
 TRIBUNAL

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** AWARD - Type of Award _____
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 _____ pages in English _____ pages in Farsi

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

** CONCURRING OPINION of Mr. Mosk
 - Date 6 Mar 86
6 pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
 - Date _____
 _____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
 - Date _____
 _____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

 - Date _____
 _____ pages in English _____ pages in Farsi



CASE NO. 52
CHAMBER ONE
AWARD NO. 215-52-1

BLOUNT BROTHERS CORPORATION,
Claimant,
and
THE GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN, IRAN HOUSING
COMPANY,
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعوی ایران - ایالات متحدہ
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CONCURRING OPINION OF RICHARD M. MOSK

I concur in the Award in order to form a majority.

I question the Tribunal's conclusion regarding the application of the doctrine of force majeure to obligations of Iran Housing Company ("Iran Housing") in connection with cement shortages, although that conclusion does not affect the result. I disagree with the Tribunal's decision that in this Case the Claimant, a United States national, which is maintaining an indirect claim based on damages suffered by an entity it controls, is not entitled to recover the full amount found to be owing that controlled entity.

I. Force Majeure

As Judge Böckstiegel has written, "[a] well-known and highly disputed issue is whether a state enterprise may

be excused from non-fulfillment or a breach of contract by claiming force majeure, if the state owning or controlling the state enterprise by an act of public authority has interfered." K. Böckstiegel, Arbitration and State Enterprise 37 (1984). Judge Böckstiegel noted that from "the material received in this research the picture is as varied as it is from the respective international legal discussions." Id. at 38.

Even if it assumed that a state enterprise may invoke force majeure for the acts of the state, one must carefully examine a number of factors, including the relationship between the state and the state enterprise and the actual responsibility for the conditions invoked.

There is evidence that Iran Housing had a role in the importation and allocation of cement and actually assumed responsibility for obtaining it. In addition, it was Iran Housing that selected a certain type of cement, of which type there were shortages. Finally, there is no evidence that Iran Housing objected to BCJ Development Company's statements during construction that increases in costs due to delays attributable to cement shortages would be charged to Iran Housing.

Under these circumstances, there was not sufficient evidence to conclude that Iran Housing was not responsible for delays attributable to the cement shortages. In view of the Tribunal's conclusion, however, it does not matter whether or not Iran Housing is deemed responsible for such delays.

II. Recovery for Indirect Claims

There is no showing as to the nationality of the minority shareholder in BCJ Development Company. That

shareholder's address has been in Florida, U.S.A., so it seems highly unlikely it is a non-United States national. Regardless of who might have the burden to establish that this minority interest in BCJ Development Company was held by a non-United States national, under the Claims Settlement Declaration, Claimant should be entitled to 100% of the amount found owing to BCJ Development Company.

Article VII, paragraph 2, of the Claims Settlement Declaration specifies that claims of nationals of the United States include "claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement."

The most reasonable interpretation of this provision is that if a United States national, through its ownership of capital stock or other proprietary interests, controls the non-United States entity which has a claim against Iran, the United States national, for purposes of identifying claims that may be brought before the Tribunal, owns that entire claim indirectly. The Claims Settlement Declaration does not create substantive claims. Rather, it confers standing upon the controlling shareholders who are United States nationals to present to the Tribunal claims of the non-United States entity.

In international claims practice, although there have been instances of proportional recovery by

shareholders, a conclusive pattern has not developed, especially with regard to treaty language similar to that in issue here. See generally 1 R. Lillich & B. Weston, International Claims: The Settlement by Lump Sum Agreements 63-102 (1975); Lillich & Weston, Introduction, in International Claims - Contemporary European Practice 3-5 (R. Lillich & B. Weston eds. 1972); Caflisch, International Claims: Contemporary Swiss Practice, in id. at 142-148, 150-156. Indeed, the Undertakings, which are part of the Algiers Accords between Iran and the United States, provide for the transfer of monies to the Federal Reserve Bank of New York to pay unpaid amounts on loans made by "a syndicate of banking institutions, of which a U.S. banking institution is a member." Undertakings, Paragraph 2(A). Thus, by this provision, the parties to the Algiers Accords specifically sanctioned a 100% recovery by a United States entity of monies owed by Iran, even though some of those monies belonged to non-United States nationals.

An interpretation of Article VII, paragraph 2, of the Claims Settlement Declaration permitting Claimant to recover 100% of the foreign corporation claim is more consistent with logic and the rationale of the provision. Under the Claims Settlement Declaration, a United States company, in which, for example, 49% of the stock is owned by non-United States citizens, is entitled to 100% of the recovery. See Article VII, paragraph 1. There is no reason why a claim of a United States national arising out of its

control of a non-United States entity should be reduced under any circumstance by the proportion of interest in that entity owned by non-United States nationals. There is nothing in the Claims Settlement Declaration which gives this Tribunal the right or the power to obtain or provide assurances that a claimant will account to its controlled entity or to a non-United States national shareholder in that controlled entity.

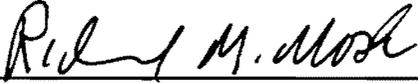
The United States national has certain fiduciary responsibilities with respect to minority interests in that controlled entity, including with respect to monies recovered on behalf of the controlled entity. Indeed, the minority shareholders might assert a claim to their interest in the Claimant's proportional recovery. The Tribunal opinion is based on the premise that the Claimant will, unless it shows otherwise, breach such a fiduciary duty in the future, and therefore may be unjustly enriched. As a result of the Tribunal opinion, only the Respondent will be unjustly enriched, for it is able to retain a portion of monies to which, according to the Tribunal opinion, Respondent is not entitled. Unless a United States national recovers 100% of the amount of the obligation, another action may have to be brought to recover the monies not awarded. Thus, the Tribunal decision leads to a multiplicity of proceedings, a result eschewed by courts of all nations. Moreover, under its ruling, the Tribunal, in effect, awards only partial compensation.

The Tribunal opinion on this issue may result in other complications. For example, difficulties may arise when there are multiple layers of entities or when control is based on something other than ownership of common stock.

Thus, I would have preferred that Claimant receive 100% of the monies owed by Respondent Iran Housing to BCJ Development Company.

I concur in the Award in this Case.

Dated: 6 March 1980
The Hague, The Netherlands


Richard M. Mosk