

Case No. 36

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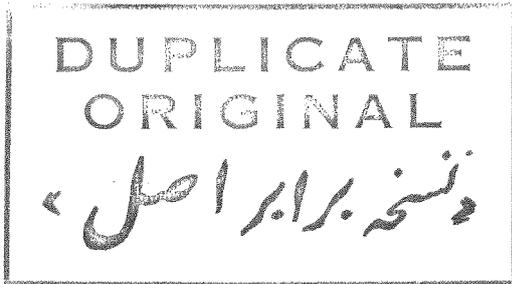
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** SEPARATE OPINION of _____
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- Date 5 NOV 86
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CASE NO. 36

225

CHAMBER ONE

AWARD NO. 259-36-1

FLEXI-VAN LEASING, INC.,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاری ایران - ایالات متحدہ
ثبت شد - FILED	
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DISSENTING OPINION OF JUDGE HOLTZMANN

I dissent from the Award in this Case which denies Flexi-Van Leasing, Inc. ("Flexi-Van") compensation for unpaid rentals and unreturned equipment due it under lease agreements with two shipping companies that had been taken over by the Government of the Islamic Republic of Iran ("the Government"). The Tribunal reaches this unfair result despite the fact that it recognizes that leases existed, that rents were not paid, that the equipment was held in Iran, and that the companies involved were under the complete control of the Government. The Government replaced the management of the two companies with its own representatives, and it should not now be permitted to escape responsibility for the damage it caused to Flexi-Van.

I.

Flexi-Van is a corporation organized in the United States that leases cargo containers, chassis, trailer trucks, and marine transport equipment throughout the world. In the course of its business, it leased equipment to two unrelated Iranian shipping companies, Star Line Iran, Co. ("Star Line") and Iran Express Lines, Co. ("Iran Express"). The leases, which followed several standard forms, all required the lessee to pay monthly rent, to return the equipment to Flexi-Van at the end of the lease, and to pay Flexi-Van the value of any unreturned equipment. Under the lease agreements, each lessee was obligated to protect and maintain the equipment in good repair, and if it was lost, stolen, or damaged to reimburse Flexi-Van for its value.

The Tribunal confirms that these lease agreements existed and were valid.¹ Award, pp. 16-17. The Tribunal

¹The Tribunal states that "in examining the merits of the claims brought against the Government, the Tribunal has assumed that certain contractual relationships existed between [Flexi-Van] and the two Iranian companies." Award, p. 17. Thousands of separate leases form the basis of the claims in this Case. The existence of those leases is evidenced by a very large number of documents, some of which involve agents in foreign ports as is customary in the shipping industry. In order to deal with this mass of documentation, the Tribunal by Orders dated 7 January 1983 and 18 April 1983, required Flexi-Van to submit a report by a firm of independent certified public accountants summarizing the voluminous documents supporting the claims and evaluating Flexi-Van's calculation of the amounts due. The accountant's report confirms the existence of the lease agreements. By these Orders the Government was given the right to inspect the underlying documents and to submit before the Hearing written comments on the accountant's report. The Government did not avail itself of the opportunity to inspect the documents or submit written comments on the report until after the Hearing. The Tribunal notes that it "makes no specific finding as to the existence and validity of each and every one of the thousands of the alleged leases." Id. While the Tribunal (Footnote Continued)

also confirms that both Star Line and Iran Express breached these contracts, concluding that "[i]t is not disputed that both Star Line and Iran Express had stopped making rental payments and had refused to return equipment" Award p. 24; see id. pp. 20-21.

The Tribunal not only affirms these breaches of contract, it also finds that both Star Line and Iran Express had been taken over by the Government. As to Star Line, the Tribunal holds that "the evidence establishes that not later than February 1980 Star Line was 'confiscated,'" that its management was taken over by the Foundation for the Oppressed ("Foundation"), and that accordingly "it seems clear that Star Line, through the Foundation, came under Government control." Award, p. 19. Similarly, as to Iran Express the Tribunal finds that the former directors had been ousted and that after February 1980 an official of the Ministry of Roads and Transportation ("Ministry") "was managing Iran Express which had indeed come under Government control." Award, p. 22.²

In these circumstances, it is understandable that Flexi-Van chose to name only the Islamic Republic of Iran as

(Footnote Continued)

made a general finding that contractual relations existed, it is understandable in the light of the Tribunal's denial of liability on other grounds, that it states that it "found it unnecessary to address the question regarding the existence of particular lease agreements" Id. p. 16.

²This is consistent with holdings in other cases in which the Tribunal, for the purpose of establishing its jurisdiction, has determined that Star Line and Iran Express are entities controlled by the Government. See Seaco, Inc. and Islamic Republic of Iran, Award No. 61-260-2, para. 17 (20 June 1986); Raygo Wagner Equipment Co. and Iran Express Terminal Corp., Award No. 30-16-3 (18 March 1983), reprinted in 2 Iran-U.S. C.T.R. 141; Raygo Wagner Equipment Co. and Star Line Iran Co., Award No. 20-17-3 (15 December 1982), reprinted in 1 Iran-U.S. C.T.R. 411.

a Respondent, because it considered, as I do, that acts of the Government were the root causes of the damages Flexi-Van suffered. Also, as Flexi-Van's Statement of Claim explains, in naming the Islamic Republic of Iran as the sole Respondent it relied on Article VII, paragraph 3, of the Claims Settlement Declaration which defines "Iran" as including any entity controlled by the Government.

II.

The Award chronicles in detail the steps by which Star Line and Iran Express were taken over by the Government. As to Star Line, the Tribunal quotes a decision of an Islamic Revolutionary Court in December 1979 ordering "the confiscation of [Star Line] and put[ting] its management for the time being at the disposal of . . . the Foundation For The Oppressed." Award, p. 17. It will be recalled that the Tribunal has held in an earlier case that the Foundation has "governmental status" and exercises "governmental authority." Hyatt International Corporation and The Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 54-134-1, pp. 23-31 (17 September 1985).

The Foundation is thus an integral part of the Government which manages confiscated properties, using monies earned by the seized enterprises to help discharge the Government's social welfare responsibilities to its citizens. This management role derives from the Foundation's Articles of Association, Article 2 of which provides for "[c]entralization in the Foundation" of seized properties "with the purpose of management." Id. p. 24 (quoting Article 2). A Government publication describes the Foundation's management function: "This institution exploits the regained properties and capital according to a calculated program and in favor of the deprived." Id. p. 28 (quoting Ministry of Islamic Guidance of the Islamic Republic of Iran, Achievements of the Islamic Revolution of

Iran 56 (1982)). This role of the Foundation is described in greater detail by an authoritative Iranian author:

"On the victory of the Islamic Revolution . . . plunderers and usurers fled and their possessions were confiscated and became public property. This property was such that processing thus necessitated a separate agency or institution. The establishment of the [Foundation] was for the purpose of undertaking the supervision of this property

The [Foundation] is responsible for protecting and managing confiscated property and companies and the respective income earned is spent by this Foundation for the benefit of the society's deprived and oppressed stratum"

Id. (quoting M. Mahajevi, Islamic Revolution -- Future Path of the Nations 78 (1982) (emphasis added)).

Thus, the Foundation is not an ordinary shareholder of Star Line. The Foundation displaced the former management pursuant to the order of a Revolutionary Court, not by normal corporate procedures, and it was charged with the duty to manage every aspect of the company's affairs.

The situation with respect to Iran Express is similar to that of Star Line, the only variation being that Iran Express was taken over by the Ministry rather than by the Foundation. The takeover was vividly described in an affidavit of Robert H. Uiterwyk which is summarized in the Award:

Mr. Uiterwyk states that he had been a shareholder of Iran Express and its deputy managing director from the time the company was formed in 1974 until late February or early March 1980 when he and the other non-Iranian members of the board of directors of Iran Express were informed by the Iranian board members that three government-appointed directors accompanied by the Revolutionary Guards had entered the offices of Iran Express in Tehran, had occupied the offices and ousted the directors and managers of the company from control.

Award, p. 21 (emphasis added). This surely does not describe the normal corporate procedure of a shareholders' meeting for the election of directors, or any other customary corporate process. Documents in evidence demonstrate that from the time of this takeover a Ministry official managed Iran Express until at least July 1982.

III.

Why then does the Tribunal deny compensation to Flexi-Van for flagrant breaches of contract by companies that it finds had been taken over by the Government? The Tribunal reaches this result on the basis that Star Line and Iran Express continued after the takeover to be "separate entities," albeit under Government management, and by finding that "Flexi-Van has failed to present proof of any action of the Government that caused either of these companies to breach the lease agreements. Absent such proof, the Government cannot be held liable for breaches of the lease agreements by Star Line and Iran Express." Award, pp. 24-25. The Tribunal thus relies on the existence of a corporate veil between the Government and the two companies.

It is true, of course, that municipal courts and international tribunals normally treat a corporation as an entity separate from its shareholders. This concept of a corporate veil was developed to limit the liability of ordinary shareholders in order to encourage investment. Courts and arbitral tribunals do, however, pierce the corporate veil³ in appropriate circumstances. See First National City Bank v. Banco para el Comercio Exterior de Cuba, 103 S.Ct. 2591 (1983); Note, Piercing the Corporate

³The practice of piercing the corporate veil is also referred to as "disregarding the corporate entity," or as the "alter ego theory" or the "instrumentality theory."

Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853 (1982); Bauschke, Lifting the Veil in German and French Law, 1976 J. Bus. L. 294; Company Law in Europe 149-50, 250 (S. Frommel & J. Thompson eds. 1975).

The corporate veil -- if, indeed, any remains -- must be pierced in situations such as exist here, where the Government confiscates a company, ousts the former managers without regard for, or recourse to, normal corporate procedures, and then installs its own representatives to direct the company's activities. The doctrine of the corporate veil, designed to limit the liability of business investors, cannot be invoked to protect a Government that confiscates and assumes management functions over what it considers public property. Nor can the corporate veil persist when, as in this Case, the companies have become so indistinguishable from the Government that they are reduced to being merely alter egos of the Government. See supra Section II.

Even if the corporate veil is not pierced, however, the Government should be held liable under the Tribunal's own formulation. The Tribunal concedes that the Government would be "liable for the damages arising out of breaches of the lease agreements if it had caused [Star Line and Iran Express] to breach these agreements or prevented them from fulfilling them." Award, p. 24. The circumstances in this Case lead inescapably to the conclusion that the Government did cause the two companies to ignore their contractual obligations. Indeed, it borders on sophistry for the Tribunal to state that "Star Line and Iran Express, although Government controlled entities, must be assumed to make their own decisions about their commercial dealings, having substantial freedom in their day to day activities, unless there is evidence to suggest otherwise." Id. p. 23. After the takeover there were no Star Line or Iran Express executives left who could make decisions; only Government

representatives managed the company. What the Award calls the companies' "own decisions" were thus the decisions of the Government representatives who ran them. This is borne out, for example, by the affidavit of Richard Maass, an agent whom Flexi-Van sent to Iran to try to recover its equipment. Mr. Maass stated that between January 1980 and September 1981 the Foundation appointed representatives who supervised the operations of Star Line, and that all important decisions had to be made by the Foundation's representatives. As he put it, every decision concerning Flexi-Van's equipment "had to be sanctioned by the [Foundation]." That evidence is un rebutted. Nor is there any reason to believe that the situation was any different at Iran Express where the evidence shows that the former directors had been ousted and a Ministry official acted as the top manager.

A critical element in managing Star Line and Iran Express was making the decision of whether to pay Flexi-Van the millions of dollars of rentals due them and whether to return Flexi-Van's valuable equipment. The representatives of the Foundation and the Ministry must surely have made that decision, for there was no one else left who could make it.

The Tribunal notes in an analogous context that Flexi-Van did not introduce as evidence specific "orders, directives, recommendations or instructions from the Foundation or the Government" requiring that rentals not be paid or that equipment not be returned. Award, p. 20. But, of course, Flexi-Van had no access to any such internal management communications. The Tribunal imposes an impossible evidentiary burden in holding that Flexi-Van cannot recover damages because it did not produce documents that are within the sole control of a confiscated company or of the Government representatives who managed it. The Tribunal stressed that in Foremost Teheran, Inc. and Government of the Islamic Republic of Iran, Award No. 220-37/231-1, pp. 24-29 (11

April 1986), the claimant, unlike Flexi-Van, was able to submit evidence of specific Governmental acts that deprived it of its rights. Award, pp. 23-24. The circumstances in Foremost were, however, entirely different. In Foremost, the claimant was a founder and major shareholder of the company that was taken over by the Government, and Foremost kept representatives in Iran who participated in company activities for a period after the takeover. Consequently, Foremost was able contemporaneously to get hold of minutes of meetings and other documents that it later submitted to the Tribunal to prove the acts of Government representatives. In sharp contrast, Flexi-Van, which was merely an outside supplier, had no such means to observe the acts of Government representatives, or to attend the meetings at which decisions affecting it were made.

It should also be noted that in international law the responsibility of a State can be engaged by its omissions, as well as by its acts. International Technical Products Corporation and ITP Export Corporation and The Government of the Islamic Republic of Iran, Award No. 196-302-3, p. 47 (24 October 1986); Tippetts, Abbett, McCarthy, Stratton and The Government of the Islamic Republic of Iran, Award No. 141-7-2, pp. 11-12 (29 June 1984), reprinted in 6 Iran U.S. C.T.R. 219, 226. Thus, proof of specific instruction by the Foundation or the Ministry to Star Line or Iran Express is not needed; it is sufficient that the Government while managing these companies ignored their contractual obligations.

I therefore would have awarded Flexi-Van damages for the breaches of the lease agreements, plus interest calculated in accordance with Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-164-1 (27 June 1985). I also would have awarded Flexi-Van its costs of arbitration determined in accordance with my Separate Opinion in Sylvania.

IV.

Flexi-Van based its claim on several alternative legal theories. Since I would have granted relief on the ground described above, I need not discuss Flexi-Van's other grounds. It is, however, necessary to comment on several errors in the Tribunal's discussion of Flexi-Van's alternative claim that the Government was unjustly enriched by retaining Flexi-Van equipment and failing to pay rent.

The Award holds that Flexi-Van is not entitled to recover on this ground because it has not proved "actual use" of the equipment by the Government. Award, p. 28. Other international tribunals, however, have not required such proof of "actual use," holding instead that a benefit constituting unjust enrichment occurs when goods are available for use by a State, regardless of whether the claimant can show particular instances of such use. "Actual use" is a misconception that first appeared in Sea-Land Service, Inc. and Government of the Islamic Republic of Iran, Award No. 135-33-1 (22 June 1984), reprinted in 6 Iran-U.S. C.T.R. 149, and that error should not be repeated. See Separate Opinion of Howard M. Holtzmann, Sea-Land Service, Inc. and Government of the Islamic Republic of Iran, Award No. 135-33-1, pp. 64-70 (1 November 1984), reprinted in 6 Iran-U.S. C.T.R. 175, 213-16. See also Shreuer, Unjustified Enrichment in International Law, 22 Am. J. Comp. L. 281, 289-91 (1974); Sucrerie de Roustchouk c. Etat hongrois, 5 Recueil des Décisions des Tribunaux Arbitraux Mixtes 772 (1925); Landreau Claim (U.S. v. Peru), 1 Rep. Int'l Arb. Awards 347, 352 (1922); Jno. P. Putegnat's Heirs (U.S. v. Mex.), cited in 3 M. Whiteman, Damages in International Law 1734 n.427 (1943).

Flexi-Van also sought recovery of the amount by which the Government was unjustly enriched as a result of its failure to pay debts owed to it. The Tribunal refuses to

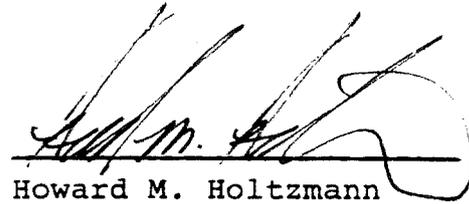
consider this in the Award stating that it "is not prepared to interpret the unjust enrichment claim as formulated . . . as encompassing a claim for unpaid debts." Award, p. 30. In other words, the Tribunal dismissed an important element of the unjust enrichment claim on the ground that it was not articulated clearly enough. The Tribunal thus repeats the mistake made in Mark Dallal and Islamic Republic of Iran, Award No. 53-149-1, p. 3 (10 June 1983), reprinted in 3 Iran-U.S. C.T.R. 10, 11, where it also turned a deaf ear to a plea of unjust enrichment on the ground that it had not been properly pleaded. See Dissent of Howard M. Holtzmann, Mark Dallal and Islamic Republic of Iran, Award No. 53-149-1, pp. 25-30 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 17, 30-32. Here, as in Dallal, a careful reading of the pleadings shows that the unjust enrichment for which relief was sought was, in fact, covered by the pleadings. Indeed, Flexi-Van sought as compensation for the Government's unjust enrichment, inter alia, accounts receivable and unpaid rentals arising from the lease agreements. Even the Tribunal states that "it may be inferred from the amounts claimed that [Flexi-Van] considered the Government also to have been unjustly enriched to the extent that Star Line's and Iran Express' debts were not paid." Award, p. 30. A plea of recovery for unjust enrichment is a cry to the conscience of the Tribunal; it should not be ignored on the excuse that it is not stated with sufficient clarity.

If the Tribunal had considered this issue, as it should have done, it could not have escaped the conclusion that the Government was, in fact, unjustly enriched when companies that it had taken over retained money rather than using it to pay their legal debts. It does not require any "further clarification," such as the Tribunal demands, or any

sophisticated economic analysis to recognize that one has more money in his pocket if he does not pay his bills.

Dated, The Hague

5 November 1986



Howard M. Holtzmann