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ORIGINAL DOCUMENTS IN SAFE

Case No. 317

Date of filing: 9 Mar 88

** AWARD - Type of Award _____

- Date of Award _____

_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

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** DISSENTING OPINION of Mr Mostafavi

- Date 9 Mar 88

9 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

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In the Name of God

CASE NO. 317
CHAMBER ONE
AWARD NO. 298-317-1

SOLA TILES, INC.,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

DISSENTING OPINION OF MOHSEN MOSTAFAVI

For the reasons set forth below, I do not concur in the Award in the instant case:

1. The Claimant has not proved that he owned the claim continuously from the date on which it arose (14 June 1979) until the date on which the Algiers Declarations were concluded. Furthermore, even if we accept, in arguendo, that

Sola Tiles was established on 23 May 1979, the documents submitted in no way indicate that 51% of its shares belonged to United States nationals as at the date on which the claim arose. This is because those documents consist of the following:

a) A certification issued by the [City National] Bank [of Los Angeles] and an affidavit by an officer thereof, to the effect that the sum of $23,335 had been deposited to a private joint bank account by the Solomon brothers and Mr. Hachamoff between 21 May and 25 May 1979.

b) A certification and affidavit indicating that an account was opened in the name of Sola Tiles on 21 June 1979, and the sum of $2,600 deposited thereto.

None of these documents suffices to demonstrate continuous ownership of 51% of the shares by United States nationals. Even if we set aside all of the justifiable misgivings which arise in connection with the creation of this company (eg. whether it was really established to carry out commercial activities, or whether it was a strategm whereby to give an Iranian company an ostensibly American identity), and even if we can thus concur with the majority that "The ownership of 51% of Sola's shares by United States nationals is thus established as at 6 September 1979," nonetheless, in view of the fact that the claim arose on 14 June 1979, acceptance of the Tribunal's jurisdiction would be contrary to Article VII, paragraph 2 of the Claims Settlement Declaration, which provides that

> "'Claims of nationals' of Iran or the United States as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state..."

This is because it has in no way been established that United States nationals owned 50% or more of Sola's shares as at 14 June 1979. Moreover, the majority's argument that "No evidence has been adduced by the Respondent which suggests otherwise," is beside the point, because the Respondent does not have the duty to

produce evidence to this effect. After all, in order to determine whether or not it has jurisdiction over this claim, the Tribunal must consider the evidence submitted by the Claimant and decide whether the latter conforms to the relevant regulations, rather than impose the burden of proof on the Respondent.

A further important point relating to jurisdiction is, whether or not Simat's assets were transferred to Sola in a legal and proper manner, such as to enable Sola to bring a claim for expropriation thereof. There does not seem to be any doubt that Mr. Hachamoff was able, under Simat's Articles of Association, to assign the company's assets. It is definite, however, that he was required to exercise his authority in conformity to the law. Simat was an Iranian company, and its transactions were subject to the provisions of Iranian regulations. In addition, there can be no doubting the fact that according to recognized principles of international law, that law which governed transfer of the shares was that of the place where those shares were issued and the company was domiciled (see: Cheshire and North, Private International Law, 10th ed., pp.555-6).

Pursuant to Article 103 of the Iranian Commercial Code, a transfer of shares can be effected only by means of a formal instrument. And according to Article 1287 of the Iranian Civil Code,

> "Documents which have been drawn up in the Bureau for the Registration of Documents or in notary publics' offices, or before other officials, within the limits of their competence and in accordance with legal regulations, shall constitute formal instruments."

Of course, the majority believes as well, that "there is no dispute that the correct form of notarization was not obtained." It adds, however, that

> "the Government of Iran cannot be permitted to rely on such a defect vis-a-vis Sola, given that it was itself responsible for the

> circumstances which made strict compliance with legal formalities impossible. Mr. Hachamoff could not return to Iran, and the power of attorney which he had granted to Ms. Eliassi to enable her to conduct Simat's affairs in his absence had been declared invalid."

With respect to the asserted presentation of the assignment document, the majority relies upon Mr. Hachamoff's statement as well:

> "Mr. Hachamoff told how he took the assignment document, in Farsi, to the Iranian Consul in San Francisco and signed the document in the presence of the Consul, who then affixed a rubber stamp and added his own signature. The Consul kept the original and, after initial reluctance, provided a photocopy for Mr. Hachamoff to retain."

The Respondent presented a witness to the Tribunal who had been a political officer at the Iranian Consulate in the United States at that time, and who explicitly testified that a different kind of stamp was being used by the Consulates at that time, and that Consuls did not have the authority to notarize such documents (indeed, even Mr. Hachamoff himself commented that the Consul had told him that he lacked the power to notarize such a document.) This witness also gave a number of examples of how documents were notarized, showing how and in what terms they were notarized on their reverse side, none of which formalities had been observed with respect to the document submitted here. He also testified, as someone who was familiar with that Consul's signature, that the said signature bore no resemblance to that of the Consul. Regrettably, however, and notwithstanding all the above, the majority does not even so much as mention this witness in its reasons for the Award; instead it relies solely upon the statements of Mr. Hachamoff and his witness (who was in fact his employee). Moreover, it is beside the point to rely upon Ms. Eliassi's power of attorney and to assert that it was declared invalid, because this power of attorney explicitly gave its holder

> "power of attorney to look after all of the movable and immovable property of the Principal, to engage in all manner of transactions whether final or conditional, or mortgage or rental... to resort to the various Iranian banks and to receive the principal of, and

interest on, deposits and savings of the Principal..."*

It thus had nothing to do with managing Simat's affairs and bank accounts; rather, it related solely to Mr. Hachamoff's personal property. Unfortunately, however, by adding the word "business" in the English translation of this power of attorney (the original of which is in Farsi and French), [the Claimant] broadened its purport to include the company's affairs as well, and in this way fabricated evidence in support of his claim. The Parties' relative position in this argument is such, that my colleagues have gone so far as to state that

> "The Tribunal is satisfied that Mr. Hachamoff, on Sola's part, made every effort possible in the circumstances to comply with any formal legal requirements and to ensure that the Iranian authorities had notice of the assignment. Whatever the result with respect to a third party, it would be inequitable to find the assignment invalid vis-a-vis the Government of Iran on the sole ground that the steps taken by Mr. Hachamoff fell short of the formal requirements of Iranian law." !

2. In taking up the claims on the merits, the majority operates on the assumption that the Claimant was placed in a disadvantageous position with respect to production of evidence in proof of his claim, and therefore that he could not be expected to submit his best evidence in support thereof. In fact, however, the available evidence in the case strongly indicates that the Claimant was entirely capable of submitting sufficient documentary evidence but intentionally withheld it -- finding it detrimental to his case -- on the pretext that he lacked access to the said evidence. Therefore, rather than release the Claimant from his obligation to

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> * [Retranslated from Farsi original. The English translation submitted by the Claimant reads, in relevant part, as follows:
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> "Giving power of attorney to appointee, to handle all his business and properties, furniture and buildings. To sell them; to buy; to rent them to anyone; at any rate; any price; and any conditions ... The appointee can make requests to any... bank, etc., to receive or pay any necessary money..."]

provide further evidence, the Tribunal should use his withholding of evidence against him, so as not to permit the Claimant to profit from this misrepresentation of the facts. While Mr. Hachamoff states explicitly on page 3 of his Affidavit that

> "I therefore gathered up as many of my business records and documents that I could carry in a couple of suitcases and left Iran on the last flight from Teheran Airport to Israel,"

he has submitted only a small number of invoices-- deficient ones at that. His allegation that some of these documents were left behind in Iran is totally incorrect as well, because when officials of the Committee entered the home of Mr. Hachamoff (with the consent of his employees) and, in the presence of both of the said employees inventoried what remained, no documents were to be found. Mr. Hachamoff and his employees remained in communication throughout the six months from [his departure from Iran in] January 1979 down to the alleged expropriation in June of that year, and there can be no doubt that if any documents did still remain in Iran, they would have been sent to him, particularly inasmuch as Mr. Hachamoff states in his Affidavit:

> "By assigning Simat entirely over to the control of Sola Tiles, an American corporation, I thought that the American company would be able to either continue to do business in Iran or could safely secure the valuable assets of Simat..."

It thus goes without saying that Mr. Hachamoff would have needed a full set of the company's documents for the purpose of making such an assignment which, it has been asserted, took place in the month of May, had it been effected for proper reasons and not as a subterfuge. Moreover, since postal services were operating and Mr. Hachamoff states that he was in daily contact with his staff by telephone, there was nothing whatsoever to prevent him from gaining access to his records. Indeed, Mr. Hachamoff has even refused to produce the balance sheet mentioned in the text of the alleged assignment document. At the Hearing conference, we all witnessed the scene where Mr. Fekrati stated that he had obtained a writ from the court for the purpose of attaching Mr. Hachamoff's

property, since the latter had not paid the rent on his house, whereupon Mr. Hachamoff immediately produced a set of checks in order to prove that he had always paid his rent-- even though the issue of whether or not he had paid his rent had no bearing whatever on the task before the Tribunal. Such meticulousness in maintaining records is not unusual in a businessman, and this approach is surely not restricted to the rent on Mr. Hachamoff's home. It can thus be taken for granted that in failing to produce his documents, the Claimant was seeking to claim an inordinately large amount. While it is true that the Respondent made a late filing of the records relating to the Claimant's bank account, the discrepancy between the balance reported by the bank and that alleged by Mr. Hachamoff clearly reveals this intention. Therefore, where the Tribunal has such evidence right before it, it should not disregard such evidence and thereby permit the Claimant to use his assertion of lack of access to evidence for improper ends.

In weighing the Claimant's claim, the instant Award has admittedly tried to compare it to the report by Mr. Barilli and the testimony of Mr. Muratori. Unfortunately, however, my colleagues have not only deemed it unnecessary to analyze this report and testimony in order to clear up any problems pertaining thereto, but they have regarded Mr. Fekrati's testimony in such a peculiar light that they even adduce it in support of the Claimant's claim. As is stated in the Award,

> "At the hearing of the claim, evidence was given by Mr. Nureddin Fekrati, an attorney who had been instructed by the landlord of the premises rented by Simat in Tehran to commence proceedings for the recovery of rent arrears. Having obtained a judgment in his client's favour, he proceeded to obtain a writ of attachment and visited the property to ascertain the value of goods available for seizure in execution of the debt. Mr. Fekrati stated that he was able to seize the telephone line at the showroom, but that there was little else of value. In the event that the company's assets had been expropriated, Mr. Fekrati said, there would have been no possibility that the attachment would be allowed to proceed."

From these statements, the majority immediately draws the conclusion that

> "Mr. Fekrati's statement that there was nothing other than a telephone at Simat's premises is entirely consistent with a finding that the assets of the company had been expropriated at some earlier date. In the view of the Tribunal, the weight of the evidence does not support the Respondent's argument that Simat had been abandoned by its owners."

Regrettably, the Tribunal did not take into account the point that the telephone line would not have been left behind, being something of value -- particularly at a place of business -- if the company's assets had been expropriated; surely, if this telephone line were not expropriated before all else, it would at least have been taken along with the other goods. The Tribunal has apparently forgotten that the Respondent showed a film of the road leading to the Claimant's alleged warehouse, in order to demonstrate, contrary to the assertion of Mr. Pour-Ebrahimi (an employee of the Claimant), that it was impassable to containers. In that film, Mr. Ibrahimi , Simat's sales representative, explained how Mr. Hachamoff had gotten his property out of Iran. This film is nowhere reflected in the present Award. More important still, when Mr. Hachamoff's house was searched, there was nothing to be found except for some worthless used and dilapidated things. Unfortunately, this matter is described in the Award in such a way that it is actually taken as corroborating the claim that the goods supposedly existing in the warehouse had been expropriated. (paragraph 36 of the Award). And yet, according to that same proces verbal, the items found in Mr. Hachamoff's house were turned over to Mr. Pour-Ebrahimi for safekeeping, a measure which is nowhere reflected in the Award.

The majority concludes, in light of Mr. Barilli's statement in his letter of 18 July 1983 to Mr. Hachamoff that "you attributed to your assets a value of US$ 750,000," that

"A value contemplated by a serious potential investor on the basis of professional advice offers a well-founded starting point for the Tribunal's own assessment of Simat's value during the latter part of 1979."

Mr. Barilli's report examined Simat's value solely from the legal, rather than financial, point of view. Therefore, since this letter was written more than four years after Mr. Barilli's report, it cannot be regarded as a contemporaneous document or as an assessment "by a serious potential investor." It can, of course, be regarded as testimonial evidence, but it should be noted that three individuals presented testimony on behalf of the Respondent, as against this testimonial evidence. The Tribunal did not so much as mention the testimony of two of these witnesses in its Award, while with respect to that of Mr. Fekrati, it has viewed it in the peculiar light already discussed above. Furthermore, although Mr. Muratori repeats the same points made by Mr. Barilli, he was not involved in the appraisal of Simat, and merely stated what he had heard from Mr. Barilli. Thus, such testimony cannot serve to confirm the figures provided by the Claimant in this case on the basis of his memory, a Claimant who could have provided written evidence in this connection but did not. Since the tiles had been purchased in Italy, the Claimant could easily have obtained and provided the Tribunal with copies of the relevant orders, shipping documents, and receipts, rather than request an attorney to submit an unreliable financial opinion four years after his visit. I am not surprised that the Claimant would resort to such evidence in support of his claim, but I am surprised that the Tribunal would accept it and then render an award against the Respondent on the basis thereof.

The Hague,

Dated 9 March 1988

Sayyed Mohsen Mostafavi