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Case No. 268

Date of filing: 14 Mar '90

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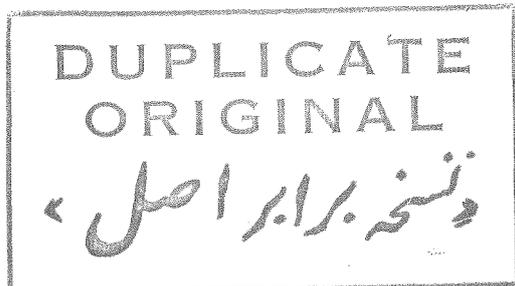
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CASE NO. 268

CHAMBER ONE

AWARD NO. 474-268-1

ROBERT R. SCHOTT,
Claimant,

and

ISLAMIC REPUBLIC OF IRAN,
MINISTRY OF MINES AND
INDUSTRIES OF IRAN,
MINISTRY OF HOUSING AND
URBAN DEVELOPMENT OF IRAN,
REVOLUTIONARY GUARD OF IRAN,
BANK MARKAZI,

Respondents.

| | |
|---------------------------------------|---|
| IRAN-UNITED STATES CLAIMS TRIBUNAL | دیوان داوری دعاری ایران - ایالات متحدہ |
| FILED | ثبت شد |
| DATE | 14 MAR 1990 |
| | ۱۳۶۸ / ۱۲ / ۲۲ تاریخ |

SEPARATE OPINION OF HOWARD M. HOLTZMANN

I.

1. The Award in this Case finds that there is "no doubt" that the Claimant, a business executive, had a collection of Persian rugs and antiques in Tehran. Yet, the Award denies him compensation for the loss of this property. The majority cites a miscellany of reasons. But its central holding appears to be that there is insufficient proof that the collection was taken by Iran's Revolutionary Guard from a warehouse where the Claimant had placed it for safekeeping. I dissent from this holding because I find compelling evidence of a taking for which the Government of Iran must be held responsible under international law and in accordance with this Tribunal's previous decisions in similar cases.

2. In weighing the evidence of the taking at issue in this Case, one must begin with the testimony of the Claimant's son, Mr. Robert Schott, Jr. His account of the events is straightforward and persuasive. It is uncontested that, several months after his family left Iran at the outset of the Islamic Revolution, the younger Mr. Schott, who had been employed as a business executive in Iran by a subsidiary of General Electric Company, returned to pack and ship his father's household effects and collections of rugs and antiques. He relates that he was able to ship six crates of normal household goods but was prevented by Iranian government authorities from shipping the rugs and antiques, which were packed in two other large crates. Faced with that difficulty, he states that he personally placed the crates in a warehouse that was operated by Electro-Mechanical Services Company ("Emsco"), a joint venture of General Electric Company. American employees of General Electric were permitted to store personal property in the warehouse when they left Iran hastily in the tumult of the Revolution. In light of these circumstances, in which General Electric informally accommodated the needs of its employees, the younger Mr. Schott did not obtain a receipt, which he would have obtained from a commercial warehouse. Mr. Schott's testimony is contained in two sworn affidavits, and he also appeared at the Hearing where he described his experiences in detail and submitted to questions from counsel for the Respondents and Members of the Tribunal. I found him a consistent, credible and convincing witness.

3. The younger Mr. Schott's testimony that the two crates containing the rugs and antiques were placed in the Emsco warehouse is fully supported by an affidavit of Mr. William Lehfeldt, a vice president of General Electric Company whose areas of responsibility included the warehouse. Although Mr. Lehfeldt had already left Iran before Mr. Schott placed the crates in the warehouse, he testified that he continued to maintain direct "daily contact with General Electric's

remaining employees in Iran" by telephone. He states that the persons with whom he spoke included "Iranian supervisors left in charge of Emsco's warehouses." His affidavit is explicit on the subject of the taking of the Claimant's property by the Revolutionary Guard:

During one of these conversations, in late 1979, I was informed that Revolutionary guards of the Islamic Republic of Iran had seized Emsco's warehouse and had found, among other things, several sealed wooden crates of belongings stored in one of the warehouses by Robert B. Schott. I was told that the Revolutionary Guards had opened Mr. Schott's crates (as well as many others), had determined that they contained Persian antiquities and other valuables, and had seized them and their contents.

4. In the face of this statement describing a conversation in which Mr. Lehfeldt personally participated, it is hard to understand how the Award can dismiss the claim on the grounds that "Mr. Lehfeldt has not given any direct testimony concerning either the storage of the goods, the occupation of the warehouse by the Revolutionary Guards, or the confiscation of the goods." (Award at para. 57.) The Award seeks to denigrate Mr. Lehfeldt's testimony further by saying that, "[s]ince Mr. Lehfeldt was no longer in Iran at that time, the Tribunal finds his statements to have limited probative value." (Award at para. 57.) Mr. Lehfeldt's testimony is, in fact, the strongest evidence available in the circumstances. The fact that Mr. Lehfeldt, like most other Americans, had left Iran due to dangerous Revolutionary conditions does not diminish the significance of the information he received. The decisive point is that, after he left Tehran, Mr. Lehfeldt kept in close touch by telephone with developments at General Electric's properties in Iran. His sworn statement that he had these telephone contacts is plausible and unrebutted, albeit uncorroborated. The Tribunal has in other cases based awards on "convincing, though uncorroborated" evidence of takings in Revolutionary circumstances, explaining that it was "mindful . . . of the

obvious difficulty in obtaining corroborative evidence from those who might have witnessed the events described." Leonard and Mavis Daley and Islamic Republic of Iran, Award No. 360-10514-1, para. 33 (20 April 1988), reprinted in 18 Iran-U.S. C.T.R. 232, 242. Claimant in the present Case faced precisely this type of difficulty: it would have been nearly impossible for an American to find and record an eye-witness account of an expropriation that took place in Iran during late 1979, the same time period in which the hostage crisis occurred. In such circumstances, Mr. Lehfeldt's testimony -- based on a telephone conversation that he recounts in convincing detail -- is sufficient evidence from which to find a taking of property in this Case. As Judge Sir Michael Mustill and Steward Boyd, Q.C. observe in their leading treatise on arbitration, there are cases in which "misfortunes affecting one side" limit the sort of evidence that can be presented, and in such cases arbitrators are expected only to be as "diligent as the circumstances permit: and the circumstances include the state of the evidence that the parties are able to bring forward." M. Mustill & S. Boyd, Commercial Arbitration 509-510 (2d ed. 1989).

5. The persuasiveness of the testimony that Messrs. Lehfeldt and Schott, Jr. have provided can perhaps be gauged by the makeweight arguments that Respondents offer in defense, many of which are adopted by the majority. For example, in a further effort to cast doubt on Mr. Lehfeldt's testimony, the Award states that he "did not identify the source from whom he obtained the information" in his affidavit concerning the confiscation of Schott's antiques. (Award at para. 57.) To the contrary, Mr. Lehfeldt described the sources with whom he spoke as the "Iranian supervisors left in charge of Emsco's warehouses." He stopped short of naming these persons because, as recorded in the Award, he was "reluctant to disclose the name of the Emsco employee who reported the [Revolutionary] Guards'

activity out of concern for the employee's welfare." (Award at para. 57.) Weighed in the context of the events, Mr. Lehfeldt's statement is sufficiently specific to be credible.

6. The accuracy of the information that Mr. Lehfeldt received by telephone is at least partly confirmed by a letter written in 1983 to the Claimant by the Bureau of International Legal Services ("BILS"), the Iranian governmental agency responsible for presenting cases before the Tribunal. The letter states that:

according to the response received from the Ministry of the Iranian Revolutionary Guards Corps., at the time of the delivery to the Revolutionary Guards Corps. of the warehouse of the Elet and Mech. Services Company, the property claimed by you was not there

While this letter denies that the Guard took Mr. Schott's property, it officially confirms Mr. Lehfeldt's statement that members of the Revolutionary Guard occupied the Emsco warehouse. In an effort to disown this damaging admission, the Revolutionary Guard (referred to in the Award as the "Ministry of Sepah Pasdaran" or "the Ministry") has since submitted an affidavit from one of its own members, asserting that the warehouse of the Electro-Mechanical Services Co. was not "[a]mong the warehouses that I and the unit under my supervision leased or purchased or obtained permission from the Ministry of the Government organizations to use." (Doc. 97, Ex. 9, para. 6.) As the Award notes, "[t]he Ministry has even denied the existence of the warehouse in question." (Award at para. 60.) The Ministry has, in fact, gone further, asserting that "a company in the name of Electro-Mechanical Services Co. was actually non-existent." (Doc. 97, p. 9.) In light of all of the other evidence and the Revolutionary Guard's own earlier pleadings, the denial that either Emsco or its warehouse even existed is so extreme and far-fetched that this defense

deserves to be given no weight. Yet, the Award suggests that the existence of the Emsco Warehouse, as acknowledged by BILS in its letter to the Claimant, is one of the "disputed facts" in this Case. (Award at para. 60.) And "[g]iven these disputed facts," the Award finds that the Tribunal "cannot pronounce upon the question of whether the warehouse was taken." (Award at para. 60.) The majority itself seems embarrassed by its timidity, for in the very next sentence the Award says that "[a]t any rate, the Tribunal finds it is not necessary to decide this question in view of its conclusions reached above," i.e., the Award's conclusions that the antiques were not stored in the warehouse and were not confiscated. (Award at para. 60.)

7. In an apparent effort to add weight, or at least bulk, to those conclusions, the Award offers a variety of findings on other issues, most of which are irrelevant and all of which are unconvincing. It will suffice to mention only a few. The Award seeks to weaken the credibility of the younger Mr. Schott in two ways. Mr. Schott, Jr. testified that he succeeded in shipping six crates of household goods out of Iran; the Award says that "there is no evidence such as shipping documents demonstrating that the six crates containing household goods were indeed exported." (Award at para. 57.) Since no claim is made for the six crates, it is hard to know why the Claimant should have presented shipping documents relating to them or how the Tribunal can reasonably draw an adverse inference from his sensible decision not to clutter the record with such irrelevances. Similarly, the Award questions Mr. Schott, Jr.'s explanation that he was assisted in his efforts to ship the goods by a certain Mr. Daroughi, noting that "there is no further proof that Mr. Daroughi indeed assisted Schott, Jr." (Award at para. 57.) Whether Mr. Daroughi assisted Mr. Schott, Jr. is irrelevant to the central issue of whether the crates were taken by the Revolutionary Guard from the Emsco warehouse; Mr. Daroughi's function in advising Mr. Schott on shipment

procedures was finished long before that time. The only issue relating to Mr. Daroughi is a small, peripheral dispute over whether he was employed in some capacity in the Iranian customs system, as Mr. Schott, Jr. was led to believe, or whether he had no such function, as the Respondents contend. But that, too, is irrelevant, and it is hard to comprehend what value "further proof" concerning Mr. Daroughi's assistance would have, or what inference can be drawn from its absence.

8. So intent is the majority on discrediting the Claimant's evidence that it even tries to undermine uncontroverted facts. Thus, the Award acknowledges that "[t]here seems to be no doubt that Schott was a collector of Persian carpets, antique ceramics and glass" (Award at para. 55), but the majority then declares that, "apart from the statements in the Affidavits, there is no proof in the record that the [antiques] existed There are no invoices from purchases made by Schott." (Award at para. 61.) This implies that Schott could only prevail on his expropriation claim if he had saved bills for objects purchased as many as 30 years before Schott left Iran. The insinuation that Schott's ownership of antiques may for this reason be doubted is not only unfair but contradicts the Award's own earlier finding that Schott collected Persian antiquities. As the Award correctly notes, that finding "is confirmed by the testimony of the Affidavits" of people who "visited Schott's house in Tehran on many occasions, where his collection was displayed." (Award at para. 55.)

9. The majority also seeks to impugn the credibility of the Claimant's expert witness on the issue of valuation. The Award notes that there are "substantial discrepancies" between the valuations offered by the expert, Mr. Rabi Soleimani, and the Claimant's own estimate. (Award at para. 61.) This discrepancy is not necessarily surprising. In his Statement of Claim, Schott estimated the value of his

antiques as of 1978, based on personal knowledge of what he had paid for them as long ago as 1948. The valuations provided by Mr. Schott's expert witness, an Iranian antique dealer, reflect a more knowledgeable assessment of the market value that these antiques had attained by the time they were confiscated. But whether or not the "substantial discrepancies" in these valuations are thus justified, the majority's discussion of them is not. The Award admits that "there is no need to address the various estimations of value of Schott's antique collection," Award at para. 61, and then proceeds to address precisely this issue.

10. The Award further impugns Mr. Soleimani's credibility by distorting the record. The majority states that "Mr. Soleimani estimates the objects without having seen them, which is unusual in this particular profession." (Award at para. 61.) While it is obviously true that Mr. Soleimani had no access to the confiscated goods at the time that he submitted his appraisal, it is important to note Mr. Schott's explanation that Mr. Soleimani "had sold to me some of the items on the list," and that all of the items Mr. Soleimani appraised had been purchased from the gallery where he had worked.

11. The Award seeks to cast additional doubt on the Claimant's credibility by finding that the Claimant's description of his carpets was contradicted by his son. The Claimant stated in his affidavit that the 35 carpets for which he sought compensation were "for the most part 1.2x2 meters [and] were of the Turcoman, Caucasian, and Azerbaijan 'village' variety." When asked at the Hearing whether his collection included any kilims, the Claimant said that there had been kilims in his house in Tehran but that these were part of his wife's collection and were not among the 35 carpets for which he sought compensation. At a later point in the Hearing, the Claimant's son was asked about the carpets that he had packed in the two large crates that were

stored in the Emsco warehouse. Mr. Schott, Jr. replied that he recalled there were four or five kilims among the 35 carpets. In describing this divergence in the two men's recollections concerning a relatively minor number of the lost rugs, the Award states that Schott, Jr. "contradicted" his father's description of the collection. (Award at para. 61.) The use of the word "contradicted" appears designed to cast aspersions on the Claimant's overall credibility. The majority further finds that this "contradiction" is significant because "kilims . . . , as the Tribunal observes, are typically among the least expensive carpets." (Id.) The majority does not explain the basis on which it takes judicial notice of this alleged fact; there is no evidence as to the value of kilims in the record.

12. Finally, the Award unfairly suggests that Mr. Schott, Jr.'s account of how he stored the antiques in the Emsco warehouse is undermined by a letter that his father wrote, on an entirely different matter, to the Iranians' Bank. The letter was written after the Claimant, Mr. Schott, Sr., was forced to leave Iran and when he had come to realize that he would not be able to return. The letter's purpose was to persuade the bank, which had been the Claimant's employer for nine years, to send him the financial records and personal effects that he had left in his office as well as some of the funds that remained in his accounts. The person to whom Mr. Schott, Sr. addressed his letter had been installed as Director of the bank following the Revolution, and the Claimant thus found himself in the awkward position of asking the bank's new management for a favor. Not surprisingly, therefore, the letter adopted an ingratiating tone, thanking the bank "for being helpful to my son, Robert B. Schott, who was recently in Iran arranging to have our personal effects shipped to me in Athens." Instead of recognizing the difficult situation in which Mr. Schott, Sr. found himself, the Award turns his courtesy against him. "The Tribunal notes that although Schott is thanking the

Bank for its assistance to his son . . . , no mention is made of any attempt or failure to have the antique collection exported; the collection is not mentioned at all in the letter." (Award at para. 58.) The Bank, of course, had no influence over Iran's export process and played no role in preventing the younger Mr. Schott from shipping the rugs and antiques out of the country. Thus, any reference that the Claimant might have made in his letter to these export problems would not only have been pointless but would have introduced an unnecessary sour note in his request for assistance. Given this background, I do not see how the majority can fairly extract any adverse inference from Schott's letter.

13. Having made this scattershot attack on peripheral issues, the majority persuades itself that it has defeated the Claimant's central allegation that the Revolutionary Guard confiscated his rugs and antiques from the Emsco warehouse. Indeed, the Award goes so far as to declare that "there exists no evidence in the record to prove [the Claimant's] allegation." (Award at para. 59.) Notwithstanding such hyperbole, the fact remains that there is convincing testimony in the record from two witnesses to support Mr. Schott, Sr.'s claim that his carpets and ceramics were stored at the Emsco warehouse and subsequently confiscated. Moreover, no credible rebuttal to this evidence has been presented. I conclude that Claimant has sustained his burden of proving that such an expropriation by the Revolutionary Guard occurred.

II.

14. The remaining question, therefore, is whether the Government of Iran is liable for this action by its Revolutionary Guard. The Tribunal has previously held that the Government of Iran is liable for deprivation of property caused by the Revolutionary Guard. For example, in William

L. Pereira Associates, Iran and Islamic Republic of Iran, Award No. 116-1-3 (19 March 1984), reprinted in 5 Iran-U.S. C.T.R. 198, Claimant presented evidence that the Guard had confiscated the contents of its office as well as its car. The Tribunal held that "[u]nder public international law the Government of the Islamic Republic of Iran must be deemed responsible for the actions of the Revolutionary Guards." Award No. 116-1-3 at p. 43, 5 Iran-U.S. C.T.R. at 227. The Tribunal awarded compensation for the value of the property.

15. Similarly, in Kenneth P. Yeager and Islamic Republic of Iran, Award No. 324-10199-1, para. 43 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 92, 104, the Tribunal found "sufficient evidence in the record to establish a presumption that revolutionary 'Komitehs' or 'Guards' after 11 February 1979 were acting in fact on behalf of the new government . . . in operations of which the new Government must have had knowledge and to which it did not object." The Tribunal concluded that actions by members of the Revolutionary Guard, who forced Mr. Yeager and his wife to abandon their apartment and their personal belongings in Tehran, were attributable to the Government of Iran. The Tribunal cited principles in the Draft Articles on State Responsibility adopted by the International Law Commission. The Award further stated that, "[u]nder international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary 'Komitehs' or 'Guards' and at the same time deny responsibility for wrongful acts committed by them." Award No. 324-10199-1 at para. 45, reprinted in 17 Iran-U.S. C.T.R. at 105. See also Computer Sciences Corporation and Government of the Islamic Republic of Iran, Award No. 221-65-1, p. 44 (16 April 1986), reprinted in 10 Iran-U.S. C.T.R. 269, 303 (finding government liable for the expropriation of claimant's offices by members of the Revolutionary Committee).

16. Although the affidavit that the Revolutionary Guard has submitted in this Case denies that the Guard occupied the particular warehouse owned by Emsco, the same document makes clear that the Guard often needed and used such buildings. The affiant, Mr. Mohammad Khani, was a member of the Guard for more than seven years following the Revolution. He states that, throughout that time, "my duty . . . was to provide building and warehouse space needed by [the Guard]." He further explains that a regular procedure existed for acquiring such properties. First, "the units of [the Guard] in need of storage or other space [were] to report their needs." Then, "the reports were checked" by Mr. Khani's unit. Finally, Mr. Khani states, "after the need was verified, my unit used to take the necessary actions to meet the needs of Sepah by providing the suitable space in the suitable location at the suitable time." This practice is implicitly confirmed by one of the Revolutionary Guard's pleadings in this Case. In its submission, the Guard objects to Claimant's assertion that his goods were confiscated, arguing that "it is absolutely incorrect to employ the term 'confiscation' for the security-related and disciplinary actions of agents of government . . . which are of necessity carried out in order to protect public property." I also note that, in a prior case, the Tribunal found that a claimant's warehouse was taken over by unidentified agents of the Revolutionary government and that its contents were expropriated. See Dames & Moore and Islamic Republic of Iran, Award No. 97-54-3, pp. 19-22 (20 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 212, 221-23.

17. It seems clear, therefore, that the Guard's procurement of warehouse space was an exercise of governmental authority. It is also clear that the Guard's use of warehouses was sufficiently widespread that "an operation of this size and nature was clearly known to the new [Iranian] government." Yeager, Award No. 324-10199-1, para. 44, reprinted in 17 Iran-U.S. C.T.R. at 104. Accordingly, the

Guard's actions while exercising such governmental authority are attributable to Iran, which cannot "deny responsibility for [the Guard's] wrongful acts." Id. at para. 45, reprinted in 17 Iran-U.S. C.T.R. at 105. Indeed, that conclusion is even clearer in the present Case than it was in Yeager. For the expropriation in Yeager occurred before the Revolutionary Guard was officially recognized by government decree, in May 1979. By contrast, the Guard's confiscation of the rugs and antiques in this Case occurred long after that decree -- at approximately the same time that the Guard was recognized as the "protector of the revolution" by a new article in the Iranian Constitution. See Yeager, Award No. 324-10199-1, para. 40 n.4, reprinted in 17 Iran-U.S. C.T.R. at 102 n.8.

18. For all of these reasons, I would hold that Iran must compensate Claimant for the value of his rugs and antiques at the time they were confiscated by the Revolutionary Guard. There is ample evidence on which reasonably to establish that value. As I have noted, the claim is based in substantial part on an appraisal by Mr. Soleimani who was employed by the family firm that had sold Mr. Schott a large portion of his collection. The Award correctly records Mr. Soleimani's sworn statement that he "was personally present at the time of many of these purchases." (Award at para. 34.) Mr. Soleimani has given an appraisal for all of those items that were purchased from his family's gallery. Mr. Schott determined the value of items that he purchased elsewhere by extrapolating from Mr. Soleimani's appraisal of similar artifacts that were purchased at the Soleimani gallery. By contrast, the Revolutionary Guard and the Government of Iran, which obviously have easy access to numerous experts on the value of Middle Eastern antiques and rugs, introduced absolutely no evidence on valuation. Their failure to do so leaves Mr. Schott's prima facie case un rebutted and creates the strong inference that the values claimed were reasonable. Accordingly, I would award Mr.

Schott the amount claimed, with a reduction in the value of those items on Mr. Schott's list that were not appraised by Mr. Soleimani and as to which the description furnished by Mr. Schott is not sufficiently precise to permit confident extrapolation from Mr. Soleimani's appraisal of allegedly similar items.¹

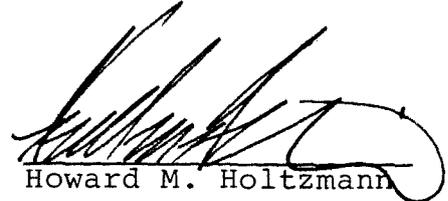
III.

19. The compensation sought for the expropriated rugs and antiques constitutes by far the largest claim in this Case. However, as the Award discusses in detail, the Claimant also alleges expropriation of shares in various Iranian companies and of several bank accounts. I believe it is likely that, at some time, the Claimant did hold each of these interests. It is also possible that these interests were expropriated. However, I agree with the Award's determination that none of these claims can succeed. As to two of the claims -- relating to the shares and the accounts in Iranians' Bank -- this Tribunal lacks jurisdiction. (Award at paras. 44 & 50.) As to the other claims, even allowing for the Revolutionary conditions in Iran that hampered Claimant's collection of proof, Claimant simply has not come forward

¹Such a reasonable reduction in the amounts claimed is supported by Tribunal practice. See, e.g., Yeager, supra, at para. 57, reprinted in 17 Iran-U.S. C.T.R. at 109; Dames & Moore, supra, at p. 23, reprinted in 4 Iran-U.S. C.T.R. at 224; see also Intrend International, Inc. and Imperial Iranian Air Force, et al., Award No. 59-220-2, p. 8 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 110.

with sufficient evidence to support a finding of expropriation. Finally, the Claimant has not demonstrated his entitlement to the salary, severance pay and retirement bonus that he seeks from Iranians' Bank. I therefore concur in the Tribunal's disposition of all of the remaining claims in this Case.

Dated, The Hague
14 March 1990



Howard M. Holtzmann