

DUPLICATE
ORIGINAL
نسخه برابر اصل

March 24, 1983

CASE NO. 16

CHAMBER THREE

AWARD NO. 30-16-3

RAYGO WAGNER EQUIPMENT COMPANY,

Claimant,

and,

IRAN EXPRESS TERMINAL CORPORATION,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داورى دعاوى ايران - ايالات متحده
ثبت شد - FILED	
Date	۱۳۶۲ / ۱۱ / ۵
	25 MAART 1983
No	16
	19

CONCURRING AND DISSENTING OPINION OF

RICHARD M. MOSK

I concur in the Tribunal's decision that it has jurisdiction over this case. My expanded discussion of the jurisdictional issue is, I believe, consistent with and supportive of the reasoning and conclusion in that part of the Award concerning jurisdiction.

I respectfully dissent from the Award on the merits in this case because, as I discuss below, the evidence in the record and applicable legal principles support an award in favor of the Claimant.¹

¹The Tribunal has never expressly decided whether, in any one case, there can be different majorities. In the instant case there are different majorities for the issue of jurisdiction and for the question as to who shall prevail on the merits.

Questions In Federal Restraints On Foreign Enterprise, 74 Harv.L.Rev. 1489, 1547 (1961) ("control for what purpose?"). The government control necessary to establish jurisdiction over an Iranian entity under the Claims Settlement Declaration does not have to be the type of control which would lead to direct liability of the Government of Iran under theories of corporate identity, alter ego, piercing the corporate veil or interference with contractual or advantageous relations.³

The Respondent has suggested that an "instrumentality, or entity controlled by the Government of Iran" (Article VII, paragraph 3, of the Claims Settlement Declaration) should be interpreted to mean only government agencies or entities that have been nationalized by the Government of Iran or in which the Government of Iran owns a majority of shares of stock. Such an interpretation is not "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31, paragraph 1, 1969 Vienna Convention on the Law of Treaties, (entered into force January 27, 1980, reprinted at 8 Int'l Leg. Mat'ls 679 (1969).

³As noted in footnote 2, supra, the Government of Iran is, under the Algiers Declarations also directly liable for awards against any component of "Iran" as defined in the Claims Settlement Declaration.

The Permanent Court of International Justice provided an indication of the general meaning of the term "controlled entity" when it declared that the "conception of control", as used in a Geneva Convention, "is an essentially economic one and that it contemplates a preponderant influence over the general policy." Certain German Interests in Polish Upper Silesia P.C.I.J. Ser. A No. 7 at 55,68-69 (1926). See also 1 Jowett's Dictionary of English Law 454 (2d ed. 1977). Other descriptions of control suggest that such influence includes the power or authority to manage or direct the entity. See, e.g., Universal Carloading & Distr. Co. v. Railroad Retire. Bd., 71 F.Supp 369,370 (D.D.C. 1942), aff'd, 172 F.2d 22 (D.C. Cir. 1948) (control includes "the right or power to direct the policies and business of another [This] interpretation does not require the right or power to be exercised in order to constitute 'control.'").

"Control" has not required nationalization or ownership of a majority of (or even any of) the capital stock of the entity. See Baron De Neuflize v. Germany and the Deutsche Bank, 4 Ann.Dig.Pub.Int.L.C. 323 (Franco-German Mixed Arbitral Tribunal 1928) (in connection with control considered not only stock ownership but such elements as financial and administrative influence); United States v.

of control."); 1 Swarzenberger, International Law 402-406 (3d ed. 1957).

That the Governments did not intend to give a narrow meaning to the term "entity controlled by the Government of Iran" is further suggested by the all-encompassing definition of "Iran" in Article VII, paragraph 3, of the Claims Settlement Declaration. Surely the inclusion of "political subdivision of Iran," and "any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof" (emphasis added) is sufficiently broad to include certain non-governmentally owned entities.

The United States Foreign Sovereign Immunities Act of 1976 provides that a "foreign state ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state...." An "agency or instrumentality of a foreign state" is defined as any entity "which is a separate legal person, corporate or otherwise, and... which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof...." Title 28 U.S.C., Section 1603. Since a corporation in which a majority of shares are owned by a government is an "agency or instrumentality" of that government, the term "entity controlled by the Government"

must have a broader meaning than "agency" or "instrumentality" and cover entities in which the government does not have a majority of shares or other ownership interest.⁵

There are logical reasons for a more inclusive definition of government-controlled entity. If one of the Governments, through its representatives or appointees, has the authority to influence whether an entity pays its debts and has the ability to direct and participate in proceedings against the entity before this Tribunal, it would be reasonable to extend jurisdiction to such an entity, even if the Government does not officially, or as a matter of record, "own" the entity.⁶ This is especially so when the continued operation of the entity serves a public or governmental interest. See Mavrommatis Palestine Concessions (Gr. v. G.B.) [1924] P.C.I.J., Ser. A, No. 2, at 17-22 ("[C]ontrol always means measures of a special character in connection with an economic policy consisting in subordinating, in one way or another, private enterprise to public authority.").

⁵That an entity may not invoke the doctrine of sovereign immunity has not meant it is necessarily not government-controlled. See United States v. Deutsches Kalisyndikat Gesellschaft, 31 F. 2d 199 (S.D.N.Y. 1929); Annot., 25 ALR 3d 322,340 (1969).

⁶In the instant case, Respondent's pleadings contained the official emblem of the Government of Iran.

In addition, the Government of Iran and Respondent contended in a United States court that Respondent was a government entity and therefore entitled to assert the defense of sovereign immunity and was subject to the jurisdiction of this Tribunal. Taking such a position constitutes the type of subsequent practice by a party to the treaty which suggests that Respondent fits within the definition of an "entity controlled by the Government of Iran." See Vienna Convention on the Law of Treaties, supra, Article 31, paragraph 3(b). Moreover, in its United States court pleading, Respondent asserted that Iranian law required private corporations, "including upon information and belief, [Respondent] to be administered by the Government of the Islamic Republic of Iran."⁷

Thus, the Claims Settlement Declaration does not preclude the Tribunal from maintaining jurisdiction over entities such as the Respondent.

The facts in the instant case are sufficient to establish Respondent as an entity controlled by Iran. The actual shareholders of Respondent corporation and their

⁷ Having taken such a position before another judicial body, Respondent and the Government of Iran should be estopped from taking a contrary position before this Tribunal. Cheng, General Principles of Law as Applied by International Courts and Tribunals 141-42 (1953); MacGibbon, Estoppel in International Law 7 *Int'l & Comp.L.Q.* 468,479 (1958); Bowett, Estoppel Before International Tribunals and Its Relation to Acquiescence [1957] *Brit.Y.B. Int'l L.* 176,195.

duly elected directors are no longer exercising any of their rights in connection with that corporation. It does not appear likely that the rights and powers of these shareholders or directors will be restored in the foreseeable future. Thus, these shareholders and directors do not direct, manage or otherwise control the corporation. Since they do not, who does? A corporation does not run by itself. If the owners and directors of a company abandon it, then it must remain dormant or it must be dissolved, liquidated or be put into some type of bankruptcy proceeding, normally by a creditor. See The Commercial Code of Iran, Articles 199-231, 412-550, reprinted in Vafai, VIII Commercial Laws of the Middle East-Iran, Bk 7 (1982).

The Government of Iran enacted legislation providing for the governmental appointment of provisional company directors ("Legal Bill Concerning the Appointment of Provisional Director or Directors for Supervising Production, Industrial, Commercial, Agricultural and Service Units whether in Public or Private Sector," June 14, 1979 ("Act") reprinted in 1 Digest of Laws and Regulations Approved by the Islamic Revolutionary Government 31) (Masouduzzafar trans. 1979)), "for the purpose of preventing the closure of said units."⁸ Id. at Art. 1. Iran has acknowledged that

⁸This Act superseded the "Decree on the Appointment of Provisional Managers for the Supervision and Management of Institutions and Companies" issued by the Revolutionary Council of the Islamic Republic of Iran on April 16, 1979.

it had to take such actions for the preservation of businesses in order to maintain employment of the workers and otherwise to serve the national interest. If a company such as Respondent, was involved in a "public sector" (Article 44, Constitution of the Islamic Republic of Iran) or otherwise important industry, the Government required its continued operation. The Government of Iran did not take steps to keep such companies operating for the benefit of the company's true owners or creditors, but rather for the benefit of the Government.⁹ The evidence shows that the shareholders in Respondent have been denied their shareholder rights to control and direct the management of Respondent and to obtain profits.

The very fact that a company, allegedly abandoned by its shareholders and directors, has continuously functioned outside of any legitimate bankruptcy or liquidation proceedings suggests that it is subservient to Government interests and is therefore subject to government control.¹⁰

⁹ If, as Respondent asserts, the company is merely a "shell", one might ask how it continues to pay its employees and their representative -- the one who appeared at the hearing and who was identified in a pleading as "managing director." Whether a "shell" or not, the Government, having determined to keep the company in existence and under government control, became responsible under the Algiers Declarations for certain of its debts.

¹⁰ This is not to suggest that a company in bankruptcy or liquidation proceedings necessarily is not or was not at a relevant time controlled by the Government of Iran.

current and routine affairs;" the "supervising members, without having the right to delegate representation, shall have the right to exercise full supervision over all the affairs of the relevant unit particularly over the actions and activities of the directors." Id. at Art. 3. There is no limitation upon the director's term of appointment.

Id. at Art. 2. The government-appointed directors replace the actual directors and persons in charge, who are "stripped of their competence." Id. "Shareholders are not allowed in any way to appoint directors in their stead."

Id. The government-appointed directors must prepare a certain report on the company "and have it signed by the related representative of the ministry, government institution or company" and "submit it in a report about the general and financial condition of the unit to the relevant Ministry of Labour and Social Affairs, government institution or company." Id. at Art. 5. Moreover, the directors must at the end of their term submit a report "to the related ministry government, institution or company as well as the Ministry of Labour and Social Affairs" Id. The salary of the director is regulated. Id. at Art. 4. No strikes or lockouts are permitted. Id. at Art. 6. Any "default or violation in the affairs of the units ... committed by the directors or owners thereof" must be reported "to the relevant ministry, government organization or company" Id. at Art. 4. The appointed director may

act on behalf of the company. "The carrying out of affairs beyond the normal and current affairs of the unit shall be contingent upon the approval of the relevant ministry, government institution or company...." Id. at Art. 3. Certain signature power can be granted "with the information of the Ministry of Labour and Social Affairs." Id.

In short, however this law is interpreted or applied, it is apparent that the Government is deeply involved in the affairs of the company and that the true owners of the company have been divested of all of their former control and indicia of ownership in favor of government interests.¹²

It should be noted that despite the allegations and evidence of government control in the instant case, the Respondent did not present any documentary or other significant evidence concerning the current management of the administrative or financial affairs of the company that would indicate a lack of government control. This is not to suggest that any such evidence could establish a lack of government control when a company continues to operate under the circumstances discussed above. But the failure of the Respondent to produce such evidence which would, if it

¹²The exclusion of such owners would seem consistent with the Government's apparent goal to exclude foreigners from important sectors of the Iranian economy. See The Protection and Development of Iranian Industries Act, reprinted in II A Digest of Laws and Regulations Approved by the Islamic Revolutionary Government of Iran 23 (Masouduzzafar trans. 1979).

existed, be in its possession, must be construed as indicating its non-existence. See Sandifer, Evidence Before International Tribunals 147 (1975 ed.).

Accordingly, I concur in the decision that Respondent is an entity controlled by the Government of Iran and is therefore subject to the jurisdiction of the Tribunal.

THE MERITS

It is true that the Claimant's presentation contained certain deficiencies. These deficiencies can be explained, in part, by the obvious difficulties in obtaining evidence in Iran and producing evidence before this Tribunal.¹³ Of course, it is not unusual for Tribunals such as this one to be "compelled to act upon the basis of meager, incomplete, and unsatisfactory evidence." Sandifer, supra at p. 22.

Claimant did, however, present at least some evidence on each point necessary to establish its claim. Respondent, although claiming that it had documentary evidence, did not produce it. The Tribunal, however, failed to draw any inferences from the failure of Respondent to produce such evidence. See Sandifer, supra at p. 147.

¹³On certain important points the Claimant relied on "business records" without submitting the sworn testimony of certain of its present or former employees and representatives. No explanation was given for the failure to produce such evidence.

The Claimant, a small, privately held United States company, by written leases, leased two pieces of cargo-handling equipment to Respondent Iran Express Terminal Corporation. The leases were signed by a person who purported to be an agent of Respondent corporation. Claimant delivered the equipment to someone it must have thought to be acting on behalf of the Respondent, who then sent the equipment to Iran with a bill of lading naming Respondent as consignee. Claimant submitted inspection reports suggesting that the equipment was inspected in Iran. Claimant's files indicated it received requests for spare parts for the equipment. Claimant received some payments in connection with the leases. A film shows the equipment being used on the docks in Iran, and there are indications that the equipment was operating under Respondent's name. The lease payments ceased, and the equipment has never been returned.

The original leases were signed on behalf of Respondent by Robert Uiterwyk. The amendments thereto were signed by Hendrik Uiterwyk, who at least ultimately was on the Board of Directors of the Company. Indeed, it is conceded by Respondent that Respondent was part of a group of entities basically controlled by the Uiterwyks.

Respondent submitted as its only "evidence" copies of what purport to be some of Respondent's corporate documents and the denial of Respondent's government-designated representative that it has the equipment. Respondent's representative was not even with the company at the time of the leases. Moreover, he denied being Respondent's managing director, despite being so identified in one of Respondent's pleadings. Thus, his credibility is, at best, suspect.

The Tribunal's opinion is premised on the view that the Claimant has not submitted sufficient evidence to sustain its burden of proof that Respondent took such actions necessary to obligate itself for the apparent pre-incorporation agreements. Although challenging the validity of the leases, Respondent never raised the issue that the leases were executed prior to the incorporation of Respondent. Thus Claimant never addressed this issue.

Organizations, Int'l Ency. of Comp. L. 32 (undated).¹⁶ As Professor Buxbaum noted, "cases ... indicate that in all legal systems [the problems of specific adoption of the earlier contract], whether or not conceptually worked out as a matter of basic civil law, or as a matter of association law, is resolved in favor of a finding of adoption; the actual possibility of rejection of such contracts remains available only for a very narrow group of fact situations." Buxbaum, supra at p. 32.

The Uiterwyks signed the leases; they formed Respondent corporation and according to Respondent, controlled it; thereafter they (or one of their corporations) acted as agent for Respondent; after the formation of Respondent they apparently controlled the use of and payments for the leased equipment. Their actions and knowledge should be imputed to Respondent corporation for purposes of establishing the adoption of the pre-incorporation leases. See Chartrand v. Barney's Club, Inc., 380 F. 2d 97, 100-01 (9th Cir. 1967).

¹⁶ But see English law which has stricter requirements for the corporate adoption of pre-incorporation debts. Buxbaum, supra at p. 32 n.204; Frommel and Thompson supra at p. 560. Article 248 of the Civil Code of Iran provides that unauthorized contracts can become binding "orally or by an act which signifies ... consent to the contract." Civil Code of Iran (Sabi trans. 1973). Moreover limitations on the authority of directors "shall be null and void so far as third persons are concerned." Article 118, The Commercial Code of Iran, reprinted in Vafai, supra, Bk. 7; see also Article 135 of the Commercial Code of Iran, Id. (action taken by directors and the manager valid vis-a-vis third parties notwithstanding the "non-observance of the relevant formalities.").

Certainly if control of Respondent corporation had not changed, Respondent should not have been able to avoid liability to claimant. The fact that control changed long after the acts attributable to the entity took place should not alter Respondent's legal obligation.

That the Uiterwyk Corporation sent a telex to the Government of Iran concerning the equipment is not inconsistent with Claimant's position. The Uiterwyk Corporation had guaranteed performance of the leases, so that its reference to its interest in and responsibilities with respect to the equipment is quite understandable. Indeed, the telex adds verification to the present location of the equipment.

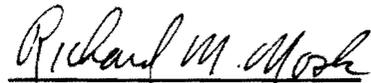
The Tribunal concludes that there was insufficient evidence to establish that the lease agreements were binding and that Respondent possessed the equipment "under the lease agreements." The Tribunal says nothing about the allegation that the Respondent has used or possessed the equipment. If, as Claimant contends, and some evidence suggests, Respondent had possession of or control over the equipment, even if not under the lease agreements, Claimant is entitled to damages based upon unjust enrichment, which is a remedy available under both municipal and international law. See 1 Schwarzenberger, supra at pp. 577-579; American Law Institute, Restatement of the Law of Restitution, Section 1, (1936), Civil Code of Iran, Articles 301-06, 336-37 (Sabi trans. 1973); Zweigert and Müller-Gindullis, Quasi-Contracts, III Private International Law, Int'l Ency. Comp.L., Chapter 30 (undated).

Claimant should not be denied any remedy if, as suggested by evidence, Iran, as defined in the Claims Settlement Declaration, has Claimant's equipment, is using it in an essential government industry and has failed to pay for the equipment or return it.¹⁷ The Tribunal's failure even to discuss the possibility of a remedy in the absence of a lease enforceable against Respondent, constitutes a glaring omission.

For the reasons stated above, I believe the evidence was sufficient to render an award in favor of the Claimant, and therefore I dissent from the decision dismissing the Claim.

Dated, The Hague

March 24, 1983



Richard M. Mosk

¹⁷ Claimant does have a guarantee from the Uiterwyk Corporation with respect to the leasee's obligations, or a portion thereof, but apparently Uiterwyk Corporation has initiated a Bankruptcy Act proceeding in the United States. See Iranian Asset Litigation Reporter, Feb. 4, 1983, p. 6006. The Uiterwyks have brought a claim before this Tribunal claiming, inter alia, amounts that would have to be paid Claimant on the guarantee. Nothing in the majority opinion should be construed as precluding rights under the guarantee. Thus, it is still possible that Claimant can ultimately receive some compensation.