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ORIGINAL DOCUMENTS IN SAFE

Case No. 199

Date of filing: 9 APR 84

\*\* AWARD - Type of Award \_\_\_\_\_  
 - Date of Award \_\_\_\_\_  
 \_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* DECISION - Date of Decision \_\_\_\_\_  
 \_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* CONCURRING OPINION of \_\_\_\_\_  
 - Date \_\_\_\_\_  
 \_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* SEPARATE OPINION of \_\_\_\_\_  
 - Date \_\_\_\_\_  
 \_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* DISSENTING OPINION of \_\_\_\_\_  
 - Date \_\_\_\_\_  
 \_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* OTHER; Nature of document: notification of correction

- Date 9 APR 84  
12 pages in English \_\_\_\_\_ pages in Farsi

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	۱۳۶۳ / ۱۱ / ۲۰ 9 APR 1984
No.	199

CASE NO. 199

CHAMBER THREE

AWARD NO. 117-199-3

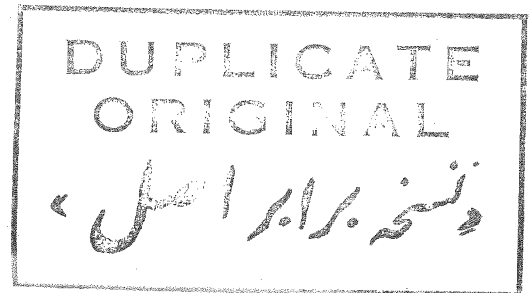
AMERICAN HOUSING INTERNATIONAL, INC.,

Claimant,

and

BANK SADERAT IRAN, GOVERNMENT OF THE  
ISLAMIC REPUBLIC OF IRAN, HOUSING  
COOPERATIVE SOCIETY OF OFFICERS OF  
STATE GENERAL GENDARMERIE,

Respondents.



DISSENTING OPINION OF RICHARD M. MOSK

NOTIFICATION OF CORRECTION

Attached are the corrected pages 1, 3, 4, 5, 7, 8, 11,  
and 12 of the English version of the Dissenting Opinion of  
Richard M. Mosk, filed on 19 March 1984, together with an  
explanatory memorandum.

The Co-Registrars

MEMORANDUM

TO: The Co-Registrars  
FROM: Richard M. Mosk  
DATE: 5 April 1984  
RE: NOTIFICATION OF CORRECTION

Attached please find the corrected pages 1, 3, 4, 5, 7, 8, 11 and 12 of the English version of my Dissenting Opinion in Case No. 199, filed on 19 March 1984.

The corrections made are:

Page 1, line 6: add "A. Jurisdiction"

Page 3, line 9 : delete ", churches"

line 11: delete "or potential financial backer"

Page 4, lines 11 and 12: "an indication" replacing "one indicia"

Page 5, lines 10 and 11: "to contradict Mr. Morris' statements." is deleted.

Page 7, line 12: add "the" before "inference that..."

Page 8, line 1: "February 14, 1977"

line 2: "the" before "parties" is deleted

line 3: "January 4, 1978"

line 7: comma added "HCS, replying ..."

line 8: "January 26, 1978," comma added after "1978"

Page 11, lines 20 and 21: "Actions leading to" estoppels and "actionable" misrepresentations ...

Page 12, line 1: "negligent,"

line 2: add "facts or intentions" before "during contractual ..."

*Richard M. Mosk*

CASE NO. 199

CHAMBER THREE

AWARD NO. 117-199-3

AMERICAN HOUSING INTERNATIONAL, INC.,

Claimant,

and

BANK SADERAT IRAN, GOVERNMENT OF THE  
ISLAMIC REPUBLIC OF IRAN, HOUSING  
COOPERATIVE SOCIETY OF OFFICERS OF  
STATE GENERAL GENDARMERIE,

Respondents.

DISSENTING OPINION OF RICHARD M. MOSK

I dissent to the Award dismissing the Claimant's claim. I believe that based on the record, the Tribunal should have asserted jurisdiction over the Housing Cooperative Society of Officers of State General Gendarmerie ("HCS") and found HCS liable to Claimant.

A. Jurisdiction

Under the Claims Settlement Declaration, the Tribunal can have jurisdiction over an Iranian entity only if, under Article VII paragraph 3, of the Claims Settlement Declaration, that entity is an "agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof."

That the government of Iran was deeply involved in the Gendarmerie project is evident from Hearing statements of the HCS representative, Mr. Rami. Mr. Rami asserted that land upon which the Gendarmerie project was to be constructed was obtained by HCS through a special government legislative program. The supplying of housing for Gendarmerie officers is, by its nature, a governmental function. Indeed, it was anticipated that the project would ultimately include schools and other typically governmentally supplied services. Moreover, the government was an essential financial backer of the project.

Claimant's bid on the project was approximately \$180,000,000, which, as Mr. Rami indicated, was one third of the amount bid by a French company and one half of the amount bid by a German company. Mr. Rami stated that HCS had anticipated that it would receive governmental grants. Furthermore, Major General Mahagheghi, Chairman of the Board of Directors of HCS, in a letter dated January 26, 1978, wrote that the HCS efforts to receive a "loan from the Government will shortly yield results." This loan was a prerequisite to the project. It is inconceivable that a several hundred million dollar project could be financed through merely the two thousand Gendarmerie officer members of HCS or that such officers could themselves offer sufficient security to obtain private capital. Moreover, any governmental loans or grants required approval of the national consultative assembly. See Iranian Constitution,

Article 80. Thus, governmental involvement was apparently necessary.

The fact that the project was never undertaken following the revolution further suggests the control of the government. Mr. Rami stated that the housing project did not proceed because of a change in governmental policy on housing. Indeed, the Constitution of the Islamic Republic of Iran expressly provides for priorities in housing that would militate against the Gendarmerie project. See Iranian Constitution, Article 31. Certainly, the ability to control whether or not an entity's project was to proceed is an indication of control over that entity.

It is unlikely that the Government of the Islamic Republic of Iran did not have the power to control the actions of its own public servants. It is this power that appears to have caused the abandonment of the project. If the project had proceeded, it is likely that HCS would have been deemed nationalized. See Law For the Protection and Development of Iranian Industry, Art. I C (nationalizing entities with bank loans which exceed net income, whether or not the project has proceeded). The Tribunal does not have information as to HCS's financial status.

Mr. Morris of Claimant represented that he met only with Gendarmerie officers in government offices, dealt only with government banks in connection with the Gendarmerie project and was told that the government of Iran stood

behind the project. He stated he never had the slightest indication that HCS was independent of the Government.<sup>1</sup> Claimant asserts that it would never have remained in Iran until October of 1978 if it did not believe it was working on a project enjoying the support and protection of the government of Iran.

Mr. Morris' representations were not contradicted. Moreover, despite Claimant's request, HCS did not produce at the hearing various of its representatives who were directly involved with Mr. Morris.

There is correspondence confirming that the Iranian Planning and Budget Organization was involved in the review and approval of the draft contract between Claimant and HCS. Moreover, HCS used stationary bearing the emblem of the former Imperial Government of Iran. See Economy Forms Corporation, Award No. 55-165-1 (19 June 1983). HCS admitted that a government engineer from the Planning and Budget Organization of the Government of Iran was used to review plans submitted by Claimant. And a letter from HCS to Claimant indicates that the legal department of the Planning

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<sup>1</sup> Case 292 before Chamber 2 of this Tribunal also involves a housing construction contract between a claimant and a cooperative society -- the Cooperative of the Workers of the Ministry of Roads and Transportation of Iran. The files in that case, of which judicial notice can be taken, disclose a letter to the claimant from the Ministry's Department of Progress and Comfort of Workers which indicates that the Ministry itself was highly involved in the project (Exhibit H, Claimants Comments on the Statements of Defence), thus showing the relationship between the "cooperatives" and the government of Iran.

Governmental agencies, recent documents covering the association, tax returns, documents relating to government permits, loan applications and similar material would all be relevant. In short, Respondents have provided insufficient information concerning HCS or the Gendarmerie before the Revolution and virtually no such information after the Revolution. If such documents or information supported HCS's position, the Tribunal must assume they would have been produced. Because HCS has failed to produce the requested documents or other documents, which would in all likelihood establish the extent of government control, the Tribunal should have drawn the inference that such documents or information would evidence control of HCS by the government of Iran. At the very least, AHI established a prima facie case of control, which was not rebutted adequately by Respondents.<sup>4</sup>

B. Merits

Claimant alleges that on or about December 1976, HCS invited Claimant to bid on a project involving the construction of 2330 residential housing units in Tehran.

According to the Claimant, Claimant's January 26, 1977 project bid of approximately \$180,000,000 was accepted by

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<sup>4</sup>Moreover, it is arguable that under the circumstances, the Government of Iran should be liable because, through its high officials, it at least permitted the appearance that HCS was, in effect, a government controlled entity.



HCS on or about February 14, 1977. Letters written by both parties indicate that a contract was essentially agreed upon in December of 1977. In its letter of January 4, 1978, Claimant requested from HCS an "absolute binding Letter of Agreement based on the Contract submitted to you and approved by General Askari and [the] Planning and Budget Organization". (Emphasis added). HCS, replying in a letter dated January 26, 1978, noted that as soon as a government loan was received, a contract "according to the agreement already made" would be signed. (Emphasis added). Therefore it appears that the parties had agreed on the essential terms of a contract.<sup>5</sup>

From the written correspondence and the representations of the parties it appears that from at least January of 1978 until July 9, 1978, HCS continued to represent that Claimant and HCS had an agreement and that as soon as the financing was secured, the formal written agreement would be consummated. From the fact of the HCS acceptance of the Claimant's bid and from statements to this Tribunal as to oral statements by HCS before January of 1978, there are strong indications that the representations by HCS actually began in early 1977. While making representations and promises that the contract would be formalized momentarily,

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<sup>5</sup> Despite a Tribunal request, the Respondents have not produced the bid and acceptance, draft contracts between the parties or correspondence between the parties concerning the contract negotiations.

is laboring under a mistake as to some matter vital to the contract or transaction, he may come under an obligation to undeceive B, at all events if the circumstances are such that his omission to do so must inevitably foster and perpetuate the delusion. In such cases silence is in effect a representation that the facts are as B mistakenly believes them to be, and A is accordingly estopped from afterwards averring, as against B, any other state of facts." Spencer, Bower and Turner, The Law Relating To Estoppel by Representation 49 (2d. ed. 1966).

It seems clear in the instant case that HCS knew Claimant was operating under the assumption that it would be awarded the contract.

Also it appears that HCS actually made representations which it knew not to be true and failed to disclose its actual intentions. Such acts amount to actionable misrepresentation. Id at 51. It is not necessary, however, that HCS have done the aforesaid acts intentionally. Actions leading to estoppels and actionable misrepresentations can be negligent. See id at 51, 69.

The analogous civil law doctrine of culpa in contrahendo is likewise applicable to this case. Under this doctrine a party may recover damages arising from his

reliance on another party's negligent, incorrect communications or negligent failure to communicate facts or intentions during contractual negotiations. See A. von Mehren and J. Gordley, The Civil Law System 837-40 (2d ed. 1977); and Kessler and Fine, Culpa in Contrahendo; Bargaining in Good Faith and Freedom of Contract: Comparative Study, 77 Harv. L. Rev. 401 (1964). Thus, as one authority has written,

Under the civil law a party who has used negotiations solely to induce the other party to take a desired course of action and terminates them after his goal has been accomplished, will have to answer in damages to the party whom he has strung along. [United States] courts are also able to protect the victim in such a situation with the help of the doctrines of misrepresentation and promissory estoppel."

Kessler and Fine, supra 77, Harv. L. Rev. at 419-20.

There is nothing to suggest that these various principles are not applicable in Iranian law. See Article 438, Civil Code of Iran (M. Sabi, Trans. 1972) ("Trickery denotes conduct which causes the other party to the transaction to be misled") and The Civil Responsibility Law, Article 8 (27 April 1960).

These principles also prevail in an international context. See Bowett, Estoppel Before International Tribunals and its Relation to Acquiescence, 33 Brit. Y.B. of Int'l. Law 176, 193 (1958); de Vries, International Pre-Contractual Obligations in International Contracts 51, 80 (Smit, Galston and Levitsky, eds. 1981).