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دیوان دآوری دعاوی ایران - ایالات متحدہ

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ORIGINAL DOCUMENTS IN SAFE

Case No. 10273

Date of filing: 31 oct 1988

**** AWARD**

- Type of Award

Final

- Date of Award

31 OCT 88

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**** CONCURRING OPINION** of _____

- Date _____

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**** SEPARATE OPINION** of _____

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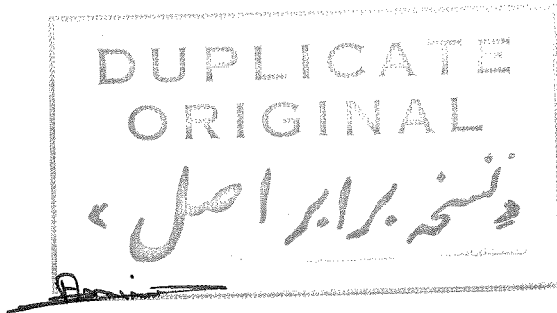
IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعای ایران - ایالات متحدہ

CASE NO. 10273

CHAMBER THREE

AWARD NO. 399-10273-3



HIDETOMO SHINTO,
 a claim of less than US\$250,000 presented
 by THE UNITED STATES OF AMERICA,
 Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
 Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دارگاه داوری دعای ایران - ایالات متحدہ
FILED - ۱۳۶۷ / ۸ / ۹	
Date	31 OCT 1988
تاریخ ۱۳۶۷ / ۸ / ۹	

AWARD

Appearances

For the Claimants:

Mr. Timothy E. Ramish,
Agent of the Government of
the United States of
America,

Mr. Michael F. Raboin,
Deputy Agent of the
Government of the United
States of America.

For the Respondent:

Mr. Mohammad K. Eshragh,
Agent of the Government of
the Islamic Republic of
Iran,

Mr. Nowzar Dabiran,
Legal Advisor to the Agent
of the Government of the
Islamic Republic of Iran,

Mr. Sohrab Rabiee,
Legal Advisor to the Agent
of the Government of the
Islamic Republic of Iran.

I. THE PROCEDURAL HISTORY

1. On 19 January 1982 the United States of America filed a Statement of Claim against the ISLAMIC REPUBLIC OF IRAN ("Iran") on behalf of the Claimant, HIDETOMO SHINTO. The Claimant alleges that Iran and its controlled entity, Sherkat Khadamat Beynolmelali - MAHAT ("SKBM"), failed to pay to the Claimant certain compensation and benefits owed to him under an employment contract with SKBM. The Claimant seeks compensation in the amount of U.S.\$5,987.11 plus interest and costs.

2. On 1 April 1985 the Claimant filed his Supplemental Statement of Claim. On 4 April 1985 the Claimant submitted the affidavit of Amir Hossein Amir Faiz, which had been omitted inadvertently from the Supplemental Statement of Claim.

3. On 3 June 1986 Iran filed its Statement of Defense.

4. On 18 August 1986 the Claimant filed his reply to Iran's Statement of Defense.

5. On 29 October 1986 Iran filed a letter raising a counterclaim for unpaid social security premia. On 13 November 1986 the Claimant filed an objection to the Respondent's counterclaim, alleging that it was not timely raised and that the Tribunal lacks jurisdiction to consider it. On 3 March 1987 Iran filed a memorial in support of the Tribunal's jurisdiction over the counterclaim.

6. On 16 November 1987 the Respondent submitted additional evidence in the form of a letter from the Corporate Registration Bureau of the Islamic Republic of Iran on the issue of Government control of SKBM.

7. A Hearing was held on 11 December 1987, at which Iran withdrew its counterclaim.

8. Pursuant to its oral directive at the Hearing, the Tribunal on 5 January 1988 issued an Order directing the Respondent to file certain documents relating to the issue of control of SKBM with the Tribunal by 7 March 1988. On 7 March 1988 Iran submitted a response to that Order. On 24 June 1988 the Claimant submitted an unauthorized reply to Iran's submission. On 14 July 1988 Iran submitted a letter responding to that submission of the Claimant.

II. FACTUAL BACKGROUND AND CONTENTIONS OF THE PARTIES

9. In December 1976 SKBM recruited the Claimant to work as a "Stock Control Specialist" in the company's offices. SKBM was an Iranian company performing services, inter alia, under the "CALS" project, a Government project under the direction of Information Systems Iran ("ISIRAN"), the purpose of which was to computerize certain agencies of the Government, including military ones. Upon his arrival in Tehran the Claimant signed an employment contract with SKBM for a period of 18 months and was issued a work permit and identification card. Pursuant to this employment the Claimant was assigned to the Signal Depot operated by ISIRAN just outside of Tehran.

10. On 13 May 1978 the Claimant signed a second employment contract with SKBM for an additional 18 month term. Under this new contract the Claimant was to receive U.S.\$2,550 a month in salary, an U.S.\$800 relocation allowance and, upon completion of the contract, return air fare to the Claimant's home in Hawaii. Article XII of the contract also provided that SKBM would assume responsibility for "all tax, income and otherwise, levied by the Government of Iran on the Salary."

11. In December 1978 the Claimant and all other SKBM employees began experiencing difficulties in receiving their salary payments. According to an 18 December 1978 letter from the Project Manager of SKBM to SKBM employees, no further payments would be made "until the customer releases monies to ISIRAN"

12. On 24 January 1979 the President of SKBM, declaring force majeure, issued a letter to all employees stating that their employment contracts were being terminated as of that date due to the "current civil unrest in Iran and the inability of the Company to meet its financial obligations at this time." The letter stated that the terminations were without cause and covenanted that SKBM would "pay all benefits and return relocation allowances" accruing to the employees upon contract completion. It also certified that "all taxes due and owing to the Government of Iran on all salary and entitlements paid or owing . . . have been satisfied." Attached to each letter was a detailed statement of entitlements and benefits for each employee. The computation sheet attached to the Claimant's letter stated that SKBM owed the Claimant a total of U.S.\$5,987.11, encompassing salary accrued to the Claimant's last day of work, a relocation allowance and air fare expenses. The letter was signed by the then Vice President of SKBM, Mr. Hassan Asgari Pour.

13. On that same day SKBM gave the Claimant a letter, signed by the same Vice President of SKBM, certifying that "monies due . . . will be forwarded in dollar instruments . . . at the official exchange rate at the time of [Claimant's] release from MAHAT, via registered mail or telex." The letter also confirmed that these monies would be "mailed in total or partial payments until payment of the above sum is completed in full when MAHAT receives payment from ISIRAN." The letter also stated, however, that the obligation to pay was "in no way dependent upon receiving

payment from ISIRAN." A certificate of authentication, issued by the Vice Consul of the United States in Tehran, was attached to the SKBM letters certifying that Hassan Asgari Pour indeed had signed these letters.

14. The Claimant departed Iran on 19 February 1979. He never received any funds allegedly owed to him, however. He thus asserts a claim before the Tribunal in the amount of U.S.\$5,987.11 reflecting those monies that SKBM admitted owing him in its letter of 24 January 1979. In short, the Claimant alleges that the failure of Iran to make good on these payments constituted a breach of his contract of employment. Alternatively, the Claimant argues that Iran is liable for those sums admittedly owed under the terms of the 24 January 1979 letter.

15. Iran denies the Claimant's allegations. It contends that he "left Iran at his own option and free-will . . .]and thus[he cannot have any claim for damages in this respect."

III. JURISDICTION

A. The Claimant's Nationality

16. The Respondent argues that the Claimant has not produced adequate evidence of his United States nationality. It further points out that the Claimant's birth certificate shows his parents to have been Japanese thus inferentially calling into question his own nationality.

17. As proof of his United States nationality the Claimant has submitted a copy of his United States passport and his certificate of birth, showing that he was born in the Territory of Hawaii.

18. The Tribunal previously has determined that such evidence is sufficient proof of United States nationality for the purposes of the Claims Settlement Declaration ("CSD"). Theodore Lauth and Islamic Republic of Iran, Award No. 233-10335-3 at 2 (8 May 1986), reprinted in 11 Iran-U.S. C.T.R. 150, 151. The Tribunal thus concludes that the Claimant has established his United States nationality.

B. SKBM as a Controlled Entity

19. The Respondent challenges the Tribunal's jurisdiction to hear this Case on the ground that SKBM is not a controlled entity of Iran as required by Article VII paragraph 3 of the CSD. Iran argues that SKBM at all relevant times was a private, independent company with no connection with the Government other than the fact that it was performing services for it as an independent contractor. In support of this position Iran submits the Articles of Association of SKBM showing that it was organized by four individuals, Amir Hossein Amir Faiz, Antonio Avlida, Mohsen Asgari Nazari and Afren Olana. In addition, Iran submits a letter dated in the English translation 31 October 1987 from the Corporate Registration Bureau to the Military Industrial Organization stating that SKBM was registered with the Corporate Registration Bureau on 8 May 1975, that according to the Minutes of the shareholders meeting of 16 June 1977 the last management change in SKBM was the appointment of Amir Hossein Amir Faiz, Mohsen Asgari Nazari and Hassan Asgari Pour as directors and that no Government appointed director had been installed.

20. The Claimant has argued two different theories of control in this Case. Prior to the Hearing the Claimant contended that SKBM was a controlled entity of Iran on the ground that it was organized for the sole purpose of providing services to, and was under the direct operational control of, ISIRAN, an established controlled entity of Iran. See Ultra Systems, Inc. and Islamic Republic of Iran,

Award No. 27-83-3 at 8-9 (4 March 1983), reprinted in 2 Iran-U.S. C.T.R. 100, 105. Through affidavit testimony of former employees of ISIRAN and SKBM the Claimant alleged that ISIRAN controlled the daily workings of SKBM, including establishing the qualifications for all SKBM employees, requiring SKBM to submit to it the qualifications of any personnel SKBM intended to hire and retaining the right to terminate any SKBM employees.

21. At the Hearing, however, the representative of the Claimant informed the Tribunal that the 31 October 1987 letter from the Corporate Registration Bureau, submitted by Iran to establish its non-involvement with SKBM and filed with the Tribunal on 16 November 1987, only three weeks prior to the Hearing, had revealed previously unknown information and had caused the Claimant to change his theory of control. The Claimant pointed out that this letter revealed that a final realignment of SKBM occurred at the 16 June 1977 shareholders meeting. According to the Claimant, the result of that realignment was that all of the shares of SKBM were held by the three individuals referred to in the letter as the newly appointed directors to the company in the following amounts: Amir Hossein Amir Faiz 52%, Mohsen Asgari Nazari 34% and Hassan Asgari Pour 14%.

22. The Claimant further alleged that in February 1979 the Iranian employees of SKBM had brought an action against SKBM for unpaid wages in a local labor court and were granted an order of the court seizing SKBM's assets. The labor court allegedly appointed the Revolutionary Guards to oversee the seizure of the assets and to dispose of them. According to the Claimant, in April 1979 the Revolutionary Guards sold SKBM's building at auction for U.S.\$200,000, paying the plaintiffs in the labor suit U.S.\$80,000 for back wages, retaining U.S.\$15,000 for expenses and giving the remainder to the Bonyad Mostazafan.

23. Finally, the Claimant contended that in the Spring of 1979 all the personal assets of the majority shareholder, Amir Hossein Amir Faiz, had been confiscated by Iran under a formal Government Order issued pursuant to the Law for Protection and Growth of Iranian Industries. As proof the Claimant submitted at the Hearing an article from the Iranian newspaper Ettela'at dated 12 March 1980 in which it reported the expropriation by Government Order of "all assets of 209 persons who had connections with the former regime." According to the Claimant, the name appearing in the article as number 170 on the list of those whose assets were expropriated was that of Amir Hossein Amir Faiz. From these facts the Claimant now alleges that Iran controls SKBM under the terms of the CSD by virtue of its expropriation of the majority of the shares of the Company.

24. At the Hearing the Respondent objected to the submission of new evidence of this nature at such a late date and requested the Tribunal to disregard it. In addition, the Respondent pointed out that the name as shown in the original Persian text of the Ettela'at article was Amir Hossein Amir Seyf, an entirely different individual, and thus not Mr. Amir Faiz, the majority shareholder of SKBM.¹ It therefore argued that regardless of the new theory advanced by the Claimant SKBM was nonetheless not a controlled entity within the terms of the CSD.

25. At the Hearing the Tribunal orally directed the Respondent to submit the original Order listing the names of the individuals whose assets had been expropriated, the

¹At the Hearing the Claimant conceded that the name appearing as number 170 in the Ettela'at article was "Amir Hossein Amir Seyf" but argued that this was merely a misspelling of Mr. Amir Faiz' name. The Claimant's representative asserted that he had been informed by Mr. Amir Faiz in telephone conversations that it was indeed his name on the list.

Minutes of the 16 June 1977 shareholders meeting referred to in the Corporate Registration Bureau letter and a copy of the Respondent's letter sent to that Bureau requesting the information supplied in the 31 October 1987 letter. The Tribunal also gave the Respondent the opportunity to submit English translations of the documents submitted by the Claimant at the Hearing, including the 12 March 1980 Ettela'at article. The Tribunal confirmed this request by written Order dated 5 January 1988.

26. On 7 March 1988 the Respondent submitted the Minutes of the shareholders meeting and its letter to the Corporate Registration Bureau but stated that it could not locate the official Order "due to the number of the Order not being supplied." It also submitted a translation of the 12 March 1980 Ettela'at article (as filed by the United States in several other cases before the Tribunal) showing the name at issue to be Amir Hossein Amir Seyf. As submitted by the Respondent the Minutes of the 16 June 1977 meeting noted that "all of the shareholders of company were present" and that those present signed the Minutes. Signatures appeared on the Minutes with the following notations:

Amir Hossein Amir Faiz	46 Shares
Hassan Asgari Pour	7 Shares
Mohsen Asgari Nazari	27 Shares

Iran thus concluded in its submission that the evidence at issue did not support the Claimant's position and that such position should be disregarded as untimely argued.

27. On 24 June 1988 the Claimant submitted a supplemental memorial in response to Iran's filing of 7 March 1988. Appended to the memorial was a copy of the official Order issued by the Office of the General Public Prosecutor, dated 12 April 1979, which the Tribunal previously had requested the Respondent to supply. The name listed as number 181 in the Order is that of Mr. Amir Hossein Amir Faiz. The

Claimant thus argued that he has established control of SKBM as of the date of the official Order, the time at which Mr. Amir Faiz' assets were expropriated.

28. Prior to reaching the issue of control the Tribunal must consider the timeliness of the arguments and evidence presented. The Claimant did not alter its theory of control until the Hearing itself, which then resulted in a post-Hearing round of submissions by the Parties. Under ordinary circumstances the Tribunal would reject these late arguments and evidence, adhering to its well established practice of allowing no new substantive submissions so close to the date of the Hearing that the opposing Party has little or no time to respond. Here, however, it should be noted that the change in the Claimant's argument came about as a result of a document submitted by Iran a mere three weeks prior to the Hearing. In such a context the Claimant had little choice but to address this filing at the Hearing. Thus the Claimant's right to raise these new arguments at the time of the Hearing cannot be questioned.

29. No such issue is raised with respect to the newspaper articles and other documentary evidence presented by the Claimant at the Hearing and by the Respondent in its 7 March 1988 submission. The Tribunal expressly authorized the submission of these documents, all of which were in the public domain, by granting the Respondent the opportunity to respond to them and directing it both at the Hearing and in the 5 January 1988 Order to submit further documentation to clarify the ambiguities in the record.

30. The only issue of timeliness remaining is in respect of the Claimant's 24 June 1988 filing responding to Iran's post-Hearing submission. This submission was not authorized by the Tribunal in its 5 January 1988 Order. The Tribunal notes, however, that the official Order filed with the

submission was initially requested from the Respondent, which informed the Tribunal that such Order could not be located. On this basis the Claimant has supplied the Order and thus it should not be rejected as new evidence not previously requested by the Tribunal. Consequently, the Tribunal finds that it should be admitted.

31. In light of these findings the Tribunal must now reach the substance of the issue of the control of SKBM. The question of control under Article VII, paragraph 3 of the CSD is one of fact. DIC of Delaware and Tehran Redevelopment Corp., Award No. 176-255-3 (26 April 1985), reprinted in 8 Iran-U.S. C.T.R. 144. Here the evidence submitted by the Claimant shows that the assets of Mr. Amir Hossein Amir Faiz, a shareholder of SKBM, were expropriated by Iran in the Spring of 1979. Mr. Amir Faiz' name clearly is listed as number 181 in the official Order. The Minutes of the 16 June 1977 shareholders meeting submitted by the Respondent further show the breakdown of stock ownership at that time to have been the following: Mr. Amir Faiz - 46 shares (57.5%), Mr. Asgari Nazari - 27 shares (33.75%) and Mr. Asgari Pour - 7 shares (8.75%). The 31 October 1977 letter of the Corporate Registration Bureau, also submitted by the Respondent, confirms that this represented the last realignment in the company. Consequently, the documentary evidence in the record establishes that Iran expropriated Mr. Amir Faiz' shares in SKBM and that at the time of the expropriation he owned the majority of the shares in the Company. It is well established in prior awards of the Tribunal that control exists where Iran has assumed a majority ownership interest in the entity at issue. See Henry F. Teichmann and Hamadan Glass Company, Award No. 264-264-1 (12 November 1986), reprinted in 13 Iran-U.S. C.T.R. 124; Blount Brothers Corp. and Ministry of Housing and Urban Development, Award No. 74-62-3 (2 September 1983), reprinted in 3 Iran-U.S. C.T.R. 225.

32. Based on the foregoing, the Tribunal concludes that, as a result of the expropriation of Mr. Amir Faiz' shares, SKBM was a controlled entity of Iran within the provisions of Article VII paragraph 3 of the CSD as of 12 April 1979, the date of the official Order taking Mr. Amir Faiz' assets, and thereafter.

C. Statute of Limitations

33. The Respondent contends that the Tribunal lacks jurisdiction to hear the claim on the ground that Clause XVIII of the Claimant's employment contract (1) requires any claim arising therefrom to be filed in Iran, thereby excluding this claim from the Tribunal's jurisdiction, and (2) imposes a time bar on the assertion of a claim under the contract. Clause XVIII of the contract reads as follows:

It is agreed that no claims in regard to this contract will be made against the person or individual representing SKBM, but that any and all claims regarding the contract will be against SKBM solely. All claims filed against SKBM must be filed in Iran as SKBM has no affiliate doing business in its behalf, nor does SKBM conduct business in any country other than Iran. Any claims by the Employee against SKBM arising out of compensation or benefit due under this Agreement shall be made within sixty (60) days from the termination hereof. No claim shall be considered for payment after sixty days from the date of termination.

(Emphasis in original)

Accordingly, Iran argues that the Claimant's failure to assert and to file a claim in Iran within 60 days from the termination of his contract constitutes a bar to the Tribunal considering the claim at this juncture.

34. Initially, the Tribunal notes that the phrase "must be filed in Iran" does not divest it of jurisdiction over the Case. See, e.g., Ultra Systems, supra, at 9, reprinted in 2 Iran-U.S. C.T.R. at 105; Gibbs & Hill, Inc. and Iran Generation and Transmission Company, Award No. ITL-6-FT at 3-4 (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 236, 239-40.

The Tribunal has never held that such general language limits the Claimant to resolution of its claim through the Iranian courts or other Iranian legal structures.

35. Given the Tribunal's findings that the proper legal basis of the claim is the 24 January 1979 letter (see para. 38, infra), the Tribunal need not consider further the effect, if any, of the time limitation contained in Clause XVIII of the employment contract.

IV. THE MERITS

36. The Claimant contends that the failure of SKBM to pay him the sums agreed upon in his contract constituted a breach of that contract warranting an award of damages in the amount evidenced by the 24 January 1979 letter. Alternatively, the Claimant asserts that this letter itself constitutes an agreement which the Respondent failed to observe. The Respondent does not directly contest the debt, arguing rather that the Claimant left Iran of his own free will.

37. The Tribunal finds that whether or not the Claimant left Iran voluntarily is irrelevant to the claim as stated. The Claimant has established that he had a contract of employment with SKBM and that the contract was terminated prematurely by SKBM due to "the inability of the Company to meet its financial obligations at this time." In a letter signed by the Vice-President of SKBM on the date of termination SKBM undertook to "pay all benefits and return relocation allowances accruing to]the Claimant[on contract completion." In a separate calculation sheet attached to the letter SKBM calculated the amount owed to the Claimant as the amount that Claimant now asserts is due. Finally, in a second letter to the Claimant from SKBM, signed by the Vice-President of the Company on the date of termination,

SKBM again undertook to pay the Claimant the sum of U.S.\$5,987.11 upon ISIRAN forwarding such sums to SKBM and further stated that the obligation to pay was not dependent upon receiving such payment from ISIRAN. There is nothing in the file to indicate that the Claimant raised any objections to the terms of payment proposed in these letters.

38. This documentary evidence establishes that the Claimant's contract of employment existed, that it was terminated by SKBM on 24 January 1979 and that SKBM admitted that it owed him the sum now claimed. By Shinto's failure to object to the terms of the 24 January 1979 letter an agreement was reached on those terms. The failure of SKBM to fulfill its commitment pursuant thereto thus constituted a breach of this agreement. The Claimant is thus entitled to the amount requested.

V. INTEREST AND COSTS

39. Pursuant to Tribunal practice the Tribunal also awards the Claimant simple interest at the rate of 8.5% per annum from 24 January 1979, the date of the termination of his employment. Theodore Lauth, supra, at 20. Each Party shall bear its own costs of arbitration.

VI. AWARD

40. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

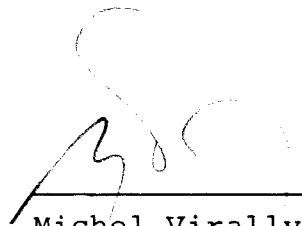
- a. The Respondent, THE ISLAMIC REPUBLIC OF IRAN, shall pay to the Claimant, HIDETOMO SHINTO, the sum of U.S.\$5,987.11 plus simple interest due at the rate of 8.5% per annum (365-day basis) from 24 January 1979 up to and including the date on

which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

- b. The above-stated obligation will be satisfied by payment to be made out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.
- c. Each Party shall bear its own costs of arbitration.

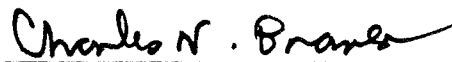
This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague
31 October 1988



Michel Virally
Chairman
Chamber Three

In the name of God



Charles N. Brower
Concurring Opinion



Parviz Ansari Moin
Dissenting Opinion