

ORIGINAL DOCUMENTS IN SAFE

Case No. 284

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** AWARD - Type of Award _____
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DUPLICATE
ORIGINAL

نسخہ برابر اصل

CASE NO. 284

CHAMBER TWO

AWARD NO. 304-284-2

156

OTIS ELEVATOR COMPANY,
Claimant

and

THE ISLAMIC REPUBLIC OF IRAN and
BANK MELLAT (FORMERLY FOREIGN TRADE
BANK OF IRAN),

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	29 APR 1987 ۱۳۶۶ / ۲ / ۹
No.	284

DISSENTING OPINION OF GEORGE H. ALDRICH

1. I regret that I must dissent in this Case, particularly as I have no disagreement with the law as stated in the Award. As in earlier decisions, the Tribunal affirms that compensation is required for losses suffered when the Claimant's property rights have been "interfered with to such an extent that its use of those rights or the enjoyment of their benefits was substantially affected" and the interference was attributable to the Respondent Government (para. 28). It is clear in context and from the citation of Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran et al., Award No. 141-7-2 (22 June 1984), that the Award is not disagreeing with the Tribunal's holding in that earlier Case that a deprivation of property requires compensation under international law whether or not the Respondent Government has acquired anything of value.

2. It is solely in the analysis of the evidence presented in this Case that the Tribunal errs. The Tribunal's

conclusion that the infringement of the Claimant's property rights -- which clearly occurred as the Award acknowledges in paragraph 47 -- has not been proved to be caused by conduct attributable to the Government of Iran is a conclusion that can be reached only by disregarding significant pieces of evidence, and that is what the majority does. The events in 1979 and 1980 that brought about the loss of the Claimant's \$800,000 investment in Iran Elevator Co. show that the Iranian Government was deeply involved. The Government, acting through several ministries and its appointed financial supervisor, worked hand in glove with the syndicate of workers at Otis Iran to milk a substantial part of the assets of Iran Elevator for the purpose of funding extravagant severance payments to those workers; and, frustrating all efforts by the Claimant and the Board of Directors of Iran Elevator, the Government has continued to this day to control the remaining assets of Iran Elevator.

3. In explaining why I believe the responsibility of the Government for the loss of the Claimant's investment is inescapable, I must point out certain evidence which the Award ignores. First, the Claimant introduced evidence, not denied by the Respondents, that, after the Revolution, the Ministry of Labor announced that no workers could be dismissed without Ministry approval, although that was not required by any existing law. This policy gives more meaning to the fact, confirmed by evidence from both Parties but only partially noted in the Award (see para. 12), that the Ministry of Labor signed the 19 January 1980 and 8 April 1980 agreements between the syndicate of workers and Otis Iran on levels of severance pay. In this connection, although Otis Iran had been in existence for less than six years, the agreed scale for severance payments ranged as high as the rial equivalent of U.S.\$40,000, an outrageous level for which the Respondents offered no justification. Moreover, on 29 January 1980, the Government of Iran blocked

the accounts of Otis Iran (whether of Iran Elevator also in unclear), allegedly on the initiative of the Foundation for the Oppressed, which was concerned that the agreement would not adequately protect all workers of Otis Iran.

4. As part of their efforts to protect the assets of Iran Elevator from the claims of the workers of Otis Iran, a quorum of Otis and Arjomand directors of both companies met in Paris on 29 January 1980 and then or shortly thereafter took two actions, both of which were to prove totally ineffective. First, as the Award notes, the Board of Directors of Iran Elevator decided to replace Mr. Naeeni as General Manager with one of the directors, Mr. Ian Reynolds. The Award notes (paras. 15 and 38) that the effort to have the minutes of that meeting formally recorded and gazetted failed when the Ministry of Justice, contrary to both the law and the Articles of Association, refused to do so on the ground that the term of the Board of Directors had expired five days previously. The Award says that there is no evidence that any effort was made thereafter to hold a general meeting of shareholders to elect a new Board or that the Ministry's decision was intended to thwart the Claimant's rights. I fail to see, however, that the Claimant and the Arjomand shareholders had any need to try to convene such a meeting (even if such a general meeting would have been feasible in Iran in 1980), for they were right and the Ministry was wrong. As to the Ministry's intentions, they are irrelevant. As the Tribunal held in the Tippetts, Abbett, McCarthy, Stratton Case, supra, the "intent of the government is less important than the effects of the measures on the owner." Moreover, the real vice here is not simply the rebuff by the Ministry of Justice; rather, it is the consistent refusal of all parts of the Government, including the Ministry of Commerce and its appointed financial supervisor, to pay any attention to the valid decision by the Board of Directors that dismissed Mr. Naeeni. Mr. Arjomand personally informed Naeeni that the Board had

dismissed him, but, to the present day, Iran Elevator's bank accounts and other assets remain under the joint control of Naeeni and the Government's financial supervisor.

5. Also in early 1980, Mr. Fayek, as Managing Director of Otis Iran, signed a letter to the District Court of Tehran declaring, under Article 413 of the Commercial Code, the liquidation of Otis Iran. The Tribunal is uninformed as to why this liquidation notice proved ineffective, and the Parties were unable to clarify that question at the Hearing, but it is evident from other evidence filed by the Respondents that Otis Iran was not in the hands of a liquidator at least by 1984.

6. On 10 March 1980, Mr. Naeeni reported verbal agreement by the syndicate of workers to the release of excess employees of Otis Iran with termination payments on the extravagant scale previously agreed and with a letter of promise signed by the company and by the financial supervisor appointed by the Government granting equal benefits to those who might be released at a later date. Such a commitment required considerably more money than was available to Otis Iran, and Naeeni suggested an intercompany loan from Iran Elevator funds. Mr. Fayek responded the next day with instructions for Otis Iran to cease operations and to lay off all personnel by paying indemnities up to the amount of the cash available in Otis Iran. On 15 March 1980, Mr. Naeeni replied that he had talked to the Ministry of Commerce about Fayek's telex of 11 March 1980 and that they said 65 million rials would have to be paid to release all the workers. Since Otis Iran had only 20 million rials, the remaining 45 million would have to be paid from Iran Elevator funds or from some other source. The telex said: "Otherwise the Government representative will not sign the release checks." To that, Mr. Fayek replied on 17 March 1980 by asking that any such agreement with the workers be cancelled if freely made, adding: "If, as we believe

considering former action of the workers, you have had to agree under threat to pay more than Otis Iran is capable of, do not ask us to give apparent authority to actions over which neither of us ultimately has any real control."

7. The evidence indicates that Mr. Naeeni and the government-appointed supervisor finally decided in mid-April 1980 to implement the agreement with the workers. The agreement of the Ministry of Labor to the proposed payments was obtained on 13 April 1980. Mr. Naeeni informed Mr. Fayek on 14 April 1980 and again on the 15th of threats by the workers of Otis Iran to plunder the parts store and set fire to the building and said he had agreed "to save myself and the company". Once again, he asked Fayek to agree. Mr. Fayek replied on 17 April 1980 by noting that the actions of the union and of the Government had deprived Otis of effective control over the assets of the two companies but that, at the same time, Otis wanted to do everything in its power to safeguard the remaining properties and the physical safety of Naeeni and any other employees who were subject to threats. The telex then stated: "Therefore, if you continue to feel in the difficult and confused circumstances currently prevailing in Iran that our formal ratification of the arrangements you have been forced into agreeing with the workers is essential in order to avoid harm to our loyal employees and acts of violence directed against our property, we hereby ratify them to the extent they are also approved by our partner, Eskandar Arjomand." Mr. Naeeni replied on 21 April 1980 that the Ministry of Commerce required an unconditional acceptance by the Claimant, in which event it would withdraw the Financial Supervisor so that Naeeni could sign the releases and other documents. Naeeni said the choice was either to give an unconditional ratification or to release Naeeni from his responsibilities. On 23 April 1980, Mr. Fayek replied by refusing any further authorization and relieving Naeeni of his positions with Otis Iran. The telex noted that "we have had no effective

control over the assets of Otis Iran and Otis Manufacturing [Iran Elevator] for several months and have never understood why our authorization was requested in the first place." Despite these communications, according to a document filed by the Respondents, Mr. Naeeni had already on 20 April 1980 written to the Ministry of Commerce stating that the "redemption charges" were approved by both the foreign and Iranian shareholders.

8. The facts of this Case, as described above and in the Award, show that the efforts by the Claimant to protect its ownership interests in Iran Elevator failed during the course of the year 1980. By the end of that year, the management of the company and control over its assets were in the hands of a financial supervisor appointed by the Iranian Ministry of Commerce and of Mr. Naeeni, the former General Manager, who had been dismissed by the Board of Directors in January 1980 but who was nevertheless retained by the government-appointed supervisor. That a substantial portion of the liquid assets of Iran Elevator was used -- at the insistence of the Ministries of Commerce and Labor -- to fund severance payments to the workers of a separate, although related, corporation is clearly established. Whether the remainder of those assets have subsequently remained available to the government-controlled management of Iran Elevator or have also been expended has not been clarified by the Respondents, but it is clear, in any event, that the Claimant lost all access to them during the year 1980.

9. While I agree with the majority that the evidence presented is inadequate to prove a controlling or directing role by the Ministries of Labor and Commerce in the conduct of the workers of Otis Iran, I am satisfied that the Ministry of Labor prohibited the dismissal of employees except by mutual consent and that both ministries supported the demands of the workers for severance payments far beyond the

requirements of Iranian law, effectively prevented the dismissal of any Otis Iran workers until those demands were met, and required the use of funds taken illicitly from Iran Elevator to ensure funding of those payments. For those acts of its ministries, the Islamic Republic of Iran is responsible.

10. The Respondents are also responsible for their refusal to accept the removal of Mr. Naeeni by the Board of Directors of Iran Elevator and his replacement by Mr. Reynolds. In the first instance, this refusal was attributable to the Ministry of Justice and was contrary to law. The Ministry of Commerce and its appointed supervisor evidently also closed their eyes to the law and continued Mr. Naeeni in office, as demonstrated by the affidavit of Mr. Naeeni filed in this Case by the Ministry of Commerce on 6 July 1984. One of the most basic rights of the owners of a company is the right to designate and replace the persons who manage the company and its assets. By 3 March 1980, when the Ministry of Justice refused to accept the removal of Mr. Naeeni and his replacement by Mr. Reynolds, the Claimant was fully justified in concluding that the company and its assets were, from that time onward, under the control of a government-appointed financial supervisor and a fired former employee who was kept in office by decision of the Government of the Islamic Republic of Iran.¹

¹It is possible that Mr. Naeeni's retention resulted from the law pursuant to which the Government appointed a supervisor of Iran Elevator, as that law provides that upon such an appointment, "previous directors and managers will be stripped of their competence in managing" the affairs of the company, and "the shareholders [shall] have no right whatsoever to choose managers in their place." Clearly that law and its affects on the Claimant's shareholder rights are attributable to the Respondents. Law No. 7/2571 of 19 June 1979.

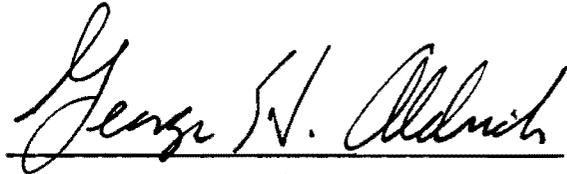
11. The Respondents are also responsible for the refusal by the Foreign Trade Bank (now Bank Mellat) to accept lawful instructions with respect to Iran Elevator's bank accounts. While the 30 million rial check was cashed before the protesting telex from Mr. Fayek was received in January 1980, the bank nevertheless permitted the special account into which that check had been deposited to be used in April and May of 1980 to fund severance payments despite having been placed firmly on notice that signatures on the 30 million rial check had been procured at gunpoint and for illicit purposes not authorized or endorsed by the owners of the account. Moreover, the bank also failed to follow the instructions which had been given, in accordance with the procedures suggested by the bank, by Arjomand and Fayek to place any remaining funds in interest-bearing time deposits. Finally, the bank evidently failed to give effect to the revocation of the signature authorities delegated to Naeeni and Pourzand respectively by Fayek and Arjomand. Checks drawn on the account thereafter, and the Respondents submitted evidence of such activity through March 1980, were not signed by persons designated by the Board of Directors of the company. The Respondents are manifestly responsible for this conduct, which directly interfered with the property rights of the Claimant.

12. I find it remarkable that the majority holds that Bank Mellat had no responsibility with respect to the 30 million rial account after it was informed by Arjomand and Fayek that the check that funded that account had been procured at gunpoint. I believe that minimal fiduciary responsibilities under any system of law would oblige a bank to place some restraints on the use of stolen funds after it had been informed of the theft by the owners. Its failure to do anything in this connection opens it to the charge that it became an accessory after the fact to grand larceny.

13. In light of the above considerations, the fact that Mr. Naeeni wrote a letter on 22 January 1980 requesting the Ministry of Commerce to appoint a supervisor cannot absolve the Respondents from their obligation to compensate the Claimant for the loss of its property rights in Iran Elevator. Whether Mr. Naeeni's letter was inspired by the Iranian minority shareholders who remained in Iran or by fears for his own safety and worries that he would not be able to resist the continuing, combined pressures of the union of workers of Otis Iran and the Ministry of Labor or, as he said in his telex to Mr. Fayek, was "suggested and dictated by the Government", it is clear that it was an unauthorized request, taken against the wishes of both the Claimant and Mr. Arjomand, who together held more than 80 percent of the shares. It is equally clear that the appointed financial supervisor and his superiors at the Ministry of Commerce used the position and its veto power over expenditures, not to protect the interests of the shareholders of Iran Elevator, but in order to convert assets of Iran Elevator for the benefit of the Iranian employees of Otis Iran. Moreover, no request by Mr. Naeeni for the November 1980 or subsequent appointments of supervisors has been placed in evidence; and even if there had been a further request from Mr. Naeeni, little weight could be given it in view of the fact that he had been removed from office by the Board of Directors and was retained solely by decision of the Respondents.

14. In sum, I cannot agree with the Award's selective and, I believe, misleading statement of the facts and erroneous analysis of the evidence in this Case. The Claimant has lost its \$800,000 investment in Iran Elevator, and the Respondents have had control over Iran Elevator and its assets since 1980 and have used at least a substantial part of those assets for illicit purposes. In my view, the Respondents clearly should be required to repay to the Claimant that \$800,000, plus interest from 3 March 1980.

Needless to say, the fact that the Claimant has already received some compensation by virtue of its insurance policy with the U.S. Overseas Private Investment Corporation should not affect that result.

A handwritten signature in cursive script, reading "George H. Aldrich". The signature is written in dark ink and is positioned above a horizontal line.

George H. Aldrich