriated accounts with these two banks.

Bank MELLI filed its Statement of Defence on 15 March 1982, Bank TEJARAT filed its Statement of Defence on 20 April, 1982 together with a Counterclaim for payment of US\$ 485,513.12 representing the value of letters of credit.

The Government of Iran did not file a Statement of Defence.

A Pre-Hearing Conference was held on 27 May 1982.

The Parties later submitted their documentary evidence.

A Hearing was held on 8 October 1982.

Post hearing memorials were later submitted by the Claimant and by Bank MELLI.

II. CONTENTIONS OF THE PARTIES

Harza alleges that it is a national of the United States and that from June 1966 until March 1978, under contract to the Iranian Ministry of Energy, it provided engineering consulting services and assistance as part of a project to develop electric power resources in Iran. In order to facilitate its activities in connection with this work, Harza opened two current Rial accounts into which it paid fees earned on the project and out of which it paid financial obligations incurred in Iran and remitted funds to its main office in the United States. One account was opened in Bank Melli Iran and a second in Iranians' Bank, which was later merged by legislative act of the post-revolutionary government with Bank Etebarate Iran and other banks into the new Bank Tejarat.

In 1979, in the course of liquidating its operations in Iran, Harza attempted on four occasions to pay obligations incurred in Iran by drawing checks on its Bank Melli account. On 14 March 1979 a check in the amount of Rials 1,960,920 was made out to the Ministry of Economic Affairs and Finance and signed by one George Pabich, Secretary-Treasurer of Harza. Upon presentation, this check was dishonored by Bank Melli on the ground that no signature card for Mr. Pabich was on file with the bank and that the signature was therefore not verifiable. In April 1979, a replacement check in the amount of Rials 1,960,920 was transmitted to the same payee signed by a W.P. Leber, the official liquidator of Harza's Iran operations. Again, upon presentation, the check was dishonored on the ground that Mr. Leber's signature was not on file.

On 3 December 1979, Mr. Leber sent to Harza's Tehran counsel a copy of the Official Gazette entry announcing his appointment as liquidator along with a letter signed by him authorizing

the bank to honor checks signed by him. Mr. Leber requested that the counsel transmit these items to Bank Melli. On the same day, a third check was issued in the amount of Rials 231,313, this time to Harza's Iranian counsel, over the signature of Mr. Leber. Subsequently, a fourth check in the amount of Rials 1,960,920 was issued on 7 December 1979 over Mr. Leber's signature in yet another attempt to effect payment to the Ministry of Economic Affairs and Finance. These two checks were also dishonored on the above-mentioned grounds.

Harza then attempted to execute formal signature cards which would meet the bank's objections regarding the verification of Mr. Leber's signature. On the precise instructions of a Bank Melli official, the signature cards were completed, Mr. Leber's signature was authenticated by Harza's principal bank in the United States and the cards were sent to and received by Bank Melli.

On 25 February 1980, despite compliance with Bank Melli's instructions in this regard, the bank informed Harza's Iranian counsel that even these actions were not adequate and that a supplemental verification of Mr. Leber's signature would have to be made by an Iranian consulate. At this point, almost a year after it had first attempted to draw on its Bank Melli account, Harza concluded that the account had been effectively blocked and desisted from further efforts to use its funds. It should be noted that, during the present proceedings, Bank Melli has stated that it now accepts Mr. Leber's signature but that, since it was received in January 1980, no checks have been presented. The Claimant has presented evidence to the effect that as late as April 1980, the bank was still refusing to accept Mr. Leber's signature.

Harza alleges that Bank Melli's actions were wrongful and amounted to an expropriation by the Islamic Republic of Iran of its funds in the account by direct and repeated interference

with the use and enjoyment of its property in violation of the Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran of 15 August 1955,^{1/} ("Treaty of Amity") and principles of international law. Furthermore, although it took no steps to draw on funds in its Bank Tejarat account, Harza alleges that Bank Melli's actions demonstrated a general government policy to block its bank accounts, and perhaps those of American companies in general, and that, therefore, its Bank Tejarat account had likewise been expropriated.

Harza seeks an award for the dollar equivalent as of 14 March, 1979 of the undisputed amount in its Bank Melli and Bank Tejarat accounts, being \$330,634.44 and \$3,951.56 respectively. Harza also seeks interest from 14 March 1979, the date of the Pabich check, to the date of payment of the award at a rate equal to its borrowing rate. Harza also seeks its costs of arbitration.

The Respondent, THE ISLAMIC REPUBLIC OF IRAN, has not filed a Statement of Defence. However, Bank Melli Iran and Bank Tejarat filed Statements of Defence, supplemental pleadings and documentary evidence and appeared at the Pre-Hearing Conference on 27 May 1982 and at the Hearing held on 8 October 1982. Furthermore, Bank Tejarat filed a Counterclaim based upon certain letters of credit under which it alleges Harza is liable.

Bank Melli's defence, as it developed during the course of the proceedings, rests upon its denial that its actions were wrongful or amount to an expropriation. First, it alleges that its refusals to honor the checks drawn by Harza were lawful in that it was not, when the checks were presented, properly authorized to pay out of the account on the strength of the signatures

^{1/} 8 U.S.T., 849, T.I.A.S. No. 3853

of Mr. Pabich and Mr. Leber. It maintains that, on 19 September 1977, a new signature card (with power of attorney) was filed that made Mr. Shamshad Azri the sole authorized signatory. Secondly, it denies that its refusals at the time to accept Harza's efforts to authenticate Mr. Leber's signature as sufficient authorization for the checks of 3 and 7 December 1979 amounted to interference with Harza's use or enjoyment of its funds. Thirdly, it alleges that the funds remain available for Harza's use upon presentation of validly executed checks, except for an amount garnished by an order issued on 17 May 1981 by Tehran Peace Court in execution of a judgment against Harza.

Bank Tejarat also denies that it has in any sense expropriated the balance of Harza's account, pointing out that there has been no attempt by Harza to draw on the funds in the account since the revolution and that no prior attempt was ever dishonored. Bank Tejarat states that the account remains at Harza's disposal.

In its Counterclaim, Bank Tejarat contends that Harza Engineering Company is liable for the amounts due under thirty-three back-up letters of credit issued to Bank Etebarate for the account of Harza Engineering Company International ("Harza International"), a Liberian corporation. Bank Tejarat alleges that as successor to Bank Etebarate, it duly called each of the credits but was refused payment on the ground that the credits had expired prior to the receipt of Bank Tejarat's request for an extension of the credits. Bank Tejarat argues that, although the letters of credit were issued to the account of Harza International, Harza is itself liable because of an identity between the two corporations due to common ownership.

In response, Harza challenges the Tribunal's jurisdiction to hear the Counterclaim on the ground that it does not arise out of the same contract, transaction or occurrence that constitutes the subject matter of its claim, as required by the Claims Settlement Declaration. On the merits, Harza denies liability on the ground that only the issuing bank can be liable under

the terms of the letters of credit and that, even if the account party may be held liable, Harza is not the account party in any event. Harza maintains that the separate and independent legal status of the two corporations shields it from any liability which Harza International may bear.

III. GENERAL ISSUES OF JURISDICTION

The Claimant invokes as the basis for the Tribunal's jurisdiction over the claims Article II, paragraph 1, of the Claims Settlement Declaration which establishes the Tribunal for, among other purposes, "the purpose of deciding claims of nationals of the United States against Iran ... if such claims ... are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights" The Tribunal must determine that the Claimant is a national of the United States; that the Respondents are included in the term, "Iran"; and that the subject matter of the claim is as described by the language of the provision.

The Claimant has proffered a certification by the Secretary of State of Delaware indicating that Harza Engineering Company was organized under the laws of that State on 27 November 1970 and has continuously maintained its legal corporate existence since that time.

Furthermore, the sworn affidavit of Harza's corporate secretary indicates that on the basis of his personal knowledge of the records of the company's shareholders, all of whom are also employees of the company whose nationality is recorded, at least 97.3 percent of Harza's outstanding capital stock has been held by United States nationals during the period of time relevant to the claims. The affidavit also lists the names and addresses in the United States of sixteen of these employee-shareholders who hold a combined interest in the company exceeding 50 percent of its capital stock and who are United States nationals.

In view of this evidence and the absence of any evidence to the contrary, the Tribunal is satisfied that the claims presented here are claims of a national of the United States within the meaning of these terms as defined in Article VII of the Claims Settlement Declaration.

The Claimant has named the Islamic Republic of Iran as sole Respondent but has indicated clearly in its statement of claim that the Government acted through Bank Melli and through Iranians' Bank, a predecessor of Bank Tejarat. The Government of the Islamic Republic has not responded to the claim in its own name, but both Bank Melli and Bank Tejarat have appeared and offered defences to the claim. It is uncontested that these two banks are creations of and are wholly owned and controlled by the Government of Iran, and, as such, they must be deemed agencies of the Government. Therefore, the claim is within the jurisdiction of the Tribunal as a claim against "Iran" as defined by Article VII, paragraph 3 of the Claims Settlement Declaration.

The third jurisdictional requirement, relating to the subject matter of the claims, is addressed below.

IV. THE CLAIM RELATING TO BANK MELLI IRAN

The Claimant has alleged the liability of Bank Melli on the basis of expropriation and has also alleged that certain measures have been taken which affect its right to bank accounts. As noted above, the Tribunal has jurisdiction over claims arising out of "expropriations or other measures affecting property rights." Thus, whether deemed an expropriation or another measure affecting property rights, the claim clearly falls within the subject matter requirements of Article II, paragraph 1, of the Claims Settlement Declaration. A mere right to payment from a bank account is not a "claim" within the meaning of the Claims Settlement Declaration, but

a claim that the use of the account has been interfered with unreasonably or that the account has in some other manner been taken is such a claim.

Ordinarily, the wrongful failure to pay amounts drawn on a current account would give rise to a simple claim for contract breach, the damages for which could be limited to proven losses caused by the dishonor. Here, however, the Claimant does not allege losses caused by the dishonor of specific checks, but rather that the pattern of behavior of Bank Melli in dishonoring four checks and in creating unreasonable barriers to the Claimant's efforts to authenticate the signature of a person authorized to draw on its account amounts to an expropriation of the funds in the account.

The Claimant is correct in asserting that a taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property.^{2/} In the present case, however, we do not need to decide how unreasonable the interference must be to constitute a taking of property, because, the Claimant has failed to prove that the actions of Bank Melli amounted to unreasonable interference. In essence, the evidence is adequate to show that the first check was wrongfully dishonored, and that the second check was correctly refused. The evidence with respect to the third and fourth checks is inconclusive and is inadequate to permit the Tribunal to find that they were wrongfully dishonored. Moreover, the evidence does not warrant a finding that Bank Melli intended to deprive

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The phrase "expropriations or other measures affecting property rights" has broad meaning under international law. See, e.g., Christie, What Constitutes a Taking of Property Under International Law, [1962] Brit.Y.B. Int'l Law 307; Draft Conv. on Resp. of States for Injuries to Aliens, Art. 10(3), reprinted in 55 Am J. Int'l Law 545, 553 (1961); 8 Whiteman, Digest of Int'l Law 1006-1020 (1967); The Measures Taken by the Indonesian Gov't Against Netherlands Enterprises, 5 Neth. Int'l L. Rev. 227, 242 (1958).

the Claimant of its right to use its bank account. Although the bank imposed requirements for the authentication of the signature of a newly authorized representative that were difficult to meet under the circumstances prevailing at the time, the evidence presented did not establish that these requirements were unreasonable or even inconsistent with normal Iranian banking practice.

These conclusions are based on the following analysis of each transaction. First, the Pabich check of 14 March 1979 was dishonored on the ground of improper signature despite the fact that Mr. Pabich was authorized to sign checks and that his signature was on file with Bank Melli, as disclosed by the Claimant's evidence. That evidence shows that Mr. Pabich was officially recorded in the public records of the Company Registration Office as being an authorized signatory to all of Harza's Iranian bank accounts and that this authority was published in the Official Gazette on 24 October 1968. Furthermore, Mr. Pabich sent a completed Bank Melli signatory card to Harza's project manager in Iran on 16 January 1969. That this signatory card was transmitted to the bank is indicated by the fact that it served as the authentication of the project manager's signature as well. Mr. Pabich's signature was accepted as valid by Bank Melli on at least one prior occasion when the authority of a later project manager to sign checks was accepted on the basis of a power of attorney signed by Mr. Pabich. When asked at the Hearing if Mr. Pabich's signature card was in Bank Melli's files, the bank's representative indicated that this was indeed possible but that later check signing authorizations would have superseded the card. The bank's representative asserted that the only valid signature card on file during the relevant time was that of Mr. Azri, the power of attorney for which was given by Mr. Pabich. However, no evidence was presented that Mr. Pabich's prior authority had been revoked. Thus the bank had a duty to honor the Pabich check and its refusal to do so was wrongful. However, the available evidence is inadequate to permit the Tribunal to determine

whether that refusal reflected mere negligence in failing to find an old card, a general policy that new cards supersede old ones, or a deliberate decision to deprive Harza of the use of the account.

On the other hand, the first Leber check of April, 1979 clearly was not wrongfully dishonored. Harza does not even contend that Bank Melli had been proffered a specimen of Mr. Leber's signature by the time this check was presented and the Bank is correct in pointing out that it would have to be liable to the account holder if it had honored the check in such circumstances.

Whether the second and third Leber checks, dated 3 December and 7 December 1979, respectively, were wrongfully dishonored is more difficult to say. Mr. Leber's authority to sign checks and a specimen of his signature were communicated to Harza's counsel in Tehran for the purpose of presenting them to Bank Melli along with the 3 December check, but the evidence is inconclusive on the question of what documents counsel actually presented to the Bank. The Tribunal therefore cannot conclude that these two checks were wrongfully dishonored.

Finally, we must examine Harza's further efforts to meet the bank's requirements to authenticate Mr. Leber's signature. On the advice of counsel who was discussing the problem with the bank, Harza obtained blank signature cards which were thereupon signed by Mr. Leber. Harza then contacted an official at the New York City branch of Bank Melli who gave specific instructions regarding the steps to be taken to authenticate Mr. Leber's signature through Harza's Chicago bank. Harza fully complied with these instructions and mailed the required documents to Bank Melli. Subsequently, Harza learned through its Iranian counsel that these efforts were not satisfactory to Bank Melli officials who had by then added the additional requirement that Mr. Leber's signature be verified by an Iranian

consular officer. Shortly thereafter all Iranian consular offices were closed in the United States, and the Claimant abandoned its efforts to use the Bank Melli account, although discussions between counsel and the bank continued fruitlessly for some months. In this connection it should be noted that the communications from the Claimant's counsel in Tehran reflected his continued belief that the problems experienced in using the account could be resolved and that the conditions imposed by the bank for verification of Mr. Leber's signature could be met, even in the strained circumstances existing in late 1979 and 1980 when the Claimant's representatives found it difficult, if not impossible, to travel to Iran and when Iranian consulates in the United States were closed.

The failure of the Claimant to pursue its efforts to use its account beyond the spring of 1980 is not explained in the record, but if it was based on a judgment that the account had been "taken" through unreasonable interference with its use, the evidence to justify such a judgment has not been presented. As noted above, the Claimant does not allege and has not shown any damages as a result of the wrongful dishonor of the Pabich check. We therefore hold that the claim relating to Bank Melli should be dismissed for want of proof.

V. THE CLAIM RELATING TO BANK TEJARAT

The evidence with regard to Harza's account with Bank Tejarat is quite different from that presented with regard to the Bank Melli account. Harza did not attempt to draw on the Bank Tejarat account but argues that its experience with Bank Melli establishes that it would have been confronted with the same pattern of interference had it done so.

Implicit in the Claimant's argument is the assertion that Bank Melli acted in accordance with a general government policy to deny it access to its funds. However, the Claimant presented no direct proof of such an overall policy nor did it offer any circumstantial evidence that would indicate such a policy. Indeed, as we have noted above, Bank Melli, in defending its own conduct, did not cite any general law or policy in pursuit of a public purpose.

Therefore, to the extent that the claim relating to Bank Tejarat is based upon any interference by the bank with Harza's rights or upon a broader governmental direction it must be dismissed for want of proof. Moreover, as noted above, a mere right to payment from a bank account is not an outstanding claim within the meaning of the Claims Settlement Declaration. Therefore, to the extent that the claim is based upon such a right, it does not fall within the Tribunal's jurisdiction.

VI. THE COUNTERCLAIM OF BANK TEJARAT

To the extent that the dismissal of the claim relating to Bank Tejarat is based on jurisdictional grounds, the counterclaim of Bank Tejarat must also be dismissed. Moreover, there is another reason why the Tribunal does not have jurisdiction over the counterclaim. Article II, paragraph 1, of the Claims Settlement Declaration provides jurisdiction over "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim...."

The letters of credit which are the subject matter of Bank Tejarat's counterclaim constitute undertakings of the Northern Trust Company located in Chicago, Illinois, to Bank Eteberate. The claim by Harza in this case relating to Bank Tejarat is for the wrongful failure to permit use of a bank account opened with Iranians' Bank. On its face, there appears to be no relationship whatsoever between the subject matter of the claim and that of the

counterclaim. Nor has the Respondent offered any rationale for connecting the contract (letters of credit) out of which the counterclaim arises and the occurrence (alleged taking of a bank account) out of which the claim arises.

A letter of credit is a financial instrument embodying obligations which are autonomous and independent of the transaction to which it is a condition. Moreover, even if we look behind the credits themselves, the underlying transaction between Harza International and the Khuzestan Water and Power Authority bears no relationship to the obligation to pay out of the bank accounts.

The subject matter of the claim and the counterclaim being thus distinct, the Tribunal holds that it does not have jurisdiction over the counterclaim of Bank Tejarat for this reason as well.

VII. COSTS OF ARBITRATION

In accordance with Article 40, paragraphs 1 and 2 of the Provisionally Adopted Tribunal Rules and taking into account the circumstances of the case, including the dismissal of the counterclaim, the Tribunal decides that each of the Parties shall bear its own costs of arbitrating this claim.

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

The Claim of HARZA ENGINEERING COMPANY relating to BANK MELLI IRAN is hereby dismissed.

The Claim of HARZA ENGINEERING COMPANY relating to BANK TEJARAT is hereby dismissed.

The Counterclaim of BANK TEJARAT is hereby dismissed.

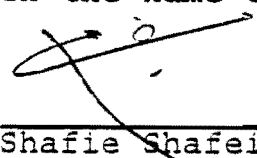
No Award is made as to costs.

Dated, The Hague
30 December 1982



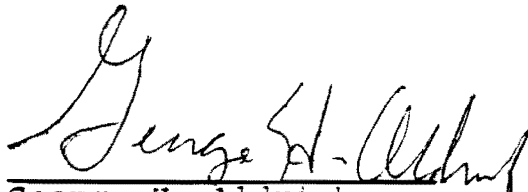
Pierre Bellet
Chairman
Chamber Two

In the name of God



Shafie Shafeiei

Concurring



George H. Aldrich