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دیوان دآوری دعاوی ایران - ایالات متّی

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

** DISSENTING OPINION of MR. MOSK
- Date 17 MARCH 84
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IRAN-UNITED STATES CLAIMS TRIBUNAL

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران-ایالات متحده
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دیوان داری دعاوی
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CASE NO. 199

CHAMBER THREE

AWARD NO. 117-199-3

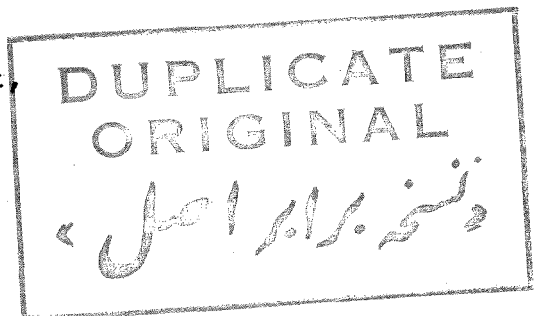
AMERICAN HOUSING INTERNATIONAL, INC.,

Claimant,

and

BANK SADERAT IRAN, GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN, HOUSING
COOPERATIVE SOCIETY OF OFFICERS OF
STATE GENERAL GENDARMERIE,

Respondents.



DISSENTING OPINION OF RICHARD M. MOSK

I dissent to the Award dismissing the Claimant's claim. I believe that based on the record, the Tribunal should have asserted jurisdiction over the Housing Cooperative Society of Officers of State General Gendarmerie ("HCS") and found HCS liable to Claimant.

Under the Claims Settlement Declaration, the Tribunal can have jurisdiction over an Iranian entity only if, under Article VII paragraph 3, of the Claims Settlement Declaration, that entity is an "agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof."

HCS is an organization, the members of which are officers of the Gendarmerie, the Iranian national police. HCS claims that it is a private company and not under the control of the Government of Iran.

HCS has submitted to this Tribunal a certificate from the Iranian Corporate and Non Commercial Organizations Registration Bureau stating that HCS is registered as a cooperative company. HCS has also submitted a partial extract from HCS's Articles of Association in which HCS is described basically as a private company established by officers of the Gendarmerie primarily for the purpose of supplying housing to Gendarmerie officers. Despite the Tribunal's request, HCS supplied no other documents.

The issue before this tribunal, however, is not whether HCS is, in form, private, but rather whether it is "controlled by the Government of Iran". This Tribunal has held that certifications of the Corporation Registration Bureau are not conclusive on the issue of independence of a corporation from Government control. See Raygo Wagner, Award No. 20-17-3 (15 December 1982). Likewise this Tribunal has held that separate juridical status "is not a sufficient basis for which to conclude that the entity conducts its operations free of the control of the government." See Economy Forms, Award No. 55-165-1 (14 June 1983). The issue of control is one of fact that is not necessarily determined by the form of the entity involved. See my discussion of "control" in my concurring and dissenting opinion in Raygo Wagner, Award No. 30-16-3 (25 March 1983).

That the government of Iran was deeply involved in the Gendarmerie project is evident from Hearing statements of the HCS representative, Mr. Rami. Mr. Rami asserted that land upon which the Gendarmerie project was to be constructed was obtained by HCS through a special government legislative program. The supplying of housing for Gendarmerie officers is, by its nature, a governmental function. Indeed, it was anticipated that the project would ultimately include schools, churches and other typically governmentally supplied services. Moreover, the government was an essential financial backer or potential financial backer of the project.

Claimant's bid on the project was approximately \$180,000,000, which, as Mr. Rami indicated, was one third of the amount bid by a French company and one half of the amount bid by a German company. Mr. Rami stated that HCS had anticipated that it would receive governmental grants. Furthermore, Major General Mahagheghi, Chairman of the Board of Directors of HCS, in a letter dated January 26, 1978, wrote that the HCS efforts to receive a "loan from the Government will shortly yield results." This loan was a prerequisite to the project. It is inconceivable that a several hundred million dollar project could be financed through merely the two thousand Gendarmerie officer members of HCS or that such officers could themselves offer sufficient security to obtain private capital. Moreover, any governmental loans or grants required approval of the national consultative assembly. See Iranian Constitution,

Article 80. Thus, governmental involvement was apparently necessary.

The fact that the project was never undertaken following the revolution further suggests the control of the government. Mr. Rami stated that the housing project did not proceed because of a change in governmental policy on housing. Indeed, the Constitution of the Islamic Republic of Iran expressly provides for priorities in housing that would militate against the Gendarmerie project. See Iranian Constitution, Article 31. Certainly, the ability to control whether or not an entity's project was to proceed is one indicia of control over that entity.

It is unlikely that the Government of the Islamic Republic of Iran did not have the power to control the actions of its own public servants. It is this power that appears to have caused the abandonment of the project. If the project had proceeded, it is likely that HCS would have been deemed nationalized. See Law For the Protection and Development of Iranian Industry, Art. I C (nationalizing entities with bank loans which exceed net income, whether or not the project has proceeded). The Tribunal does not have information as to HCS's financial status.

Mr. Morris of Claimant represented that he met only with Gendarmerie officers in government offices, dealt only with government banks in connection with the Gendarmerie project and was told that the government of Iran stood

behind the project. He stated he never had the slightest indication that HCS was independent of the Government.¹ Claimant asserts that it would never have remained in Iran until October of 1978 if it did not believe it was working on a project enjoying the support and protection of the government of Iran.

Mr. Morris' representations were not contradicted. Moreover, despite Claimant's request, HCS did not produce at the hearing various of its representatives who were directly involved with Mr. Morris to contradict Mr. Morris' statements.

There is correspondence confirming that the Iranian Planning and Budget Organization was involved in the review and approval of the draft contract between Claimant and HCS. Moreover, HCS used stationary bearing the emblem of the former Imperial Government of Iran. See Economy Forms Corporation, Award No. 55-165-1 (19 June 1983). HCS admitted that a government engineer from the Planning and Budget Organization of the Government of Iran was used to review plans submitted by Claimant. And a letter from HCS to Claimant indicates that the legal department of the Planning

¹ Case 292 before Chamber 2 of this Tribunal also involves a housing construction contract between a claimant and a cooperative society -- the Cooperative of the Workers of the Ministry of Roads and Transportation of Iran. The files in that case, of which judicial notice can be taken, disclose a letter to the claimant from the Ministry's Department of Progress and Comfort of Workers which indicates that the Ministry itself was highly involved in the project (Exhibit H, Claimants Comments on the Statements of Defence), thus showing the relationship between the "cooperatives" and the government of Iran.

and Budget Organization acted as an HCS representative in contract negotiations with Claimant. Some of these activities exceeded the usual role of a prospective lender in a project.² In addition, HCS's referral of Claimant to the Iranian Embassy in the United States and the official written recognition by the Iranian Embassy in Washington D.C. of Iran's obligation to compensate Claimant for its services rendered to HCS further indicate the control of HCS by the Government.³

The aforesaid evidence, at the very least, shifts to HCS the burden of producing evidence that it is not controlled by the Government. HCS failed to produce documents requested by the Tribunal bearing on the issue of control. One might assume that after the Revolution there would be changes in military and police functions and privileges and in the degree of independence of police and military associations. See Iranian Constitution Article 143 et seq. Respondents have provided no information on the current status of the Gendarmerie or any of its associations. HCS would undoubtedly possess documents which would bear on whether or not it was or is controlled by the Government of Iran. Minutes of its meetings, correspondence with

² A lender that is deeply involved in a project can be held liable by virtue of its control. Cf. Connor v. Great Western Savings & Loan Association 69 Cal. 2d 850, 447 P.2d 609 (1968) (Traynor, C.J.)

³ Although the letter does not refer to HCS, the un rebutted oral representations of Mr. Morris support the proposition that Iran was writing in reference to the services rendered to HCS.

Governmental agencies, recent documents covering the association, tax returns, documents relating to government permits, loan applications and similar material would all be relevant. In short, Respondents have provided insufficient information concerning HCS or the Gendarmerie before the Revolution and virtually no such information after the Revolution. If such documents or information supported HCS's position, the Tribunal must assume they would have been produced. Because HCS has failed to produce the requested documents or other documents, which would in all likelihood establish the extent of government control, the Tribunal should have drawn inference that such documents or information would evidence control of HCS by the government of Iran. At the very least, AHI established a prima facie case of control; which was not rebutted adequately by Respondents.⁴

B. Merits

Claimant alleges that on or about December 1976, HCS invited Claimant to bid on a project involving the construction of 2330 residential housing units in Tehran.

According to the Claimant, Claimant's January 26, 1977 project bid of approximately \$180,000,000 was accepted by

⁴Moreover, it is arguable that under the circumstances, the Government of Iran should be liable because, through its high officials, it at least permitted the appearance that HCS was, in effect, a government controlled entity.

HCS on or about 14 February 1977. Letters written by both the parties indicate that a contract was essentially agreed upon in December of 1977. In its letter of 4 January 1978, Claimant requested from HCS an "absolute binding Letter of Agreement based on the Contract submitted to you and approved by General Askari and [the] Planning and Budget Organization". (Emphasis added). HCS replying in a letter dated 26 January 1978 noted that as soon as a government loan was received, a contract "according to the agreement already made" would be signed. (Emphasis added). Therefore it appears that the parties had agreed on the essential terms of a contract.⁵

From the written correspondence and the representations of the parties it appears that from at least January of 1978 until July 9, 1978, HCS continued to represent that Claimant and HCS had an agreement and that as soon as the financing was secured, the formal written agreement would be consummated. From the fact of the HCS acceptance of the Claimant's bid and from statements to this Tribunal as to oral statements by HCS before January of 1978, there are strong indications that the representations by HCS actually began in early 1977. While making representations and promises that the contract would be formalized momentarily,

⁵ Despite a Tribunal request, the Respondents have not produced the bid and acceptance, draft contracts between the parties or correspondence between the parties concerning the contract negotiations.

HCS requested Claimant to be prepared to commence performance under the contract and to do some work on construction plans. HCS must have known that Claimant relied on HCS's representations and promises by remaining in Iran to work on the contract and prepare for the project.

In a letter of January 4, 1978, Claimant stated that if it could not formalize the contract, it wished to abandon the project because it was bearing great costs to remain in Iran and to remain exclusively available to HCS as requested by HCS. In its letter of January 26, 1978, HCS induced Claimant to believe that Claimant would obtain the contract by stating that HCS's efforts at receiving a government loan would "shortly yield results" and that the agreed draft contract with Claimant would be signed "immediately after" the loan. On March 18, 1978, HCS continued to cause Claimant to maintain its expectations by stating that the financing agreement would be signed "very soon". Moreover, HCS stated that Claimant should prepare construction plans and that if "due to reasons now beyond anticipation" a contract was not signed, HCS would compensate Claimant for "all expenses incurred for preparation of such construction plans." (Emphasis added.)

It was not until July 29, 1978, that HCS advised Claimant that the contract would be awarded to another contractor. Notification that it was so awarded took place on September 25, 1978. There is no indication that prior to

reliance on another party's negligently incorrect communications or negligent failure to communicate during contractual negotiations. See A. von Mehren and J. Gordley, The Civil Law System 837-40 (2d ed. 1977); and Kessler and Fine, Culpa in Contrahendo; Bargaining in Good Faith and Freedom of Contract: Comparative Study, 77 Harv. L. Rev. 401 (1964). Thus, as one authority has written,

Under the civil law a party who has used negotiations solely to induce the other party to take a desired course of action and terminates them after his goal has been accomplished, will have to answer in damages to the party whom he has strung along. [United States] courts are also able to protect the victim in such a situation with the help of the doctrines of misrepresentation and promissory estoppel."

Kessler and Fine, supra 77, Harv. L. Rev. at 419-20.

There is nothing to suggest that these various principles are not applicable in Iranian law. See Article 438, Civil Code of Iran (M. Sabi, Trans. 1972) ("Trickery denotes conduct which causes the other party to the transaction to be misled") and The Civil Responsibility Law, Article 8 (27 April 1960).

These principles also prevail in an international context. See Bowett, Estoppel Before International Tribunals and its Relation to Acquiescence, 33 Brit. Y.B. of Int'l. Law 176, 193 (1958); de Vries, International Pre-Contractual Obligations in International Contracts 51, 80 (Smit, Galston and Levitsky, eds. 1981).

Thus, under applicable municipal law and general principles of law and equity, Claimant is entitled to compensation.⁶ In view of the Tribunal holding, it is not necessary that I specify the amount of such compensation. Certainly it should include an amount necessary to compensate Claimant for the time and expenses incurred during the period that Claimant was misled.

Dated, The Hague
17 March 1984


Richard M. Mosk

⁶ I do not comment on whether or not the Iranian Government assumed HCS's liability, by virtue of the March 15, 1979 letter from Mr. Rouhani on official Iranian Government stationery.

July of 1978 HCS ever advised Claimant that HCS was considering other proposed contractors. Yet, for a lengthy period of time, HCS led Claimant to believe that Claimant either had or would obtain the contract.

It appears from the statements of HCS's representative at the Hearing that HCS did not even consider Claimant as a qualified bidder. Indeed, according to this HCS representative, the fact that Claimant's bid was so much lower than other bids and because of Claimant's alleged lack of experience, Claimant was never seriously considered as a potential contractor. It appears that HCS merely used the Claimant's bid to obtain lower bids from other companies.

Thus, HCS, for its own benefit, made representations, knowing that Claimant would rely on them to its detriment, which it did, and negotiated with Claimant without disclosing the actual unlikelihood of a contract. Moreover, HCS had or should have had knowledge that Claimant believed that it had at least a reasonable possibility of obtaining the contract and that Claimant relied on this belief.

Generally a remedy in such a situation is available. In common law countries, such circumstances would lead to a recovery under theories of misrepresentation or estoppel.

"Where A and B are parties to a negotiation or transaction and, in the course of the bargaining or dealings between them, A perceives that B

is laboring under a mistake as to some matter vital to the contract or transaction, he may come under an obligation to undeceive B, at all events if the circumstances are such that his omission to do so must inevitably foster and perpetuate the delusion. In such cases silence is in effect a representation that the facts are as B mistakenly believes them to be, and A is accordingly estopped from afterwards averring, as against B, any other state of facts." Spencer Bower and Turner, The Law Relating To Estoppel by Representation 49 (2d. ed. 1966).

It seems clear in the instant case that HCS knew Claimant was operating under the assumption that it would be awarded the contract.

Also it appears that HCS actually made representations which it knew not to be true and failed to disclose its actual intentions. Such acts amount to actionable misrepresentation. Id at 51. It is not necessary, however, that HCS have done the aforesaid acts intentionally. Actionable estoppels and misrepresentations can be negligent. See id at 51, 69.

The analogous civil law doctrine of culpa in contrahendo is likewise applicable to this case. Under this doctrine a party may recover damages arising from his