IRAN-U 340-100 S TRIBUNAL

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Case No. 340 Date of filing: 24 JULY 84

** AWARD - Type of Award _____

- Date of Award _____

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of MR. ANSARI - Dissent & Concur

- Date 24 JULY 84

10 pages in English 9 pages in Farsi

** DISSENTING OPINION of _____

- Date _____

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** OTHER; Nature of document: _____

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- Date _____

_____ pages in English _____ pages in Farsi

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IN THE NAME OF GOD

CASE NO. 340
CHAMBER THREE
AWARD NO. 133-340-3

CAL-MAINE FOODS INC.,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN and SHERKAT-E SEAMOURGH,

Respondents.

OPINION OF PARVIZ ANSARI
CONCURRING IN PART, AND
DISSENTING IN PART
TO THE AWARD

I. CLAIMANT'S CLAIMS AND GROUNDS OF ACTION

In its Statement of Claim, the Claimant has brought one principal claim consisting of a demand for the sum of approximately $500,000, and two ancillary claims arising out of the first, consisting of a demand for 20% interest

($100,000) in accordance with the terms of the Letter of Intent dated 14 April 1976, and a demand for costs.

Claimant's grounds for its action are, that Cal-Maine International Limited, a subsidiary of the Claimant company (CMI), by the aforementioned Letter of Intent concluded an agreement with an Iranian company, Seamourgh Incorporated, for the purpose of forming a company named Sea-Cal and made provision therein for certain specific rights and duties of the Parties thereto. These rights and duties included, inter alia, the provisions of paragraph 5 of the Letter of Intent, namely:

> "5) For a period of two years from the date Sea-Cal acquires ownership of the land to be used for the poultry complex, Cal-Maine shall continue to be a shareholder in the Sea-Cal. Upon expiration of the said two years Cal-Maine shall have the option either to continue as a shareholder or to sell all its shares in Sea-Cal to Seamourgh. This option must be exercised within 30 days after expiration of the said two years. Should Cal-Maine elect to exercise its option to sell its shares Seamourgh agrees to purchase such stock at a price which will be equal to the total capital paid in by CAL-Maine plus any retained but unpaid earnings or earnings to date which have not been allocated. However, in any event such price shall not be less than the total of Cal-Maine's paid in capital plus 20% percent interest. Seamourgh shall be entitled to a creditagainst the aforesaid interest in an amount equal to any cash dividend received by Cal-Maine during such period. Payment from Seamourgh to Cal-Maine shall be made as soon as possible after the expiration of the aforesaid 2 years period but in any event within 60 days after notice of Cal-Maine's intention to sell its shares." *

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* (translator's note: Quoted verbatim from the English original, without correction of the several erroneous or anomalous usages therein.)

Claimant alleges that its subscribed capital investment in Sea-Cal, amounting to approximately $500,000 (ie. 28% of the total subscribed capital of the company), has been lost as a result of the actions of the Respondents. The Claimant bases this allegation on three theories, in the alternative:

First, that CMI has been deprived of its interest in Sea-Cal as a result of the acts of expropriation by the Government of Iran, and that CMI is entitled to compensation in accordance with The Law for the Attraction and Protection of Foreign Investments in Iran, upon which Claimant had relied in investing its capital in Iran;

Second, that by assuming control over Seamourgh, which was in turn the parent company for Sea-Cal, the Government of Iran had consequently taken over control of the latter company as well, and that CMI was thereby deprived of its rights as a shareholder in Sea-Cal and was precluded from exercising the right, accorded it under paragraph 5 of the Letter of Intent, to sell its shares and receive an additional 20% in interest.

Third, that Seamourgh having had a contractual obligation towards CMI, the Government of Iran has an international obligation to honor said contractual obligations by virtue of having assumed control of Seamourgh.

In its Memorial dated 14 July 1983, the Claimant has advanced another claim, consisting of a demand for the sum of $155,054.65 in accounts receivable, representing the value and costs of services, parts and personnel, and in all it demands the sum of $651,694.66 plus interest at 10% per annum.

In the said Memorial, the Claimant has advanced another ground for its first claim (the demand for approximately $500,000), alleging that Seamourgh, acting through its wholly-owned subsidiary Moghava Sazi Shargh, purchased CMI's shares for $496,630.01 in July 1979, and that Seamourgh's obligation to pay the purchase price arises from paragraph 5 of the abovementioned Letter of Intent.

II. SEGMENTATION OF THE AWARD

1) Concurring Opinion

A) I concur in that portion of the Award where (the claim for) the accounts receivable is rejected by reason of the fact that said claim was submitted after 19 January 1982 and is therefore not cognizable. The point which is worth noting here is that any new claim by the Claimant cannot be considered covered by Article 20 of the Tribunal Rules, which deals with amendment of statements of claim and defence because-- aside from being prejudicial to the rights of the Respondent-- the bringing of a new claim, with a new amount sought and new grounds, is in clear violation of Article III, paragraph 4 of the Claims Settlement Declaration.

B) Neither interest nor costs were included in the Tribunal Award. Apart from the situation in the present claim, where nonpayment of interest and costs is obligatory, it is on principle neither just nor normal (to order) payment of interest or costs to parties in such an extensive and diverse arbitration process, the costs of which are borne equally by the Iranian and United States Governments (Article VI, paragraph 3 of the Claims Settlement Declaration). There are numerous instances of awards by the

Tribunal as well, in which neither interest nor costs have been awarded. See for example: Award No.35-219-2 dated 30 March 1983 (Benjamin R. Isaiah and Bank Mellat); Award No.117-199-3 dated 19 March 1984 (American Housing International, Inc. and Housing Cooperative Society of Officers of State General Gendarmerie, et al); and Award No.135-33-1 dated 22 June 1984 (Sea-Land Services, Inc. and The Government of the Islamic Republic of Iran).

In light of the foregoing, I concur in this respect in the Award.

2) Dissenting Opinion

In its decision with respect to the capital investment of CMI in Sea-Cal, the majority has held that Claimant is entitled to recovery of the sum of $496,630.01. The basis for the majority's contention is that Seamourgh, acting through Moghava Sazi Shargh, has purchased CMI's shares and is thereby obligated to compensate it for the purchase price. The majority explicitly states that the shares have been purchased by Moghava Sazi Shargh, and even that the minutes of the Sea-Cal Extraordinary General Meeting on 16 August 1979 reveal that the shares were purchased by Moghava Sazi Shargh; and further, that the stockholder list appended to the said minutes reveals Moghava Sazi Shargh to be the holder of 3500 shares, and CMI to hold no shares. Notwithstanding this fact, the majority has resorted to three pieces of evidence in finding Seamourgh liable for payment of the price of the shares:

> "First, it was Seamourgh which was responsible under the option agreement. Second, it seems unlikely that CMI would substitute a wholly-owned subsidiary for the parent, Seamourgh, as the obligor.

> Third, there was a memorandum of 1 December 1979 reflecting a credit to CMI of 35,000,000 rials for the purchase price of the shares. That document also shows that it was Seamourgh, not Shargh, which sought the permission of the Government of Iran to transfer the purchase price..."

The foregoing constitutes the main core of the majority decision, which is inconsistent with the facts and contentions in the case, with the legal rules applicable to the case, and even with the contents of the Award itself. For this reason, I dissent to the majority decision and state my reasons for rejecting said decision hereinbelow.

III. REASONING

1) The first point which must be taken up is that Moghava Sazi Shargh is not a respondent in the present case, and that the Claimant's Statement of Claim fails to make the slightest reference to said company or to the purchase of the shares through it. This issue was first introduced in Claimant's Memorial of 14 July 1983, and the raising of this new issue, which has totally altered the Claimant's grounds of action, cannot by any means be construed as constituting an amendment or supplement to the Statement of Claim on the basis of Article 20 of the Tribunal Rules. The Claimant itself was aware that it was unable to add a further respondent to the claim brought by it, and so it has set out to change its grounds of action in such a way as to succeed in attaining the very result precluded by the Rules. This method of changing the grounds of action is unquestionably prejudicial to the rights of the Respondents, and in this respect the majority decision stands in violation of the Tribunal Rules (Alternativa Petitio non est audiena).

2) In its decision, the majority expressly states that "the Tribunal does not find it necessary to decide whether the obligation of Seamourgh created by the Joint Venture Agreement to buy the Sea-Cal shares owned by CMI had matured, as contended by Claimant."

Notwithstanding the above, however, the majority is of the opinion that this very Agreement constitutes a part of the evidence for holding Seamourgh liable for payment of the purchase price, though said Agreement has no further bearing upon the present discussion and even the Claimant, by virtue of having changed its grounds of action, believes Seamourgh to be liable, aside from the Agreement, for payment of the purchase price by reason of having purchased the shares through Shargh.

3) The majority's other evidence is founded upon a futher illogical assumption, namely that it seems unlikely to the majority that CMI would substitute a subsidiary company (Shargh) for its parent (Seamourgh). Such a line of reasoning constitutes its own best refutation. Every company, whether a subsidiary or a parent company, possesses its own juridical personality and makes transactions on its own behalf; and one company cannot be held liable for the obligations of another, on the assumption that the first is the parent of the second and the latter the subsidiary of the former. Such speculative reasoning can never carry any legal weight ("An argument founded upon speculation is invalid").

4) The majority's third piece of evidence is a handwritten letter on a plain sheet of paper bearing neither a number nor a letterhead, dated 1 December 1979, addressed to Seamourgh Company's Financial Affairs Department and apparently signed by Mr. Ahmad Gerami. The contents of the letter

reveal that 3500 shares of Morgh-e Shomal (Private Joint-Stock) Company (Sea-Cal's new name) had been purchased from Cal-Maine at face value (35,000,000 rials), which sum should be transferred following agreement by the Ministry of Finance, and credited to the account of Cal-Maine. See: Claimant's Document No.57 in its volume of documentary evidence filed on 18 November 1983. Aside from the matter of its validity and authenticity-- which are highly questionable inasmuch as the letter could have been written at any time-- this letter, which is in the form of a routine internal memorandum, is on principle inconsistent in content with other, valid documents of the Parties which have been prepared on official office stationery and signed by numerous individuals.

The minutes of the Sea-Cal Extraordinary General Meeting of 16 August 1979, which has been mentioned in the majority Award, constitutes the first of these documents. According to the said minutes, which were prepared in the presence of all the shareholders or their proxies and lawyers and have been signed by a minimum of eight persons, the sale of CMI's shares to Moghava Sazi Shargh was confirmed, and the latter company is listed first in the stockholders list appended thereto with 3500 shares, with Seamourgh being listed second with 8995 shares. Therefore, if Seamourgh had acted to purchase the shares through Shargh, then Shargh could not have attended Sea-Cal's General Meeting as an independent shareholder with 3500 shares. See: Claimant's Document No.40, in its volume of documentary evidence filed on 14 July 1983.

The minutes of Morgh-e Shomal's (Sea-Cal's) Extraordinary General Meeting of 10 December 1979 constitute the second of the said documents. According to paragraph 4 of the minutes, which have been drafted on official office stationery of the said company and have been signed by a mini-

mum of eight persons, Moghava Sazi Shargh had resigned from its membership on the Board of Directors; moreover, its name is not be be found on the list of stockholders appended to the said minutes. See: Claimant's Document No.56, Exhibit B, in its volume of documentary evidence filed on 18 November 1983. Therefore, there would on principle have been no need for Shargh to resign and withdraw from the affairs of Morgh-e Shomal if it had not acted as a principal in purchasing the shares.

Based on the above, and upon the documentary evidence available in the present case, there can be no doubt as to the transfer of CMI's shares to Moghava Sazi Shargh. It is now necessary to examine whether the majority's contention that Seamourgh purchased the shares through Moghava Sazi Shargh possesses any legal credibility.

5) The laws of Iran govern the formation of Sea-Cal, the issuing and transfer of its shares, Shargh's alleged capacity as Seamourgh's proxy in purchasing the said shares, and all other issues arising therefrom. Nonetheless, the majority has failed to acquaint itself with the laws governing this transfer. Pursuant to Article 196 of the Iranian Civil Code, "The party making a transaction is the person to be held as bound thereby, unless express provision is made to the contrary at the time of concluding the agreement, or proof is subsequently submitted to the contrary..." The Article is based upon an important legal presumption, namely that the parties to a transaction are to be regarded as its principals and that it is necessary to present evidence in order to prove the contrary.

In addition, Article 231 of the Iranian Civil Code provides that contracts are binding only upon the parties

thereto or their legal locum tenens. On the basis of these two rules, only a party to a transaction is to be regarded as a principal thereto, and only he is bound by his agreement, unless proof is made to the contrary of these two important legal principles.

In the present case, the majority has no firm evidence for holding that Seamourgh is bound by the sale of the shares. In light of the official minutes of Sea-Cal's Extraordinary General Meeting as discussed above, and in view of Claimant's telex dated 5 July 1979 where it expressly states that it has agreed to sell the shares to Moghava Sazi Shargh (see: Claimant's Document No.24, in its volume of documentary evidence filed on 15 April 1983), as well as Letter No.4404-8-31 by the Office for Foreign Investments in Iran dated 8 September 1981, which confirms the sale of the shares to Shargh (see: Claimant's Document No.34, in the same volume of documentary evidence), there cannot possibly remain any doubt that Shargh acted as a principal in purchasing the shares; and the majority is unable to prove the contrary of this legal presumption merely by resorting to feeble and dubious assumptions and arguments.

Based on the foregoing, I dissent in this respect to the majority Award and conclude by rejecting the Claimant's claim in this portion as well.

Ansari

Parviz Ansari Moin