IRAN-UNITED STATES CLAIMS TRIBUNAL

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91

ORIGINAL DOCUMENTS IN SAFE

Case No. 368 368-91 Date of filing: 10 Nov '93

** ~~AWARD~~ - ~~Type of Award~~ Final

- Date of Award 10 Nov '93

58 pages in English — pages in Farsi

** DECISION - Date of Decision _____

_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CHAMBER THREE
CASE NO. 368
AWARD NO. 551-368-3

UNIDYNE CORPORATION,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN
acting by and through
THE NAVY OF THE ISLAMIC
REPUBLIC OF IRAN,
Respondent.

AWARD

Appearances:

For the Claimant:

Mr. John F. Mardula,
Counsel;
Mrs. Joretta Watts,
President;
Mr. David Conner,
Vice-President;
Mr. Al Mendis,
Mr. Jim Gurley,
Project Managers;
Mr. Clay Rogers,
Product Development.

For the Respondent:

Mr. Ali H. Nobari,
Agent of the Government of the Islamic Republic of Iran;
Mr. H. Mehdizadeh,
Legal Adviser to the Agent;
Mr. M.H. Zahedin,
Assistant Legal Adviser to the Agent;
Mr. Rajab Khodayari,
Representative, Ministry of Defence;
Mr. Z. Ghazi Shariat Panahi,
Representative, Iranian Navy;
Mr. Abbas Nasrollahi,
Representative, Iranian Navy.

Also present:

Mrs. Lucy F. Reed,
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.

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I. INTRODUCTION

1. This Case concerns a claim brought by UNIDYNE CORPORATION (hereinafter referred to as "Unidyne" or the "Claimant"), a corporation allegedly organized under the laws of the Commonwealth of Virginia, against THE ISLAMIC REPUBLIC OF IRAN ~~acting by and through the NAVY OF THE ISLAMIC REPUBLIC OF IRAN~~ (hereinafter referred to as the "Navy" or the "Respondent").

2. On 1 November 1977 Unidyne concluded a contract with the Navy pursuant to which Unidyne was to develop a system of scheduled "Maintenance and Material Management" for a number of the Navy's vessels (the "Contract" or the "Agreement").[1] The total Contract price was U.S.$3,609,382.00, part of which has been paid by the Navy. Unidyne claims U.S.$1,317,210.00 as "the reasonable value of the services performed and the equipment and material furnished for which Unidyne has not been compensated." The Respondent, asserting that Unidyne's performance was late, defective and incomplete, presents a counterclaim in the total amount of U.S.$5,235,561.47 plus Rials 11,555,000.00.

II. PROCEDURE

3. As a result of Presidential Order No. 61 filed on 19 April 1988, this Case was reassigned from Chamber One to Chamber Three.

4. On 18 January 1982 Unidyne filed its Statement of Claim. On 14 and 15 February 1983 the Respondent submitted a Statement of Defence and Counterclaim with supporting exhibits. On 21 April 1983 the Claimant filed a Statement concerning the Tribunal's jurisdiction, a Reply to which was filed by the Respondent on 24 October 1983. The Claimant filed a Supplemental Statement regarding Jurisdiction on 26 July 1985. Unidyne

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[1] A more detailed overview of the essential provisions of the Contract follows in paragraphs 22 et seq., infra.

submitted a Reply to the Navy's Counterclaim on 16 May 1983. The Respondent filed a Rejoinder on 5 December 1986.

5. By Order of 12 December 1986 the Tribunal directed the Parties to file "copies of any additional written evidence on which they will seek to rely together with a list of all documentary evidence submitted by them." The Order further stated that "each Party may file a Hearing Memorial explaining the evidence and summarizing the issues in this Case." The Claimant and the Respondent each filed a list of evidence on 16 March and 9 October 1987, respectively. On 6 July 1988 the Navy filed a Brief and Evidence in Rebuttal.

6. On 22 August 1990 the Claimant submitted a list of the witnesses it would present at the Hearing. Those witnesses qualified as rebuttal witnesses under Note 2 to Article 25, Paragraph 1, of the Tribunal Rules. No witnesses were designated by the Respondent.

7. The Hearing was held on 7 September 1990. At the Hearing, the Claimant attempted to submit in evidence its Articles of Incorporation and the birth and death certificates of Mr. Raymond Watts in support of its position that Unidyne qualifies as a national of the United States under Article VII, Paragraph 1, of the Claims Settlement Declaration. It is evident that Unidyne could have submitted all of the documents in question to the Tribunal together with its earlier filings. Furthermore, Unidyne has given no adequate explanation for the delay in their submission. The Tribunal therefore determines that these documents are inadmissible due to late submission.

III. JURISDICTION

A. The Parties' contentions

8. Unidyne states that it is "a corporation duly organized and existing under the laws of the Commonwealth of Virginia, with its principal place of business in Virginia, and a national of

the Commonwealth of Virginia, United States of America." As to the Respondent, Unidyne asserts that the "Navy of the Islamic Republic of Iran is a wholly owned instrumentality or agency of the Islamic Republic of Iran and is controlled by the Islamic Republic of Iran and is the successor-in-interest to the Imperial Iranian Navy."

9. The Navy does not dispute that it is an agency of the Islamic Republic of Iran. As to the Claimant, the Navy points out that

> legal action may be brought against Iran in the event that the Claimant is of U.S. nationality and fulfils [sic] the conditions required by [the Claims Settlement Declaration]; the burden of proof for such eligibility lies on Unidyne's shoulders.
>
> The veracity of the documents appended to the Statement of Claim is thrown into doubt due to the lack of certification.

Based on the alleged absence of evidence of the Claimant's nationality, the Navy requests the Tribunal to dismiss the Claim for lack of jurisdiction.

10. The Respondent further argues that the forum selection clause contained in Article 3.4.12 of the Contract divests the Tribunal of jurisdiction to hear the Claim.[2] The Navy asserts that this clause assigns the final decision in the event of a dispute to the Iranian Courts. The Respondent argues that this clause therefore meets the exemption provision of Article II, Paragraph 1, of the Claims Settlement Declaration relating to contracts "specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts."

11. In reply to the Respondent's argument, the Claimant argues that both the express language and the context of the

[2]For the text of that clause, see paragraph 17, infra.

clause make clear that it only covers "questions of fact," and not questions of interpretation or execution or any other questions of law relating to the Contract. Citing a number of Tribunal precedents, the Claimant points out that the Tribunal has decided in other cases that it has jurisdiction when the relevant contract clause provides for determination by Iranian Courts of some, but not all, disputes that might arise. Unidyne further argues that it is also entitled to recover under theories of quantum meruit and unjust enrichment, and that, as these theories need not rely upon any express contract, there is no applicable forum selection clause precluding the Tribunal's jurisdiction. Finally, Unidyne argues that, in any event, the forum selection clause is not binding in view of the changed conditions in the Iranian legal system since the negotiation of the Contract.

12. The Respondent replies that the Parties to the Contract clearly intended the clause to cover all disputes, and not just those relating to questions of fact. It would be illogical for the Parties to have provided merely for the method of settlement of some, and not all, of their disputes. Also, the Navy argues, questions of law necessarily relate to issues of fact. The Respondent asserts that the Tribunal precedents cited by Unidyne do not apply to this Case. As to Unidyne's further arguments in favor of the Tribunal's jurisdiction, the Navy argues that: as the "decision of the arbitrator is not binding and, a fortiori, final and conclusive," it "is therefore only the competent court of Iran that settles all disputes in every respect;" that application of theories of quantum meruit and unjust enrichment does not preclude the jurisdiction of the Iranian Courts on the basis of the Contract clause; and that the Tribunal has previously rejected the argument that forum selection clauses in contracts concluded with Iran are not binding in view of changed circumstances.

B. The Tribunal's findings

1. The Claimant's nationality

13. A review of the Contract and the correspondence between the Parties suggests that Unidyne is a company incorporated in the United States and that it maintained its principal place of business, at least for the purposes of the Contract, in Norfolk, Virginia. Furthermore, the Tribunal takes note of a United States judicial decision vacating Unidyne's attachments against Iranian assets, in which Unidyne is described as "a Virginia corporation with its principal place of business in the State of Virginia." Unidyne Corp. v. Government of Iran et al. 512 F Supp. 705, 707 (E.D.Va. 1981).

14. In its submissions prior to the Hearing, however, the Claimant failed to file evidence supporting the assertion that, from the date the Claim arose until 19 January 1981, fifty per cent or more of its stock had been held, directly or indirectly, by citizens of the United States.

15. At the Hearing, the Claimant's witnesses testified regarding Unidyne's status as a United States corporation. Mrs. Joretta Watts, the President of Unidyne and the holder of seventy-one per cent of its shares, testified that her husband, Mr. Raymond Watts, founded Unidyne in 1970 and that he remained its majority owner until his death in 1984. Mrs. Watts further testified that her husband was a United States citizen, born in West Virginia. Mr. David Conner, Vice-President and General Manager of Unidyne, testified that he had known Mr. Raymond Watts since 1969 and knew him to have been both a United States citizen and the majority owner of Unidyne until 1984.

16. In the Tribunal's view, the statements made at the Hearing by Unidyne's President and majority owner and its Vice-President, provide adequate basis for concluding that more than fifty per cent of Unidyne's capital stock was continuously held by a citizen of the United States, namely Mr. Raymond Watts, from

the date the Claim arose until 19 January 1981. Furthermore, the testimony of Mrs. Joretta Watts and David Conner regarding the nationality of the majority of the Claimant's shareholders is in line with most other elements in the file relating to Unidyne: the Company is incorporated under the laws of Virginia; its principal place of business is in Virginia; most if not all of its officers are United States nationals. Given that Unidyne does not appear to have any links with a country other than the United States (apart, of course, from Iran where the Contract was performed), it seems unlikely that the majority of the shares would be in the hands of a foreigner. The Tribunal therefore determines that there is sufficient evidence in the record to satisfy the jurisdictional requirements established by Article VII, Paragraphs 1 and 2, of the Claims Settlement Declaration. See Economy Forms Corporation and Government of the Islamic Republic of Iran et al., Award No. 55-165-1, p. 9 (13 June 1983), reprinted in 3 Iran-U.S. C.T.R. 42, 47; see also Cosmos Engineering, Inc. and Ministry of Roads and Transportation, Award No. 271-334-2, p. 2 (24 Nov. 1986), reprinted in 13 Iran-U.S. C.T.R. 179, 180.

2. The forum selection clause

17. The forum selection clause contained in the Contract reads as follows:

> Except as may be otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be initially settled by the Director, T.D., IIN, who shall mail or otherwise furnish a copy of his decision to the Contractor. The decision of the Director, T.D., IIN, shall be final and conclusive unless, within 30 days from the date of receipt of such copy the contractor delivers to the Commander-in-Chief, IIN, a written appeal. The decision of the Commander-in-Chief, IIN, or his duly authorized representative for such matters, shall be final unless the contractor delivers within 30 days thereafter, a written appeal to the Commander-in-Chief, IIN, in which case the dispute shall be referred to and settled by arbitration as follows: Both parties shall name an arbitrator and a third shall be appointed by mutual consent of the two

> arbitrators themselves, and the three arbitrators shall jointly decide the issue.
>
> If the dispute is not settled by the arbitrators within a reasonable length of time; if the parties cannot agree upon the third arbitrator or if any one party refuses to accept the decision of the arbitrators, the dispute shall be referred to the appropriate court of Iran. The decision of the arbitrators, if accepted by the parties or the decision of the courts of Iran shall be final and may be inforced [sic] or judgement thereon may be entered in any court having jurisdiction.
>
> Pending final decision of a dispute hereunder, the contractor shall proceed diligently with the performance of this contract.

18. The question whether the forum selection clause divests the Tribunal of jurisdiction over the Claim must be considered in light of Article II, Paragraph 1, of the Claims Settlement Declaration. That provision excludes from the Tribunal's jurisdiction claims "arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts."

19. In Ford Aerospace and Communications Corporation, et al. and Air Force of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 6-159-FT, p. 4 (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 268, 270 the Full Tribunal noted that in order to exclude the Tribunal's jurisdiction, the contractual choice of Iranian Courts must cover any claims arising under the contract. In this connection the Full Tribunal held that

> [i]mportant aspects of the contract including some of the Claimant's obligations to be performed outside Iran and all the Respondents' obligations such as payment have been left outside the jurisdiction of the selected courts. Such limitation of the jurisdiction places Article 9 of the contract outside the requirement that the Iranian courts must be solely competent for any disputes arising under the contract. Therefore, the Tribunal is not prevented by Article 9 from asserting jurisdiction over all claims arising under this contract.

See also American Bell International and Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 41-48-3, pp. 12-13 (31 May 1984), reprinted in 6 Iran-U.S. C.T.R. 74, 80-82; Itel International Corporation and Social Security Organization of Iran, et al. Interlocutory Award No. ITL 43-46-2, pp. 4-5 (22 June 1984), reprinted in 7 Iran-U.S. C.T.R. 31, 33-34.

20. The forum selection clause in this Case, by its terms, applies to "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement." This language clearly distinguishes between a "question of fact" and one of law, such as, for example, a question of interpretation of the Contract itself or of the Parties' obligations thereunder. Moreover, the express terms of the forum selection clause indicate that the Iranian courts have jurisdiction over questions of fact only if the parties cannot mutually agree on the composition of the arbitration panel or one of the parties rejects the decision of the arbitrators. Therefore, the Tribunal determines that the limitation on the scope of the Contract's forum selection clause places the clause outside the requirement of the Claims Settlement Declaration that the Iranian Courts must be "solely" competent as to "any disputes" arising under a contract.

21. Accordingly, the forum selection clause in the Contract at issue does not preclude the Tribunal from exercising jurisdiction over the Claim and Counterclaim.

IV. THE TERMS OF THE CONTRACT

22. As described by the Claimant, the Contract, which was signed on 1 November 1977, called for the establishment of a program which, through the generation, collection and monitoring of various forms, would maintain accountability of maintenance and repair actions to be performed by the Navy. As part of this so-called "3M" program ("Maintenance and Material Management"),

Unidyne was to develop and deliver a Planned Maintenance System ("PMS") designed to reduce equipment out-of-service time. This is a preventive maintenance program to keep shipboard equipment and systems in near perfect operating condition and thereby maintain fleet readiness by reducing breakdowns and extending equipment service life. The Claimant was to develop, manufacture and deliver the materials, schedules and library equipment necessary to administer this program for every ship in the Iranian Navy.

23. In the words of the Respondent, the Contract was for the preparation and performance of a standard and single repair and maintenance program for the vessels of the Iranian Navy, similar to that existing in the United States Navy. Through the exercise of scheduled and standard programs, books, publications, and technical software, all vessels were to be serviced and maintained as prescribed. The Respondent has listed the following principal aims of the program:

a) creation of a standard and uniform system of reparation and maintenance at the level of various floating units of the Navy;

b) timely servicing of the sets;

c) diminishing the unexpected reparation of sets and systems;

d) raising the operational and yielding ability of the sets and systems;

e) increasing the life of sets, equipment and systems; and

f) consequently, reducing the costs of reparation and maintenance, reducing the budget required and, finally, progressively achieving the organizational aims and duties of the Navy.

24. The Respondent's pleadings identify the following obligations for the Claimant pursuant to the Contract:

1. to carry out extensive studies and comprehensive investigations regarding the records of reparations of the

eqipment [sic] and sets of the Navy's vessles [sic] and smaller units;

2. to prepare training publications and books in several hundred copies and to deliver them to the Navy;

3. to prepare and deliver to the Navy the management guide book of reparations and materials in several hundred copies;

4. to prepare thousands of forms regarding the process of repairing and maintaining the sets and to propagate them in several million copies to be delivered to the Navy;

5. to prepare a technical library with equipment and other requirements for the follow up of the 3M System;

6. to train the Navy personnel to such an extent that they can directly undertake, upon completion of the contract, the reparation and maintenance of ships and launches and the equipment and the paraphernalia thereon on the basis of the 3M System;

7. to procure for the Navy various software and hardware;

8. to install on the related equipment the cards, the softwares and the hardwares;

9. to test the launched system after the installation of softwares and hardwares, and to set aright the deficiencies and defects detected; and

10. to rectify at its own expense upto [sic] two years after completion of the contract and the [sic] test and hand over of the system any defects and deficiencies and troubles that may come forth.

25. It appears from the above that the agreement had five major components: (1) a preliminary screening of the Navy's maintenance records, (2) the preparation and delivery to the Navy of various materials (forms, books, software and hardware), (3) the training of Navy personnel, (4) the installation and the testing of the program, and (5) a two-year guarantee period. The Contract (not including the guarantee period) had an anticipated duration of 24 months.

26. According to Article 3.1 of the Agreement, the consideration for the work that needed to be performed by the Claimant amounted to U.S.$3,609,382.00. Article 3.3 of the Contract divides the Claimant's assignment into different

elements. Upon its completion, each such assignment together with an invoice therewith was to be submitted to the Respondent for approval.

27. Article 3.2.1 provides for the down payment by the Respondent of twenty percent of the consideration, totalling U.S.$721,876.00. The Respondent transferred this amount to the Claimant after having received a bank guarantee for a sum equal thereto in accordance with Article 3.4.11 of the Contract. Article 3.2.1 furthermore provides that, in order to reimburse the Respondent for the down payment, the Respondent would reduce each performance payment by twenty percent until the down payment was liquidated.

28. The Respondent also obtained a performance bond from the Claimant in the amount of U.S.$144,375.00 in accordance with Article 3.2.1 of the Contract. Finally, as required under the same article, on 4 December 1977 the Navy's bank, at its request, opened a letter of credit with the National Westminster Bank of London in favor of the Claimant for the total amount of the consideration. After approval of the invoices, payment was made by submitting the approved invoice to the National Westminster Bank of London for a draw down against the letter of credit.

V. GENERAL DESCRIPTION OF THE CLAIM AND THE COUNTERCLAIM

29. In its Statement of Claim, Unidyne sought compensation in the amount of U.S.$1,897,423.00 plus interest. At the Hearing, however, the Claimant reduced the principal amount of relief sought to U.S.$1,317,210.00. The Claimant maintains that it is entitled to such compensation because the Navy breached the Contract by:

a. failing to make timely and reasonable review and approval of materials submitted by the Claimant;

b. failing to make timely and complete payment on invoices;

c. failing to provide for the passage of material through Iranian customs;

d. failing to schedule training sessions provided for in the Contract;

e. failing timely to construct and adequately to equip ships for inspections scheduled by the Navy and to be performed by the Claimant; and

f. failing timely to make arrangements to allow the Claimant to complete the Contract.

30. In addition, the Claimant maintains that the Navy expropriated certain equipment and furniture at the time its personnel was forced to leave Iran. The Claimant also seeks compensation for various costs and expenses as a result of the decreased efficiency of personnel and in the areas of housing and storage, which were incurred because of the Respondent's alleged actions commencing in September 1978. Finally, the Claimant seeks an award for costs of legal representation.

31. The Respondent denies that it defaulted under the Contract and maintains that, on the contrary, the Claimant failed to abide by its contractual obligations. More specifically, the Respondent alleges the following violations of the Contract by Unidyne:

a. delay in performance;

b. delivery of defective materials;

c. failure to deliver all materials;

d. failure to install and test the program;

e. failure to evaluate and correct the program subsequent to its installation;

f. abandonment of the site without its consent;

g. failure to extend the guarantees provided for in the Contract; and

h. failure to comply with undertakings to continue performance separate from the Contract.

32. In its Memorial in Rebuttal, the Respondent calculates its purported damages at U.S.$5,083,223.42. In addition thereto, the Respondent maintains that the total sum it paid to Unidyne in consideration for the work performed exceeds the value of such work and claims the amount overpaid totalling U.S.$152,338.05. Finally, the Respondent contends that the Claimant still owes the Iranian Social Security Organization certain amounts in connection with its work in Iran. Initially, it contended that the latter sum due amounted to Rials 23,650,596.00. In its Memorial in Rebuttal, however, the Respondent reduced this amount to Rials 11,555,000.00. Finally, the Respondent also claims interest and U.S.$ 83,100.00 as costs of the arbitration proceedings.

VI. THE CLAIMS

A. The Navy's alleged failure to make timely and reasonable review and approval of the materials submitted

1. The Parties' contentions

33. The Claimant maintains that "the delivery of services and materials by Unidyne was specifically agreed to be based upon a critical path of performance which required timely approval by [the Navy] of submissions by Unidyne." According to the Claimant, the Respondent not only failed timely to approve those submissions, but its review thereof was unreasonable and erroneous. The Claimant maintains that it consequently was

forced "to expend many needless man-hours researching comments of [the Navy] on items that ultimately were found to require no revision." In support of this contention, the Claimant included a "sample list of dates of submissions and approvals for representative segments of the contract." This list purportedly proves that the time required by the Respondent to approve the submissions consistently was longer than the fifteen day period applicable for such approval.

34. The Respondent replies that delays in approval, if any, resulted from the fact that the materials delivered by the Claimant were defective and that the Navy exercised its right to notify Unidyne of such defects under the Contract. Moreover, the Respondent argues that the Navy had a period of 45 days to effect payment and that "invoices submitted for completed and acceptable material were settled prior to the deadline."

2. The Tribunal's findings

35. The timing of the acceptance or rejection of Unidyne's submissions is governed by Article 3.2.1 of the Contract. This provision states: "[u]pon submission of each completed work element ... and the invoice therefore [sic], the [Navy] will indicate its acceptance or rejection thereof within 15 days and when acceptance is made, will effect payment within 30 days."

36. It must be observed that the above provision does not require approval by the Navy within fifteen days of the delivery of the materials but only that a decision to accept or reject Unidyne's submissions be made within such period and that Unidyne be notified thereof. Consequently, the fact that the Claimant's comparative list referred to in paragraph 33, supra, indicates that the Respondent did not approve several of the work items within fifteen days of their delivery does not by itself establish that the Navy's later approval was untimely. Indeed, such delay may well have been caused by the need to rectify the materials as a result of legitimate comments made by the Navy. Therefore, in order to determine whether the Navy's approval of

Unidyne's materials was delayed unduly, account must be taken of the Claimant's next argument, namely that the Respondent's review of the submissions was unreasonable.

37. The Claimant contends that, as a result of the Navy's inordinate scrutiny of its submissions, it incurred substantial costs that were uncalled for, because it was forced to evaluate comments that proved to be without merit. In support of this allegation, the Claimant submitted a copy of a letter it had sent to the Navy on 1 December 1978 in reply to the Navy's remarks regarding the "F Class Package," which it then had delivered. In that letter, the Claimant complained that it had expended "many ... man-hours ... needlessly due to excessive review time on [materials delivered] that were basically correct." According to Unidyne, these problems arose because the Navy's "review group did not have access to the proper reference documents to verify their comments prior to submission."

38. The letter of 1 December 1978 clearly expresses Unidyne's irritation at a particular stage of the Contract regarding what were perceived as unreasonable comments on the part of the Navy. In the context of this Claim, however, this letter cannot be considered in isolation from the rest of the record. Although it appears that only a selection of the Parties' correspondence within the framework of the review procedure is in evidence - most of it submitted by the Respondent - there are other reactions by Unidyne to the Navy's comments in the record. These include Unidyne's letters of 14 June, 8 November and 20 November 1978 and 31 January 1979. The Navy's conduct in reviewing the materials should be considered not only in light of the letter dated 1 December 1978 but of this entire correspondence.

39. The Tribunal notes that in its three letters preceding the letter of 1 December 1978, Unidyne did not complain about excessive comments on the part of the Navy. To the contrary, Unidyne responded to many of the Navy's comments by making apparently useful changes in materials to solve the cited problems, particularly in its letters of 8 and 20 November 1978.

Likewise, in its letter of 31 January 1979 the Claimant did not complain of the Navy's inordinate scrutiny but, as it had done previously, modified a considerable portion of the materials submitted to meet the Navy's objections. Undoubtedly the fact that Unidyne needed to review the Navy's numerous remarks and in several instances update the materials in function thereof, had an impact on the date of the approval of such materials and contributed to a delay in the performance of the Contract. These problems, however, appear to result more from the nature and complexity of the work to be performed under the Contract than from unreasonable demands on the part of the Respondent. That being the case, the Tribunal believes that the Claim based on the Respondent's alleged failure to make timely and reasonable review and approval of the materials submitted should be dismissed.

B. The Navy's alleged failure to make timely and complete payment for work performed by Unidyne

1. The Parties' contentions

40. The Claimant contends that the Navy failed to make timely and complete payment for work it had performed.

41. The Respondent maintains that part of the price invoiced to the Navy was to cover the value of the two-year feedback period to be provided by Unidyne. As the Contract never reached the guarantee stage, the Respondent argues that, in order to calculate the balance outstanding under the agreement, an amount reflecting the value of the guarantee should be deducted from the invoices. The Respondent estimates this sum at 7 percent of the total amount invoiced, being U.S.$166,665.76. Taking into account the foregoing, the Navy contends that the total sum paid to Unidyne (including the down payment) actually exceeds the value of the work performed and claims the difference totalling U.S.$152,338.05.

2. The Tribunal's findings

42. The record contains a number of invoices that were sent to the Navy by Unidyne for work performed.[20] The sum total of these invoices amounts to U.S.$2,314,286.31 before deduction of the down payment percentage. In addition thereto, the Respondent referred to another invoice, no. 79-0626 in the amount of U.S.$95,000.00, which is not in the record but of which it acknowledges to owe U.S.$44,133.12. Furthermore, the Respondent accepts that it owes Unidyne an extra U.S.$22,520.00 for work performed but for which no invoice was presented. The total amount of the invoices in evidence before the Tribunal increased by the sums of U.S.$44,133.12 and U.S.$22,520.00 adds up to U.S.$2,380,939.43.

43. There is a dispute among the Parties about the sum due for work performed by the Claimant on the Bandar Abbas Shipyard. According to the Contract, the Claimant was to "develop and implement a 3M System in the shipyard at Bandar Abbas." After the Claimant had commenced performance on this aspect of the Agreement, the Respondent by letter dated 19 June 1979 requested Unidyne to stop further work at the Shipyard. The Parties subsequently exchanged communications and held conferences with a view to determining how much the Claimant should receive for the work done up to that point. Only part of the documents reflecting those negotiations have been submitted to the Tribunal. The two most important documents in our possession are the Navy's letter of 14 November 1979 and Unidyne's reply thereto of the same day. The Navy's letter indicates that the Claimant valued the work done on PMS Development at Bandar Abbas at U.S.$328,808.00, whereas the Respondent only agreed to pay U.S.$102,043.98 for this work. Unidyne responded on the same day by claiming that "the [Technical Directorate's] settlement offer

[20] All but two of the invoices carry the Navy's seal indicating approval. The Respondent, however, included the two invoices without the seal among the invoices that it uses as a basis to calculate in its pleadings the balance outstanding for work performed.

for PMS development ... [i]s unacceptable" and requesting that "the Technical Directorate take more fully into account the various points advanced above and further consider the evaluation of PMS development". At the Hearing the Claimant maintained that an amount of U.S.$176,304.02 was still outstanding for PMS Development at Bandar Abbas.

44. For the Tribunal to determine the value of the performance, the Navy's objections to the figure advanced by the Claimant must be compared to the latter's reactions to those objections. The Navy's objections are contained in its letter of 14 November 1979. Regarding the PMS Development the Navy wrote that "[a]fter review and evaluation, all the work accomplished by Unidyne Corporation for development of the Bandar Abbas Shipyard package is counted at 18%." It is hard to deny that this is a rather conclusory statement providing no basis for the U.S.$102,043.98 offered by the Respondent.

45. By contrast, Unidyne's reaction to this offer contained in its letter of 14 November 1979 is elaborate and provides an explanation for the amount proposed:

> It was apparent ... that the Technical Directorate wanted only to consider a price tag (equated to 18%) for their evaluation of the PMS development work submitted by Unidyne, without fully taking into account the total percentages of effort accomplished and effort remaining. Thus, the 18% indicated ... for PMS development is not a true representation of the ratio of total effort accomplished verses [sic] effort remaining for total completion.
>
> The Technical Directorate evaluation was also based on evaluation comments by FEO personnel. It is felt by Unidyne that the Bandar Abbas personnel were very short-sighted in their summation of total Unidyne efforts on the PMS development, and were very much biased by the "value to them" of the submitted material, consisting of an uncompleted package.
>
> Following the Technical Directorate's philosopy in setting prices on cancelled areas, it would be very possible for Unidyne to complete 95% of a given element, then have the Technical Directorate cancel completion of the element and evaluate it for 50% payment.

> The Shipyard PMS development is a software package and by the nature of the work is subjective. However it is felt that Unidyne's efforts were continuously over-simplified by the Technical Directorate during [our] meetings .... It should be pointed out that almost all of the background work, research work, and layout and planning efforts have been accomplished for the shipyard, with polishing and finalizing efforts for development tasks remaining. It is doubtful if the settlement amount offered to Unidyne ... is even adequate to cover the basic efforts accomplished for this task prior to the actual writing of any development material.
>
> Unidyne delivered to the Technical Directorate that material pertaining to the Shipyard development that was in some stage of written form when Unidyne was directed to stop work on the Shipyard. This naturally caught much material in an uncompleted or uncorrelated status, representing only partially the total efforts of Unidyne. Completion of much of the material would only be a matter of manipulating data and material already assimilated, but not entered or utilized in final form.
>
> * * *
>
> Unidyne, in its discussion with the Technical Directorate, attempted to equate the overall performance on the Shipyard PMS development into a combined computed percentage of total effort accomplished in relation to total PMS development task. However, the Technical Directorate wanted only to consider a Dollar figure for their evaluation of Unidyne efforts, ignoring the percentage of effort expended by Unidyne verses [sic] the remaining effort.
>
> Unidyne therefore finds the settlement offer for PMS development ... as unacceptable, and requests the Technical Directorate [sic] take more fully into account the various points advanced above and further consider the evluation of PMS development. If a more satisfactory settlement is not achieved, Unidyne requests that it be allowed to complete the Shipyard effort, as it has less than 50% of the total effort remaining.

46. The Tribunal thus finds that the more persuasive evidence on this point is in support of the Claimant's position. That being the case, it is proper to regard U.S.$176,304.02, namely the amount mentioned by the Claimant at the Hearing (supra, para. 43), as the amount still outstanding for the work performed on the PMS Development for Bandar Abbas. The question remains,

however, whether the Claimant should be awarded this amount because on 30 January 1980 it issued invoice no. 79-0632 in which it charged the Navy only the amount of U.S.$102,043.98 for the work performed, despite its letter of 14 November 1979.[21] The next issue to be addressed by the Tribunal therefore is whether the Claimant waived its right to the excess by issuing the invoice in the amount offered by the Respondent.

47. At the Hearing, Unidyne denied that this was the case. In considering this question, one should bear in mind that just two months prior to the issuance of the invoice, the Claimant had set out in extenso in its letter of 14 November 1979 its fundamental disagreement with the Respondent's valuation of the work done. It would be rather odd if the Claimant, having written that letter, suddenly would have collapsed and given up its entitlement to the extra amount. Account also should be taken of the situation prevailing in Iran at the time the invoice was issued. As explained in paragraph 94, infra, after 4 November 1979 those American companies that had remained in Iran were forced to leave their projects and to evacuate their personnel. The invoice was issued on 30 January 1980 after Mr. Mendes, Unidyne's last American representative in Iran, had left the country on 3 December 1979.[22] Considering what is stated in paragraph 45, supra, it seems likely that the Claimant presented the invoice only in the amount that had been accepted by the Respondent because it thought it would be futile to attempt to obtain more at a time when its rapport with the Navy was jeopardized by the deteriorating relationship between the United States and Iran. This is consistent with Mr. Connor's testimony at the Hearing according to which "Unidyne attempted to get what it could" by issuing the invoice in the lower amount. The fact that the Claimant did not include any language on the invoice

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[21] The invoice in question actually is in the amount of U.S.$152,503.98. The difference between that amount and U.S.$102,043.98 is explained by the fact that it covers more than the work done on the PMS Development for Bandar Abbas.

[22] See footnote 34, infra.

indicating that the submission thereof was without prejudice to its claim for the higher amount does not establish that it thereby intended to waive its right to the excess. Unidyne might well have decided not to do so because it feared that the Navy otherwise would refuse to pay even the undisputed amount.

48. In view of the above considerations, it is reasonable to conclude that the Claimant was entitled to an additional amount of U.S.$176,304.02 for the work it performed on the PMS Development for the Bandar Abbas Shipyard and that its submission of the invoice in the amount of U.S.$152,503.98 is insufficient to hold that it waived its right to the balance.

49. The sum of U.S.$176,304.02 therefore should be added to the amount of U.S.$2,380,939.43 referred to in paragraph 42, supra, in order to calculate the sum that still may be outstanding to either of the Parties. On the basis of the Respondent's declarations and the payment slips submitted by that Party, the Tribunal determines that the Navy has made payments to Unidyne in a total amount of U.S.$2,366,611.71 including the sum of U.S.$721,876.00 it had paid as down payment.

50. Whether the Claimant is entitled to an award for the balance in the amount of U.S.$190,631.74 and whether the Respondent should be reimbursed for the value of the guarantee period depends on the circumstances under which the Contract came to an end, namely whether it was fully performed, or whether it terminated due to the breach of any of the Parties or by reason of force majeure. The Tribunal therefore will defer its decision on these questions until it has analyzed how the Contract terminated.[23]

51. As regards the Claimant's charge that the Navy failed to pay the invoices in a timely fashion, it seems likely that much of the alleged delay resulted from the need to modify the delivered material following the Navy's comments, as discussed

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[23] See paragraph 83 et seq., infra.

in paragraph 35 et seq., supra. The required modification impacted on the date of the approval of the said material and thus probably also on the date of payment of the invoices therefor.

C. The Navy's alleged failure to provide for the passage of material through the Iranian customs

1. The Parties' contentions

52. Among the breaches alleged by the Claimant, the most specific is that the Navy failed to facilitate the passage of material through the Iranian customs, causing delay and additional costs to Unidyne. According to the Claimant, the Navy acknowledged the customs problem and its responsibility for such delays by agreeing to reimburse Unidyne for the extra costs it incurred in obtaining the release of the materials and in shipping additional materials to Iran via alternative means.

53. The Respondent denies that customs clearance of the materials fell within the responsibility of the Navy and, on the contrary, claims that it "was part of Unidyne's general commitments". According to the Respondent, the fact that the Navy agreed to pay the additional costs referred to in the previous paragraph should not be interpreted as an admission that it considered itself responsible for customs clearance. The Respondent maintains that, by volunteering to pay these amounts, the Navy simply wanted to avoid any further delay in the performance of the Contract.

2. The Tribunal's findings

54. It appears from the record that an important problem faced by the Parties in the course of the Contract stemmed from the difficulties they experienced in assuring that the materials forwarded by Unidyne from the United States reached their final destination in Iran. These problems arose at quite an early stage of the Contract, as illustrated by the following letter of

Unidyne dated 14 March 1978, addressed to the Technical Directorate of the Navy.

> Subj: Request for Aid to Locate Training Materials
>
> Sir;
>
> Unidyne Corporation, Norfolk shipped the training materials for Element 1L, Introduction to CinCINST 2K as a Work Request, to Iran in January 1978. These materials arrived in Tehran, Iran during the latter part of January, 1978 and were temporarily impounded by the Iranian Customs officials.
>
> Unidyne personnel have been checking the status of the training materials weekly: This office was notified by Mr. Fred Hughes, 3M Project Manager (acting), Unidyne Corporation, Tehran, Iran, that the training materials were released to the Imperial Iranian Navy personnel in Tehran on March 4, 1978. The training materials are to be delivered to the Imperial Iranian Navy, Bandar Abbas then to the 3M Technical Office. The IIN 3M Office will make these training materials available to Unidyne Corporation instructor personnel in Bandar Abbas.
>
> Receiving no further information on the status of the training materials, Unidyne Bandar Abbas requested Cdr. Hooshangian to assist in locating the materials. After several telephone calls to the Imperial Iranian Navy personnel in Tehran, the status of the training materials is still unknown.
>
> In order to commence the training program on April 3 or April 4, 1978, Unidyne Bandar Abbas respectfully requests the Technical Directorate, Imperial Iranian Navy, Tehran assist Unidyne Corporation in locating the required training materials.

55. The single most important source of difficulties in securing the timely arrival of the materials at their final destination in Iran was the delay in obtaining customs clearance. The record contains correspondence between the Parties indicating that, at the latest as of 25 April 1978, they felt that customs clearance of Unidyne material should be expedited. Further correspondence shows that, instead of being solved, the clearance problems worsened during the months following April 1978. In a letter dated 6 June 1979, Unidyne wrote to the Navy that

> Unidyne personnel were available to initiate the PMS installation phase in September 1978, but the required material has been held by Iranian Customs since that time.[24] Two men were on site in Iran and two additional men were on a standby status at the Unidyne facility in Norfolk, Virginia.
>
> The Unidyne 3M Librarian assigned to the 3M Library in Tehran was not fully productive on 3M efforts due to non-delivery of 3M material held by Iranian Customs since September 1978. The Unidyne Librarian for assignment to Bandar Abbas was held in a standby status at the Unidyne facility in Norfolk, Virginia, pending release of material from Iranian Customs.(Doc. 10, Exh. 2-5)

56. The materials that had been held up at the Iranian customs since September 1978 were finally cleared after a delay of fourteen months, on 14 November 1979.[25] Unidyne further states that "had the Iranian Navy secured the release of that material from customs in a timely manner, it could have had the Program operating aboard 63% of their ships as early as February of 1979."

57. Unidyne maintains that the Navy's failure to obtain the clearance of the materials through the Iranian customs caused it to incur additional costs for which it claims compensation. For this Claim to be successful, it should first be established that

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[24] In its brief filed 16 May 1983 Unidyne explains more precisely that

> the completed and delivered installation packages for 63% of the vessels addressed by the contract, as well as the majority of all forms and common materials to support all PMS installations and the 3M Program, arrived in Iran in September of 1978, but the Iranian Navy was unable to release the material from customs until November of 1979.

[25] In an effort to mitigate the delays caused by the Iranian customs, Unidyne proposed to the Navy to transport the material still to be delivered under the Contract by air. By letter of 25 August 1979 the Navy replied that "[Unidyne's] suggestion of transporting remaining forms and hardware, called for in 3M contract, to Iran by air shipment is approved."

there is a legal basis for holding the Respondent liable for the alleged losses resulting from the delay in obtaining customs clearance.

58. It is reasonable to expect purchasers of goods and services from a foreign company to be delivered within the territory to ensure that the customs department does not jeopardize the proper performance of the contract by unduly delaying customs clearance. More specifically, the Navy surely must have had sufficient authority and facilities of contact with other departments of the State of Iran, including the Customs Department, to ensure timely customs clearance. In the Case at hand, moreover, the duty to obtain customs clearance is not only an implied one. Article 3.4.6 of the Contract states the following:

> The [Navy] agrees to obtain all required Iranian governmental approvals, consents, licenses, registrations and to use its best efforts to provide IIN publications required in Iran for the execution and effectiveness of this agreement and the carrying out of the provisions hereunder.
>
> The [Navy] shall ensure that Unidyne has the right to obtain resident permits and any other required documents from the Iranian Government for its foreign personnel working there.

59. The Tribunal finds the terms "all required Iranian governmental approvals, consents, licenses [and] registrations" sufficiently broad to encompass customs clearance. Furthermore, in its letter of 28 April 1978, the Navy wrote that "[its] Transportation Department trie[d][its] best to get packages from customs as soon as possible. We are making every effort to expedite the customs clearance on Unidyne 3M material." Moreover, a letter from the Navy to Unidyne dated 15 October 1979 refers to "new customs office regulations" concerning the documents necessary for clearing shipments and states that "[i]n case of shortages of any of the above mentioned items, Iranian Navy has no responsibility toward releasing the shipments." These statements, suggesting that the Navy considered itself

responsible for expediting the clearance, lend further support to the proposition that Article 3.4.6 of the Contract embraces this procedure. The Tribunal thus concludes that the Contract allocated the responsibility for obtaining customs clearance to the Respondent.

60. It follows from the record that as a result of the fourteen month delay referred to in paragraph 56, supra, the Claimant incurred extra costs beyond those that it normally would have had to bear under the Contract. At the Hearing, Unidyne quantified this loss at U.S.$594,689.00. The question, however, is to what extent the file supports this figure.

61. Unidyne's letter to the Navy dated 6 June 1979 indicates that these expenses concerned in particular the areas of labor and transportation. Because they were not in possession of the necessary material to proceed with their work, several Unidyne personnel members in Iran were forced to remain idle "pending the release of material from Iranian Customs." In the same letter, Unidyne informed the Navy that "[l]arge amounts of 3M material were sent to Iran as excess baggage with Unidyne personnel entering Iran. This was necessitated by the lack of movement of material through normal commercial channels involving Iranian Customs. Unidyne therefore incurred the high costs associated with excess baggage charges."

62. Unidyne concluded its letter of 6 June 1979 by noting that "[t]he additional financial burden upon Unidyne is in excess of $400,000.00." However, since the letter also refers to difficulties other than those related to customs clearance, this sum cannot be attributed entirely to that problem alone.[26] On the other hand, account must be taken of the fact that the sum of U.S.$400,000.00 reflected additional expenses incurred by Unidyne up to 6 June 1979, whereas the material in question was held up much longer, until 14 November 1979. Having regard to

[26] Those other problems will be discussed in paragraph 88 et seq., infra.

these conflicting considerations, the Tribunal believes that U.S.$250,000.00 is a fair estimation of the increased costs incurred by the Claimant as a result of the fourteen month delay in obtaining necessary customs clearances. In view of its determination that the Respondent should bear the consequences thereof, the Tribunal concludes that the Claimant is entitled to compensation in the same amount, plus interest at the rate of ten percent per annum running from 14 November 1979.

D. The Navy's alleged failure to schedule properly training sessions and to construct timely and equip adequately ships for inspection

63. The Claimant alleges that the Respondent's breaches include the failure to make proper arrangements for training sessions provided for under the Contract. This breach purportedly caused the Claimant to incur "additional expense for the inefficient use of its instructors' time." The Claimant also contends that the Respondent failed to construct timely and equip adequately ships for inspections scheduled by the Respondent in England, India and France. According to the Claimant, this forced Unidyne repeatedly to visit all three countries and thus "to incur additional costs ... since only one visit to each site was priced in the contract."

64. The Tribunal notes that the Contract envisaged, at least with regard to training schedules, that Unidyne would remain flexible in response to the Navy's needs.[27] Furthermore, it is not clear, in the Tribunal's view, whether or not the Contract provided for only one visit to each of the countries in which the Navy's vessels were located. In addition, the Tribunal has not been able to find in the record any trace of contemporaneous

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[27] See, e.g., pp. 1-19 of the Contract: "In the event that crews are not available for 3M training at either the ship, or the pre-commissioning school, then it shall be the follow-on responsibility of Unidyne to provide such training in a compatible time frame, not to exceed the completion date of the contract."

complaints on the part of Unidyne with regard to the training sessions and the inspections of the ships. The Claimant's remonstrances regarding training and inspection thus appear to have been raised for the first time before the Tribunal. In view of all these circumstances, the Tribunal declines to grant the relief requested by Unidyne under this Claim.

E. The Respondent's alleged failure to make timely arrangements to allow the Claimant to complete the Contract

65. It is not disputed among the Parties that the Contract was never completed. They differ fundamentally, however, on the causes of such non-completion. Unidyne asserts that it "completely performed all of its obligations under the contract or was ready, willing and able to do so, but [the Navy] could not make timely arrangements to allow Unidyne to complete the contract." The Respondent, on the other hand, argues that it did not breach the Contract, but that Unidyne refrained from performing thereunder, unilaterally deserting the work in early 1980. On the basis of their respective positions, the Parties have introduced a Claim and Counterclaim.

66. This Claim and Counterclaim raise similar questions regarding the circumstances under which the Contract came to an end. The Tribunal will therefore consider them simultaneously in paragraph 83 et seq., infra. At the same time, the Tribunal will deal with Unidyne's Claim for damages allegedly caused by the Respondent's actions commencing in September 1978 as described in paragraph 30, supra.

VII. THE COUNTERCLAIMS

A. The alleged delay in performing the Contract on the part of the Claimant

67. The initial step to be taken by Unidyne in performing the Contract was the assignment of a number of managers to Tehran and/or Bandar Abbas. These persons would prepare for the American technicians and start hiring clerical staff locally. According to Article 2.6.3 of the Contract, Unidyne "[felt] this to be a 2 - 3 week effort at maximum, the actual time depending to a great extent upon [its] ability to establish offices in Tehran and Bandar Abbas."

68. It appears, however, that not everything went according to plan in starting up the Contract. On 6 December 1977 the Navy sent a telex to Unidyne in which it noted that, despite Article 2.6.3, "no Unidyne personnel" was present yet in Iran. The telex further urged the Claimant to "comply with [its] contractual obligations." On 14 January 1978 the Navy further complained that, by then, only 6 Unidyne personnel members were stationed in Iran, whereas "[t]he proposed schedule ... states a manpower level ... of 29 in-country within two (2) months from the start of the Contract."

69. In reply to this criticism the Claimant requested on 23 January 1978 that the "[C]ontract be modified to reflect an effective start date of 21 January 1978." According to Unidyne, this amendment was required, inter alia, because the down payment was not paid until 21 January 1978 and because "[a]dequate work area at Bandar Abbas was not obtained until 15 January 1978." (Id.)

70. By letter of 27 February 1978 the Navy notified Unidyne of its refusal to change the effective date of the Contract. According to the Navy, the down payment was released only in January 1978 because "the Bank Guarantee which was Unidyne's responsibility ... was not established until [that month]." As

far as the work area in Bandar Abbas was concerned, the Navy maintained that the delays resulted from its not being supplied timely with the information necessary to obtain the required security clearances for Unidyne personnel.

71. The initial stage of performance is not the only period of delay complained of by the Respondent. In addition, the Navy generally asserts that Unidyne "considerably delayed in each stage and element of the Contract:"

> Unidyne's delay may easily be detected in the schedule of the Contract, in that the Contract time was totally 2 years, whereas when Unidyne Corporation abandoned the performance of the Contract for ever and left Iran without authorisation from the Navy ... years had elapsed since the coming into effect of the Contract, whereas the Contract was yet half completed, and is left as yet incomplete.

72. The critical path diagram attached to the Contract indicates that the Parties expected the work to take 24 months.[28] According to this schedule, the Contract should have been completed by November 1979,[29] or at the latest by January 1980.[30] It is not disputed, however, that the Contract was not completed by either of those dates.

73. While it is quite clear that the performance of the Contract lagged behind schedule, it is much less clear whether such delay was entirely the fault of Unidyne, as the Respondent contends. With regard to the problems that arose in the initial stages of the Agreement, the letters submitted by the Parties suggest that, although Unidyne may have been late in establishing

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[28] Not including the two-year feedback period.

[29] Article 3.4.4 of the Contract states that "[t]he effective date of this contract for determining start for calculating deliverables and payment schedule is [1 November 1977]."

[30] Assuming the effective date of the Contract would have been 21 January 1978, as requested by Unidyne. See paragraph 69, supra.

the bank guarantee covering the down payment, at least part of the complications resulted from the delay in securing adequate work area in Bandar Abbas.[31]

74. As regards the Navy's allegation that Unidyne caused delay beyond the initial stages of the Contract, the Tribunal observes that this complaint generally is less well documented than that concerning the delay incurred in the months immediately following the conclusion of the Agreement. Furthermore, it appears that the factors that contributed most significantly to the delay in the performance of the Contract were largely beyond the control of Unidyne. The difficulties experienced by Unidyne in obtaining customs clearance of the materials that it had sent to Iran, resulting in the goods being held up for fourteen months, were an important factor at the root of the Contract backlog. The numerous comments by the Navy on the materials submitted by the Claimant and the latter's review thereof undoubtedly compounded the problem. Finally, as shall be discussed in more detail in paragraph 83 et seq., infra, the upheaval in Iran during 1978 and 1979 seriously interfered with the work to be accomplished by Unidyne in Iran.

75. In view of the above considerations, the Tribunal does not believe that the Claimant should be held to have breached the Contract by delaying its performance as alleged by the Respondent.

B. The non-completion of the Contract

1. The Parties' contentions

76. As mentioned in paragraph 65, supra, the Parties' positions on the causes for the non-completion of the Contract are diametrically opposed. Whereas the Respondent contends that

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[31] At the Hearing, Mr. Gurley, Unidyne's initial project manager in Iran, stated that "The Navy ... did not provide living quarters in Bandar Abbas."

the Claimant unlawfully failed to finish its work, the Claimant alleges that the Respondent's actions prevented it from doing so. A Claim and Counterclaim have been introduced on the basis of those respective contentions.

77. According to the Respondent, Unidyne "refused to deliver the MRC cards, the PMS Work Centre Mannual [sic] books as well [as] the Cycle Quarterly and Weekly prepared tables" and, in breach of the Contract, failed to install, deliver, test and rectify the system. In the Navy's opinion, this is a grave violation, because without completion of the delivery and installation of the software and hardware, the system could not operate. As the Respondent states, "until such time as one hundred per cent of the project has been executed, no positive and effective advantage can be taken of the work already performed, even though 90 percent of the contract be accomplished (which has not been done so)." According to the Navy, "on several occasions [it] reprimanded the Claimant because of the failure to install the system, and even threatened Claimant with legal prosecution." The Respondent concludes that

> [i]n fact Unidyne had not unlike any other seller calculated in advance the cost of services during the guarantee period, included it in the Contract price and collected it from the Navy. Unfortunately, however, as it has been stated throughout this Brief, Unidyne Corporation never installed the system, never handed it over to the Navy and, a priori, never applied evaluation and testing and, finally, never presented the services of the guarnatee [sic] period which was to last two year [sic] beyond delivery.

The Respondent maintains that Unidyne refrained from further performance as of October 1979, and "generally abandoned the site" without the Navy's authorization early in 1980.

78. As a result of the Claimant's failure to complete the Contract, the Respondent claims to have incurred damages in the form of loss of capital investment, loss of profit, higher costs of equipment maintenance and reduction of the useful life of

equipment. It claims compensation in the total amount of U.S.$ 5,133,223.42.

79. Unidyne replies that it performed the necessary procedures and conducted the required training to enable the Navy to implement and utilize the 3M system. Unidyne emphasizes that the Contract did not require it to perform actual maintenance or repairs on Iranian naval vessels or to manage the 3M system once it was installed aboard the ships. The crucial part of the Contract, according to the Claimant, was the analysis of ship requirements and the development of materials necessary to manage the maintenance and material requirements of the ships. Unidyne claims that the Navy received complete installation packages, training material, and training for 43 of the 68 ships covered by the Contract. The Navy purportedly received and accepted the program for the remaining ships and thus could itself have printed, from the delivered material, adequate sets of material to install on those ships. Once this part of the work was completed and accepted by the Navy, and originals of all documents were delivered, the Claimant alleges that it was a "simple matter" for the Respondent to print copies in order to have all the appropriate paper work to implement the program.

80. As to the unfinished part of the work, the Claimant maintains that this was due to force majeure circumstances prevailing in Iran at the time. The Claimant states that "it was impossible for United States companies to continue to conduct business in Iran due to the political rebellion from at least mid-October, 1979 onward." The Claimant further states that "because the Iranian revolution was the cause of the inability of Unidyne to continue performance of the contract, Unidyne is relieved of any liability therefore [sic] by [the force majeure clause] of the contract."

81. The Claimant considers that it should be paid compensation for the losses that it incurred as a result of the Revolution because that event "was of [the Respondent's] own making." Such losses include the value of Unidyne's equipment

purportedly expropriated when its personnel fled Iran and various alleged consequential damages such as decreased efficiency of personnel, facility and housing costs and additional financial expenditures.

82. The Respondent denies the existence of force majeure conditions as alleged by the Claimant. Further, the Respondent argues that force majeure conditions could not have affected the Claimant's performance since Unidyne continued to perform until October 1979 and, in certain instances, early 1980. Any force majeure conditions thus would have come to an end by January 1980, and, in any case, such conditions would have had no bearing on work to be performed by Unidyne in the United States. The Respondent therefore contends that the Claimant had no justifiable excuse for abandoning its contractual obligations.

2. The Tribunal's findings

(a) The circumstances under which the Contract came to an end

83. It appears from the record that a number of events in Iran that culminated in early January 1979 fundamentally interfered with the contractual relationship between the Parties. On 2 January 1979 Mr. R. A. Watts, President of Unidyne, sent a letter regarding those events to Rear Admiral Asadolla Hessami, Technical Director of the Navy. The first two paragraphs of this letter read as follows:

> 1. Commencing in September 1978, Unidyne personnel assigned to Bandar Abbas have been experiencing extreme personal difficulties in the timely execution of their assigned 3MP2 duties in the Bandar Abbas area. This problem reached a serious crisis level on 2 January 1979, when it became imminently necessary to accomplish emergency evacuation of Unidyne personnel located in Bandar Abbas. This action was brought about as a result of extreme civil disorder in and about our employees' housing area in central Bandar Abbas, wherein gunfire was directed at these facilities including hostile personal physical actions, threats and similar abuses

> from local nationals against Unidyne's American employees.
>
> 2. As a result of the situation, it has been necessary to remove all of our employees from Bandar Abbas and to return them to the United States, until such time as the conditions improve in Bandar Abbas, allowing their return. The removal action was accomplished because of our concern for the personal safety of these people and as a result of insufficient resources to reasonably guarantee their continuing safety. Therefore, as a result of extreme civil disorder conditions in Bandar Abbas which totally prevent Unidyne Corporation personnel from execution of their assigned 3MP2 duties, Unidyne regretfully states that a Force Majeure event has occurred and so notifies the IIN of the Force Majeure event in accordance with paragraph 3.4.1, page 3-4 of the Contract for 3M Phase II.[32]

84. The above description of the conditions prevailing in Iran is in line with the Tribunal's earlier observations regarding the situation in the country at the time. In Jack Rankin and Islamic Republic of Iran, Award No. 326-10913-2, para.

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[32] The force majeure clause of the Contract provides that

> Unidyne Corporation or its sub-contractors shall not be responsible or liable for delay in delivery or failure to perform due to "force majeure" which shall include only delays other than those willfully and intentionally caused by the Unidyne Corporation (without limiting the generality of the term ("force majeure") as follows [sic]: Acts of God; fire; floods; storms; riots; strikes; lockouts; and other labor disputes resulting in work stoppage; wars; act of the United States Government; acts or omissions of the Imperial Iranian Government; delay in delivery of materials or components ordered in a reasonably timely manner caused by an event which would constitute force majeure hereunder; delays of sub-contractors or suppliers caused by an event which would constitute force majeure hereunder.
>
> Unidyne Corporation shall notify the [Navy] within a reasonable time after it learns of a force majeure event and provide such information as [the Navy] reasonably requests with respect to such occurrence. In the event of any such delay; the date of delivery shall be extended for a period equal to the time lost by reason thereof, without any penalty applied as a result thereof.

30 (3 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 135, para. 30, the Tribunal stated that, as of September 1978, individual United States nationals in Iran became the subject of harassment and violence that was instigated by the leaders of the Revolutionary Movement. Moreover, the Tribunal in Development and Resources Corporation and Government of the Islamic Republic of Iran, Award No. 485-60-3, para. 63 (25 June 1990), reprinted in 25 Iran-U.S. C.T.R. 20, para. 63, considered it "generally accepted that the conditions in Iran in early January 1979 amounted to force majeure conditions" justifying the evacuation of American personnel out of the country. Thus the Claimant cannot be held to have breached the Agreement by withdrawing its American personnel during the period in question.

85. In the subsequent paragraphs of its letter of 2 January 1979 Unidyne outlined the repercussions that the force majeure would have on the further performance of the Contract:

> 3. Unidyne fully understands that this notification of the occurrence of a "Force Majeure" event is in no way to be interpreted as a termination of the 3MP2 Contract between the [Navy] and Unidyne. The invoking of Force Majeure signifies that events have occurred outside the control of Unidyne which will impact completion of the 3MP2 Contract, and that no penalty shall be applied to Unidyne as a result thereof.
>
> 4. It is the full intention of Unidyne to continue working on various and important areas of the 3MP2 Contract. We have developed an "Emergency 3MP2 Management Plan" ... , that fully outlines our approach. We request your concurrence with this plan and, if you agree as to its merit and concept, we sincerely believe that the 3MP2 Program can continue to function with subsequent beneficial results to the Navy...
>
> 5. The removal of Unidyne personnel from Bandar Abbas only partially affects Unidyne's ability, as of today, to continue performance on the 3MP2 Program. Areas affected are basically the Installation Phase (6C) and Shipyard Effort (12L). Installation, Element 6C, however, has been affected since September because of the installation material for the 50' FPB, 65' Searchboats and La Combattantes material that has been delayed in Iranian Customs areas for the last five (5) months.

86. It follows from the above that Unidyne believed in January 1979 that the events occurring during that month would not lead to the termination of the entire Contract but merely to a temporary suspension of the performance of some of its components and to more delay, in addition to that already caused by the customs problem.[33] As evidenced, inter alia, by the proposed "Emergency 3MP2 Management Plan" referred to in and annexed to Unidyne's letter, the Contract components that were expected to be affected mostly were those that necessitated the presence of Unidyne personnel in Iran. This Plan states that the "program areas that have been affected by Force Majeure are basically those performance items that require Unidyne personnel in Iran. These are: (1) Installation Tasks, (2) Training, and (3) completion of the shipyard development package."

87. That the contractual relationship between the Navy and Unidyne did not break down completely in January 1979 is further demonstrated by the correspondence between the Parties concerning various aspects of the Agreement following the Claimant's letter of 2 January 1979. On 31 January 1979 Unidyne sent the Navy materials that had been corrected to conform to the Navy's comments. Several invoices for work performed by Unidyne were sent to, approved and paid by the Navy in the period subsequent to the announcement of the force majeure event. In a letter dated 19 June 1979 the Navy notified the Claimant of certain modifications to the Contract that it deemed necessary. Several communications regarding changes to the Contract and the continued shipments of materials by Unidyne to Iran were exchanged during the period of August 1979 through November 1979. It appeared at the Hearing that some of the Claimant's American personnel saw fit to go back to Iran in the course of 1979. Mr. Mendes, Unidyne's project manager in Iran who had left the country in December 1978 for the Christmas holidays, testified

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[33] See paragraphs 54 et seq., supra.

at the Hearing that he returned in March 1979 and remained in the country until December 1979.[34]

88. Although work under the Contract continued to be performed after January 1979, it is clear that the situation in Iran as of September 1978 rendered Unidyne's task considerably more onerous. This is illustrated by Unidyne's letter to the Navy dated 6 June 1979:

> In the spirit of good faith and mutual cooperation, Unidyne has endevored [sic] to continue contract performance ... Unidyne has also burdened itself by maintaining full contract personnel capability.
>
> During the several months starting in September 1978 and preceding the Force Majeure event, and those months following the Force Majeure event, Unidyne has, and is continuing to incur added burdens and expenditures above and beyond those it would have incurred if the Force Majeure event had not occurred.

89. The remainder of the letter is devoted to enumerating the areas in which Unidyne claims to have experienced an increase in its burdens. Apart from the passages relating to the customs problem, which have been quoted previously in paragraphs 55 and 56, supra, this list reads as follows:

> (c) Productivity of all Unidyne personnel in Iran was significantly reduced from September 1978

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[34] Apart from Mr. Mendes, it is unclear how many of Unidyne's American employees, if any, were stationed in Iran after January 1979. The record indicates that, in November 1979, Unidyne contemplated sending additional American personnel to Iran depending "on the prevailing in-country situation, delivery of required material, and establishment of a suitable staging area in Bandar Abbas for PMS installation operations." On 24 November 1979 Mr. Mendes wrote a letter to the Navy stating: "Unidyne wishes to further advise the Technical Directorate that [Mr. L. Murray and Mr. J. MacDonald] will arrive in Tehran on 6 December 1979." It is unknown to the Tribunal whether these people actually ever arrived in Iran. Relevant in this regard is that Mr. Mendes testified at the Hearing that he himself "departed from Iran on 3 December 1979, one month after the seizure of the Embassy" as he felt that it was "useless for him to stay" and because of concern for his personal safety.

due to the in-country situation leading to the Force Majeure event in January 1979.

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(e) Commencing in September 1978 and continuing into December 1978, several Unidyne personnel prematurely departed from Iran due to their concern for personal safety and welfare. This not only resulted in loss of these individuals, but adversely affected the Unidyne intergrated [sic] team efficiency, adding to the task burden of Unidyne. Unidyne also incurred a higher in-country maintenance and operating cost-ratio per remaining employee.

(f) Withdrawal of the remaining Unidyne American employes [sic] from Iran due to the Force Majeure event. Two employees left Iran during the latter part of December 1978, and eight employees left in early January 1979.

(g) Retention of Unidyne Iranian National employees on payroll during the absence of U.S. employees, and during a period of nil contract activity within Iran. Unidyne employs two Iranian Nationals in Iran.

(h) Retention of 3M Phase II Contract personnel to maintain contract capability. Approximately 12 personnel are held in a standby status with contribution of nil productive effort. Another 8 personnel are only partially utilized. In addition, many other assigned personnel are either not fully productive or working under hindrances due to lack of data gathering and inputs from Iran.

(i) Facility and housing costs in Iran during the absence of Unidyne American employees.

(j) Storage of 3M Phase II Contract material at Norfolk, Virginia, pending advisibility [sic] of shipment.

90. The foregoing demonstrates that, despite the force majeure event in January 1979, a substantial amount of activity under the Contract took place well into 1979, albeit under more difficult circumstances than foreseen at its conclusion. This finding is consistent with the Respondent's position according to which Unidyne did perform, albeit defectively, until the Fall of 1979, but failed to perform thereafter. More particularly,

the Respondent maintains that, as of October 1979, Unidyne, on the one hand, refused to remit to the Navy the balance of the materials still to be delivered under the Contract and, on the other hand, failed to proceed with the installation of the system.

91. These contentions must be considered in the light of events occurring in the Fall of 1979 as a result of which the Parties' contractual relationship took a second, even more profound change for the worse: the seizure of the 52 Americans at the United States Embassy in Tehran on 4 November 1979 and the ensuing deterioration of relations between the United States and Iran.

92. In retaliation for the seizure of the United States Embassy, the President of the United States on 14 November 1979 issued Executive Order 12170. That Order blocked, with immediate effect,

> all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

(paragraph 2 of the Executive Order)

On 15 November 1979 the Secretary of the Treasury of the United States issued the Iranian Assets Control Regulations implementing Executive Order 12170. Paragraph 535.201 (a) thereof reads as follows:

> No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after [14 November 1979] Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

93. By Executive Order 12205 issued 7 April 1980 the President of the United States "prohibited effective immediately,

notwithstanding any contracts entered into or licenses granted before [7 April 1980,][inter alia,]

> The sale, supply or other transfer, by any person subject to the jurisdiction of the United States, of any items, commodities or products, except food, medicine ~~and supplies intended strictly for medical purposes, and~~ donations of clothing intended to be used to relieve human suffering, from the United States, or from any foreign country, whether or not originating in the United States, either to or destined for Iran, an Iranian governmental entity in Iran, any other person or body in Iran or any other person or body for the purposes of any enterprise carried on in Iran.

(Emphasis added)

94. It is plain that the events occurring in November 1979 profoundly disturbed the performance of the Contract. As the Tribunal has found previously, at least after 4 November 1979 those American companies that had remained in Iran were forced to leave their projects and evacuate their personnel. See e.g. Eastman Kodak Company et al. and Government of Iran et al., Partial Award No. 329-227/12384-3 para. 39 (11 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 153, para. 39; International Technical Products et al. and Government of the Islamic Republic of Iran et al., Partial Award No. 186-302-3, pp. 22-23 (19 Aug. 1985), reprinted in 9 Iran-U.S. C.T.R. 10, 24; Starrett Housing Corp. et al. and Government of the Islamic Republic of Iran et al., Interlocutory Award No. ITL 32-24-1, p. 53 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 122, 155. Mr. Mendes' Hearing statements appearing in footnote 34, supra are consistent with these findings.

95. Furthermore, the Executive Orders and their implementing regulations (the "Freeze Orders") had the effect of barring further shipments of materials under the Contract to the Navy. This has been acknowledged by the Respondent itself. In its Statement of Defence that Party stated that "a further cause of the failure to fulfil contractual obligations was Unidyne's government, which prevented the shipment of consignments to Iran." Furthermore, in reply to Unidyne's complaint that it

"incurred storage costs for 3M Phase 2 contract materials stored at Norfolk, Virginia," the Respondent argued that these costs "were incurred as a result of the orders of Unidyne's sovereign government (United States) preventing the delivery of the materials to Iran."

96. Although it appears that the Navy did receive a limited amount of additional material after 14 November 1979,[35] it is quite clear that subsequent to the taking of the United States Embassy and to the promulgation of the Freeze Orders, the Contract ultimately ground to a halt. This is evidenced by the Navy's complaints. In a telex addressed to Unidyne dated 15 January 1980 the Navy remarked that "Unidyne Corp. has not initiated actions to implement the remaining elements of the contract since mid-October 1979. Should Unidyne fail to accomplish thier [sic] contractual obligation within 30 days upon receiving this telex, [the Navy] will have to take proper action according to the Contract." In a subsequent message[36] addressed to Unidyne the Navy noted that despite its requests that

> the status of the Contract and its completion be clarified for the Navy, however, the issue has still remained unclear. Therefore, it is necessary that Unidyne submit its final views to the Navy in writing at most until 20.1.59 (9.4.80) indicating a definite starting date for the PMS installation on the sea-going units and a definite date for the delivery of contract

[35] On 30 November 1979, just a few days before he left Iran finally, Mr. Mendes sent a letter to the Navy stating that "[a]n assortment of 3M Contract material is being delivered to the 3M Office of the Technical Directorate." In a communication dated 9 April 1980 Unidyne informed the Navy that "it recently delivered the P.M.S. documentation for the Khark to the Navy in two copies; one to the Khark in England and the other to the Technical Directorate in Tehran." It is unclear whether this statement concerns the same materials as those referred to in Mr. Mendes' letter of 30 November 1979. In its letter of 9 April 1980 Unidyne acknowledged that "[the delivery] was taken in contravention of the U.S. Government's ban on delivery of any items to Iran."

[36] The letter in question does not bear a date. It can be inferred from other elements in the file, however, that it probably was sent on 7 April 1980.

materials, and determining the status of the guarantees; otherwise, the Islamic Republic of Iran Navy shall take the necessary legal action in order to safeguard its interests.

Unidyne replied as follows on 9 April 1980:

> 1. Unidyne Corporation has been ready to extend any manner of necessary cooperation with the Navy up until the present, in order to proceed with and complete the 3M Contract, notwithstanding the obstacles and problems ensuing from the Iranian Revolution and the crisis which has come about between Iran and the U.S., and despite the financial losses which this company has sustained in the performance of its contractual obligations.
>
> ***
>
> 3. Regarding the carrying out of the 3M system installation, this company declares its willingness to cooperate with the Directorate's decisions regarding the method of completion of the work.
>
> 4. Regarding the status of the 3M Contract guarantees, said guarantees remain in force in their present state as per the contract.

In the same letter Unidyne "pledge[d] to ship the most important software and hardware elements to Iran by the first week of June 1980." It appears, however, that no further material was ever sent and that the installation of the system was never realized. The record does not contain any further communications between the Parties.

97. In the Tribunal's view, the foregoing demonstrates that the situation in Iran after the seizure and detention of the 52 United States nationals and the Freeze Orders amounted to force majeure for the Claimant, preventing it from completing the work and ultimately leading to the termination of the Contract. The fact that Unidyne managed to deliver some more material subsequent to the issuance of the Freeze Orders and that it promised to send still other materials later in the year is not inconsistent with this finding, as the Tribunal believes that it reasonably could not have been expected from Unidyne to continue

sending such materials under the circumstances described in paragraphs 91 et seq., supra.

(b) The consequences of the termination of the Contract by reason of force majeure

98. Having determined that the Contract terminated by reason of force majeure, the Tribunal will consider what effect such termination had on the rights and obligations of the Parties and will decide upon a number of the Claims and Counterclaims that have not been ruled upon previously in this Award. The Claims in question are based on (1) the Respondent's actions commencing in September 1978 as a result of which the Claimant allegedly incurred various losses, (2) the Respondent's alleged failure to make timely arrangements to allow the completion of the Contract, (3) the purported expropriation by the Respondent of the Claimant's equipment and furniture and (4) the contention that a balance is still outstanding for work performed. In addition, the Tribunal will pronounce its judgment on the Counterclaim based on the Claimant's alleged unlawful failure to complete the work under the Contract.

99. Before entering into the specifics of these Claims and Counterclaims, the Tribunal notes that, although the Contract contains a clause dealing with force majeure,[37] it does not explicitly allocate between the Parties the effects of a termination of the agreement for that reason. That being the case, the Tribunal will seek guidance on this issue among its precedents. In International Schools Services, Inc. and National Iranian Copper Industries Company, Award No. 194-111-1, pp. 14-15 (10 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 187, 197, the Tribunal found that

> [t]he governing rule as to the rights and liabilities of the Parties in these circumstances is that "the loss must lie where it falls." As the Tribunal has pointed out in connection with this rule, "[t]he apportionment

[37] See footnote 32, supra.

> of the loss is subject generally to the Tribunal's equitable discretion, using the contract as a framework and reference point." Award No. 37-172-1 of 15 April 1983 in Queens Office Tower Associates and Iran National Airlines Corp., at p. 14.

The Tribunal adopted the same approach in William J. Levitt and Islamic Republic of Iran et al., Award No. 520-210-3, paras. 74-75 (29 Aug. 1991), reprinted in 27 Iran-U.S. C.T.R. 145, paras. 74-75.

100. Applying these principles to the Case at hand, the Tribunal finds that the Claimant should not be held liable for the non-completion of the Contract, as it resulted from circumstances beyond its control, namely the situation in Iran after the seizure and detention of the 52 United States nationals and the issuance of the Freeze Orders. The Tribunal therefore concludes that items c, d, e, f and h of the Counterclaim for non-completion of the work as outlined in paragraph 31, supra, must be dismissed.

101. The Tribunal now will turn to the first of the remaining Claims, namely the one for compensation for various losses and costs allegedly incurred as a result of the Respondent's actions commencing in September 1978. To the extent those damages resulted from the delay in obtaining customs clearance, the Tribunal has already awarded the Claimant compensation therefor in paragraph 62, supra. The Claim for compensation for housing costs after the departure of Unidyne's American employees from Iran in January 1979 and for the decreased efficiency of its personnel should be considered in light of the Tribunal's prior finding that the social and economic forces operating at least in Iran's major cities during the height of the Islamic Revolution were beyond the power of the state to control through the exercise of due diligence. Sylvania Technical Systems Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1, pp. 14-15 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298, 308. As the extra costs and expenses at issue ultimately were caused by the upheaval flowing from the said forces, the Tribunal

does not believe that the Respondent should be held liable therefor. The Claimant also seeks compensation for costs associated with the storage of materials at Norfolk, Virginia. As these costs were incurred due to the Freeze Orders issued by the Government of the United States, which prevented the materials from being sent to Iran, the Tribunal believes that the Respondent should not be held liable for these costs.

102. The next Claim to be decided upon is the one based on the Respondent's alleged failure to make timely arrangements to allow the Claimant to complete the Contract. This Claim essentially is for lost profits. Considering that the Contract terminated due to the circumstances described in paragraph 91 et seq., supra, the Tribunal cannot award anything in this regard.

103. The Claimant also maintains that it has not been paid for all the work it had performed. In connection with this question the Tribunal already has determined in paragraph 50, supra, that a balance in the amount of U.S.$190,631.74 remains outstanding. The Respondent replies that it expected to receive a fully developed scheduled maintenance and material management system for its vessels, but, as the Contract was never completed, it was left with nothing more than reams of incomplete and useless papers. The Respondent therefore disputes that it should pay anything to the Claimant. While it is indeed debatable whether the Respondent was able to implement and utilize fully the 3 M system without the further expertise of the Claimant and therefore whether the Respondent was able to benefit in every respect from the work accomplished, the Tribunal's approach has been to hold a party liable to pay for work that was carried out prior to the occurrence of a force majeure event, although the contract was never fully performed. See International Technical Products Corporation et al. and Government of the Islamic Republic of Iran et al., Partial Award No. 186-302-3, pp. 21-22 (19 Aug. 1985), reprinted in 9 Iran-U.S. C.T.R. 10, 23-24; Gruen Associates, Inc. and Iran Housing Company et al., Award No. 61-188-2, p. 18 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 97, 106. Consequently, the Tribunal determines that the Claimant is

entitled to the balance in question, plus interest at the rate of ten percent per annum from 18 April 1980, being a month after the date of the last invoice.

104. In reply to Unidyne's Claim for the balance of the outstanding invoices, the Respondent argues that it should be reimbursed for the value of the two-year guarantee period. While the Contract does not provide for separate payments by the Navy for the assistance that Unidyne might have had to perform during that period, it appears reasonable to assume, as is done by the Respondent, that a fraction of the invoices that the Navy had paid reflected the value of such possible services, as a commercial enterprise would not normally commit itself to provide such assistance free of charge.

105. When the Contract terminated due to force majeure it became clear that the Navy, having settled most of the invoices received from Unidyne, had, by doing so, paid also for guarantee services that never would be performed.[38] The Tribunal believes it would be inconsistent with the principles espoused in paragraphs 99, supra, not to reimburse the Respondent for such payments.

106. The Respondent values the guarantee in question at U.S.$ 166,665.76. However, it has presented insufficient justification for that figure. A better indication of the Parties' expectations of the value of the two-year guarantee can be found in Article 3.4.11 of the Agreement. That provision states that "[u]pon completion of the contract the Bank Guarantee [covering the down payment] shall be reduced to ... dollar 72,187.00 and so remain until satisfactory completion of the two year feedback processing period." Although this amount does not necessarily reflect the exact value of the guarantee period, the Tribunal, considering also the lack of any other element in the file shedding light on its value, finds it reasonable to award to the

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[38] At the time the Contract terminated, the Respondent had paid 66 percent of the full Contract price.

Respondent 66 percent thereof or U.S.$47,643.42 (plus interest at the rate of ten percent per annum as of 18 April 1980) as reimbursement of the prepayments made on the guarantee.

107. Finally, the Claimant petitions the Tribunal to order the Respondent to pay for the value of the "equipment and furniture located in Tehran and Bandar Abbas expropriated as a result of Respondent's actions when Unidyne personnel were forced to leave the country." However, as the Claimant has not identified any particular act of the Respondent that might be construed as a taking of those assets, the Tribunal does not consider it established that the property in question indeed was expropriated. By itself, this finding should not preclude the Tribunal from considering whether liability exists on another basis. William J. Levitt and Islamic Republic of Iran et al., Award No. 520-210-3, para. 123 (29 Aug. 1991), reprinted in 27 Iran-U.S. C.T.R. 145, para. 123. For such to be the case, however, a minimum of information would be required regarding the equipment in question and what happened to it. Although the Claimant did elaborate somewhat on these questions at the Hearing, the information so provided falls short of what is necessary to establish a cognizable Claim. The Claim is therefore dismissed for lack of proof.

C. The delivery of allegedly defective materials

1. The Parties' contentions

108. A further Counterclaim by the Respondent is based on its allegation that the materials delivered by the Claimant were defective. The Navy states that "there were defects and deficiencies abounding in Claimant's performance," and that "[e]ven if the errors and defects dealt with singly were not hazardous and too serious, taken together they could not be over looked as they presented a material breach."

109. The Claimant contends that the Iranian Navy's complaint about the adequacy of Unidyne's performance is merely a legal

tactic. As evidence of the Iranian Navy's satisfaction with its performance, Unidyne has submitted various correspondence between the Parties and invoices showing that the Iranian Navy approved the work and paid for many elements of the Contract. The Claimant argues that "[c]learly, full or partial payment on any element would never have occurred if the Navy was not satisfied with its acceptability." The Claimant also points out that, as late as 29 January 1980, the Respondent had opened a new letter of credit in favor of Unidyne. According to the Claimant, this is further evidence that the Iranian Navy was satisfied with Unidyne's performance.

110. The Respondent disputes that the payment of invoices can be considered evidence of the Claimant's satisfactory performance of certain elements of the Contract. The Respondent maintains that it paid invoices with the expectation that Unidyne would complete installation of these elements, as well as follow up with monitoring, evaluation and the two-year support period provided for in the Contract. The Respondent argues that the opening of a letter of credit in January 1980 similarly should not be construed as evidence of satisfaction with Unidyne's performance. The Respondent maintains that by extending the letter of credit it intended only to show good faith and to encourage Unidyne to perform its undertakings.

2. The Tribunal's findings

111. The Tribunal believes that, in line with both the relevant Contract provisions and Tribunal precedent, the Navy's payment of invoices until January 1980 must be taken as compelling evidence that it generally was satisfied with Unidyne's work. This is particularly the case when the Respondent made a careful review of each invoice and approved only invoices that, in its view, represented the fair value of the work performed. Section 3.2.1.B of the Contract provided for payment of an invoice only after "acceptance is made" by the Navy. The Tribunal has held in the past that a party's actions (i.e., payment) may imply acceptance of the other party's

performance. See e.g. John Warnecke & Associates and Bank Mellat, Award No. 72-124-3, p. 11 (2 Sept. 1983), reprinted in 3 Iran-U.S. C.T.R. 256, 261. In the Tribunal's opinion, this finding is supported by the fact that as late as 29 January 1980 the Respondent arranged to reopen a letter of credit in favor of Unidyne, in the amount of U.S.$1,228,316.40.

112. In view of these considerations, the Tribunal believes that the Respondent's Counterclaim sub item b of paragraph 31, supra, is without merit and is therefore dismissed.

D. The non-extension of the bank guarantees

1. The Parties' contentions

113. The Respondent's final contention of breach on Unidyne's part is that Unidyne failed to extend its performance bond and its guarantee to cover the (not yet withheld) balance of the down payment and the performance of services during the two-year guarantee period. The Respondent states that, notwithstanding Unidyne's commitment in its letter of 9 April 1980 (see paragraph 96, supra), Bank Markazi, pointing out that extension of the guarantees is subject to the purchaser's approval, in a letter dated 29 April 1980 informed the Navy that it had not yet received any reply from the issuing bank regarding extension. The Navy concludes that its "struggles towards extension of the guarantees came to nought."

114. Unidyne argues that the Parties contemplated that the letter of credit to cover the down payment would stay in effect for two years, being the anticipated duration of the Contract, and that in fact the letter of credit expired by its own terms in December 1979. Unidyne notes that the Navy, by a cable of May 1980 sent by Bank Markazi to the Chase Manhattan Bank in New York, claimed for the full amount of the letter of credit, even though most of the down payment already had been liquidated and that the Iranians only went to the bank after the letter of credit had expired. Generally, Unidyne argues that "it was the

acts of the Iranian government which precluded further performance by Unidyne, and thus terminated any requirements that Unidyne Corporation maintain any letter of credit guarantees for an indefinite period of time."

2. The Tribunal's findings

115. It emerges from the record that when it became apparent that, contrary to what was expected, the Contract could not be completed within two years from the date of its signing, the question arose as to what would happen with the guarantees. Two of the guarantees under the Contract were established in favor of the Respondent. The first was to cover the down payment. According to Article 3.4.11 of the Agreement, this guarantee would be reduced to U.S.$72,187.00 to cover the two-year guarantee period. The second guarantee in favor of the Respondent was the performance bond in the amount of U.S.$144,375.00 under Article 3.2.1 of the Agreement. At least with regard to the performance bond, the Respondent requested an extension of the expiry date through Bank Markazi on 7 October 1979. It appears, however, that the American banks never extended the guarantees in question.

116. As far as the guarantee under Article 3.4.11 of the Contract is concerned, the Tribunal has found in paragraph 49 supra, that the entire down payment has been set off against the invoices received from Unidyne. Furthermore, the Tribunal has decided in paragraph 106, supra, that the Respondent is entitled to recover the prepayments it made on the two-year guarantee. In light of these determinations, the Tribunal is of the opinion that the Respondent has not been prejudiced by the non-extension of the guarantee at issue.

117. With regard to the performance bond, the Claimant's failure to obtain its extension has to be seen in the light of the Freeze Orders. Paragraph 535.419 (a) of the Iranian Assets Control Regulations states that "[paragraph] 535.201 prohibits the unlicensed extension of credit to Iran or any Iranian entity,

by persons subject to the jurisdiction of the United States, after the effective date."[39] The Respondent itself refers in its memorial filed 5 December 1986 to a statement by Bank Markazi that "owing to the freeze of the Iranian accounts by the Government of the United States ... , the United States banks refused to extend guarantees."

118. In view of the foregoing, the Tribunal does not believe that the Claimant can be held liable under the Contract for failing to obtain the extension of the guarantees established in favor of the Respondent, despite its statement contained in its letter of 9 April 1980.

E. The Claimant's alleged failure to pay social security premiums.

119. Unidyne's final breach alleged by the Respondent is the failure to pay social security premiums in the amount of Rials 11,555,000.00. As the alleged obligation to pay these contributions arose not out of the Contract but by the application of the law of Iran, this Counterclaim is outside the Tribunal's jurisdiction. International Technical Products Corp. et al. and Government of the Islamic Republic of Iran et al., Award No. 196-302-3, p. 29 (24 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 206, 226; Howard Needles Tammen & Bergendoff and Government of the Islamic Republic of Iran, Award No. 244-68-2, para. 58 (8 Aug. 1986), reprinted in 11 Iran-U.S. C.T.R. 302, para. 58.

VIII. COSTS

120. Considering the outcome of the Award, the Tribunal, applying the criteria outlined in Sylvania, Award No. 180-64-1 at pp. 35-38, reprinted in 8 Iran-U.S. C.T.R. at 323-324, decides

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[39] For the text of the relevant passage of paragraph 535.201, see paragraph 92, supra.

to award the Claimant U.S.$15,000.00 as compensation for the legal costs it incurred.

IX. AWARD

121. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a. THE ISLAMIC REPUBLIC OF IRAN is obligated to pay UNIDYNE CORPORATION

the sum of:

(i) Two hundred fifty thousand United States Dollars (U.S.$250,000.00), plus simple interest at the rate of ten percent (10%) per annum (365-day basis) from 14 November 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account,

and

(ii) One hundred ninety thousand six hundred thirty-one United States Dollars and Seventy-four Cents (U.S.$190,631.74), plus simple interest at the rate of ten percent (10%) per annum (365-day basis) from 18 April 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account,

and

(iii) Fifteen thousand United States Dollars (U.S.$15,000.00),

less the amount of:

Forty-seven thousand six hundred forty-three United States Dollars and Forty-two Cents (U.S.$47,643.42), plus simple interest at the rate of ten percent (10%) per annum (365-day basis) from 18 April 1980 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 shall be satisfied by payment 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. All other Claims and Counterclaims are dismissed.

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

Dated, The Hague,
10 November 1993

Gaetano Arangio-Ruiz
Chairman
Chamber Three

In the Name of God

Richard C. Allison

Mohsen Aghahosseini
Dissenting Opinion