

302-216

۳۱-۲۱۶

ORIGINAL DOCUMENTS IN SAFE

Case No. 302

Date of filing: 28 Oct 85

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Far

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Far

** CONCURRING OPINION of _____

- Date _____
_____ pages in English _____ pages in Far

** SEPARATE OPINION of Charles Broner

- Date 24 Oct 85
7 pages in English _____ pages in Far

** DISSENTING OPINION of _____

- Date _____
_____ pages in English _____ pages in Far

** OTHER; Nature of document: _____

- Date _____
_____ pages in English _____ pages in Far

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحدہ

CASE NO. 302

CHAMBER THREE

AWARD NO. 196-302-3

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date 28 OCT 1985 1364 / 10 / 6	تاریخ
No. 302	شماره



INTERNATIONAL TECHNICAL PRODUCTS CORPORATION
and ITP EXPORT CORPORATION, its wholly-owned subsidiary,
Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN
and its agencies, THE ISLAMIC REPUBLIC IRANIAN AIR
FORCE and the MINISTRY OF NATIONAL DEFENSE, acting
for THE CIVIL AVIATION ORGANIZATION,

Respondents.

CONCURRING AND DISSENTING OPINION
OF CHARLES N. BROWER

I concur in this Award save for its disposition of the claim for the value of Claimants' building in Tehran.

While I am sensible of the obstacles to a finding of Iranian Government liability for an expropriation in this case, I believe that Bank Tejarat has failed to carry its burden to satisfy the Tribunal that it has succeeded legitimately to Claimants' real property. Accordingly, I

would have adjudged Bank Tejarat liable to Claimants for the value of the building, which I would have set at \$445,359.¹

I.

The record as it stands suggests that the "sale" set up by Bank Tejarat may well have been a "forced" one and devoid of effect. See Vagts, "Coercion and Foreign Investment Rearrangements," 72 Am. J. Int'l L. 17 (1978) [hereinafter cited as Vagts], and Gowan & Copeland (United States v. Venezuela), 4 Moore, International Arbitrations 3354, 3357 (1885). While Bank Tejarat avers that Mr. Attar agreed to a sale on behalf of Claimants, the former President and Controller of Claimants both have contradicted that assertion under oath. Indeed, Bank Tejarat's own evidence casts considerable doubt on its position. No actual contract of sale has ever been produced by Bank Tejarat. The 23 September 1979 letter of Mr. Attar, on which such Respondent relies for corroboration of the alleged sale, refers, in Mr. Attar's own handwriting, to "the Bank's demand." (Emphasis added.) It is uncontested that Mr. Attar, an Iranian, thereafter left Iran and has remained abroad. The proces verbal allegedly accompanying Bank Tejarat's assumption of possession has never been produced. It is significant, too, that the alleged sales price of 21,200,000 rials was less than half the value appraised just over a year earlier (48,000,000). See Vagts, supra, at n.18 and accompanying text. Against this background the failure of Bank Tejarat to produce any testimonial evidence, or further documentary proof, or to explain such omission,

¹I believe that Bank Tejarat is properly before us as a Respondent in respect to this claim inasmuch as it appeared in response to the claim following its timely assertion against the Iranian Government and the Bank and Claimants have continued thereafter to litigate this claim between them.

where it bears the burden of proving the legitimacy of its acquisition of the building, see Article 24(1) of the Tribunal Rules, and has control of the relevant evidence, see D. Sandifer, Evidence Before International Tribunals 147-154 (rev. ed. 1975) and cases cited therein, would have justified the Tribunal in finding against it.

Bank Tejarat's belated attempt on the eve of the Hearing to shift ground and allege reliance on a lawful mortgage foreclosure is largely significant for suggesting that Bank Tejarat also appreciates the weakness of its position. As an independent basis of an allegedly lawful transfer it likewise incites suspicion. The Bank consistently alleged until shortly before the Hearing that it had requested that the Revolutionary Prosecutor perform the necessary formalities to complete transfer of title pursuant to the "sale." On 2 July 1982 it asserted to the Tribunal that "[t]he transaction is now in the process of taking place," i.e., pending signature by the Revolutionary Prosecutor, even though more than six months had passed since publication of notice of the "executive writ" on 9 November 1981, without a request for auction having been received. Hence the Bank, were it truly relying on foreclosure rights, could have expected a transfer shortly without any risk of the Bank having to make any payment of any "excess proceeds," i.e. any difference between the "sale" price and the mortgage loan indebtedness. Interestingly, Bank Tejarat has never asserted specifically that the Revolutionary Prosecutor did not sign transfer deeds as anticipated. The unexplained extended delays in the foreclosure proceedings² further suggest that rather than

²It was a year after conclusion of the alleged contract of sale in September 1979 before the "executive writ" was obtained on 2 September 1980; more than fourteen months later that notice of the writ was published on 9 November 1981; and, after both the six month period for demanding an
(Footnote continued)

furnishing the true basis for the Bank's acquiring the building they have been used belatedly in an attempt to place this matter beyond our jurisdiction.³ The Bank must have felt that as a practical matter it already owned the building; it hardly would have allowed years of interest to accumulate, at the mortgage contract rate of 12 per cent per annum, which it was not being paid and likely never was to be paid, without liquidating its security.

I am struck also by the fact that the rial total recorded in the 7 September 1983 deed of transfer, i.e., 21,749,063, potentially is more reflective of the alleged sale price (21,200,000) than what would have been due on a true mortgage foreclosure, which would involve more. The 14,000,000 mortgage loan of 11 May 1978 bore 12 per cent simple interest. Claimants concede that as of 31 December 1978 they owed 15,259,970 rials, which, after subtracting the unpaid principal, means 1,259,970 rials in interest (and commissions). At the rate of 12 per cent per annum approximately another 7,840,000 rials in interest would have accumulated from 1 January 1979 to 7 September 1983, the date of formal transfer, making a total due then of 23,099,970.⁴

(Footnote continued)

auction and the eight month grace period for payment had lapsed (in May and July of 1982, respectively), over a year before the transfer was completed by deed of 7 September 1983.

³The alleged taking must have occurred by 19 January 1981. See Article II(1), Claims Settlement Declaration.

⁴This is without considering the 5 percent "execution charges" referred to in the 7 September 1983 deed, which would add another 1,154,989.50 rials.

The alleged foreclosure may also be questioned in other respects. Note 3 to Article 34 of the law on which Bank Tejarat relies specifies that publication notice of executive writ proceedings is permissible only if "the domicile of the obligator has not been indicated on the

(Footnote continued)

II.

The value of Claimants' property interest in the building would be fixed as of the date of expropriation, which I deem to be 21 October 1979, the date Bank Tejarat took possession pursuant to the "sale" transaction, in accordance with the evidence presented. As the only evidence of the value of the building is the May 1978 appraisal of 48 million rials, I would accept this as being the value on the date of expropriation. No evidence has been presented to indicate that the building's value either appreciated or depreciated after the appraisal.⁵

(Footnote continued)

instrument, or if it is for some other reason impossible to determine his domicile" The notice of publication here, however, on its face recites the Tehran address of Mitchel and Roberts correctly, noting it appeared in the relevant deed; hence the cryptic statement in the newspaper notice that such address "was not identified by the concerned bailiff" seems improbable. Alternatively, one wonders why Claimants could not have been notified directly, or why, at least, efforts to that end were not made. The very power of attorney on which Bank Tejarat relied for the authority of Mr. Attar is signed by Mr. Burrows, who is identified therein as being affiliated with one of the Claimants. Internal documentary evidence of Iranians' Bank reveals that the bank was aware of the relationship of Mitchel and Roberts to Claimants. In addition, the materials appended to the executive writ expressly describe Mitchel and Roberts as being "under directorship of Mr. Alexander Patrick . . . , a national of the United States holding passport No. 2905922/Z" In this connection, it is worth noting that Iranian authorities frequently have delivered legal notices in the United States through the Algerian Embassy in Washington, D.C.

There is some question also as to whether Bank Tejarat under any circumstances would have had the right to take title to Claimants' building directly rather than sell it at public auction. The mortgage terms themselves may at least support an inference that Bank Tejarat agreed to the latter course, waiving whatever statutory rights it may have had to the contrary.

⁵ In their Reply Memorial and Rebuttal filed 21 January
(Footnote continued)

This gross asset value of the building must be reduced by any liabilities outstanding to arrive at its compensable value. The main liability is the 14 million rial mortgage, issued on 11 May 1978, and carrying an interest rate of 12 percent per annum, payable, with principal, once every three months. Bank Tejarat has not submitted any information on the amount of principal and interest owed; however, Claimants submit that 15,259,970 rials was owed as of December 1978 and Bank Tejarat has not challenged this figure.⁶ Apparently, no payments of mortgage principal were ever made. Thus, an additional 1,353,332 rials in interest is due for the period 1 January 1979 through 21 October 1979, the date of expropriation.⁷

In addition to mortgage principal and interest, conceded by Claimants as owing, Bank Tejarat contends that it incurred various tax, legal and executive expenses. Bank Tejarat first contends that it paid 1,000,000 rials in taxes against a letter of guarantee issued by Iranians' Bank. While a copy of the letter of guarantee has been submitted, neither proof of payment on the guarantee nor proof of the underlying tax obligation has been adduced. Bank Tejarat also asserts that it incurred "legal and executive expenses" in connection with the transfer of title. These alleged expenses are not reflected in the documents. In any case,

(Footnote continued)

1985 Claimants state for the first time that the building had become worth 180,000,000 rials, asserted to be the equivalent of \$1,972,602. No evidentiary support for this assertion was submitted, however, and its relevance to a determination of value as of a date more than four years earlier is attenuated at best. In any event Claimants did not pursue this point and their post-Hearing Memorial filed 14 March 1985 contained nothing on this issue.

⁶Claimants assert that \$216,915 remained owing on the mortgage, using an exchange rate of 70.35 rials/dollar.

⁷Calculated for the sake of simplicity as 9 2/3 months at 12% simple interest on 14,000,000 rials principal.

they are not properly chargeable to Claimants to the extent that the transfer of title was in contravention of law. Thus, these items cannot be deemed a liability of Claimants in respect of the building.

In view of the evidence outlined above, I would find the net value of the building as of 21 October 1979, the date of expropriation, to be 31,386,698 rials, computed as follows:

Rials	48,000,000	Gross value of building
-	14,000,000	Mortgage principal
-	1,259,970	Mortgage interest through December 1978
-	1,353,332	Mortgage interest from January 1979 through 27 August 1980
	<hr/>	
	31,386,698	Net asset value of building

I would hold Bank Tejarat liable to Claimants for this amount, which, converted to dollars at the market rate of 70.475 rials/dollar prevailing at the end of October 1979, see International Financial Statistics, Supplement on Exchange Rates (IMF), is equivalent to \$445,359.

Charles N. Brower
Charles N. Brower