ORIGINAL DOCUMENTS IN SAFE

Case No. 368

368-92

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- Date _____

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** SEPARATE OPINION of _____

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** DISSENTING OPINION of Mr Aghahossin

- Date 12 Nov 93

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2

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

IN THE NAME OF GOD

Case No. 368
Chamber Three
Award No. 551-368-3

UNIDYNE CORPORATION,
Claimant,

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

Dissenting Opinion of Mohsen Aghahosseini

This is a Dissent to an Award in which the Majority have first fashioned a claim, of which there is no trace of whatever nature in the pleadings, and then proceeded, in the absence naturally of any defence, to grant the Claimant the full amount of the assumed claim.

This may appear a harsh description. But then the gravity of what has been done, and in particular the injustice to the Respondent, is such that no degree of restraint, here exercised

to the utmost, will allow a gentler but still adequate characterization[1]. First, though, a word on the relevant facts.

I. The background

The facts in this case, which are adequately reflected in the Award, need not be repeated here. Instead, those which are relevant to the present purposes will be shortly reviewed.

On 1 November 1977, Unidyne Corporation (hereinafter Unidyne or the Claimant) enters into a Contract with the now Navy of the Islamic Republic of Iran (hereinafter the Navy or the Respondent). The Contract calls for the developing by Unidyne of a system of "Maintenance and Material Management" (abbreviated as "3MP2"). As part of this programme, Unidyne is required to deliver a " Planned Maintenance System" (PMS) for a number of the Navy's vessels, and for the Bandar Abbas Shipyard. This latter work is designated in the Contract as Element 12L. The Contract price, totalling $3,609,382.00, is to be paid gradually and in proportion to the amount of work performed by Unidyne and approved by the Navy.

For a year or so, Unidyne renders services and is compensated accordingly.[2] As the Revolution gathers momentum,

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[1] The Award violates the Respondent's rights in a good many instances other than the one dealt with here. It assumes jurisdiction, for instance, not on the basis of any documentary evidence in the pleadings in support of the Claimant's nationality, of which there is none, but by relying on the statements made by the Claimant at the Hearing, depriving thereby the Respondent of any opportunity to rebut. This, and the like of it, which may, though not without difficulty, be attributed to simple difference of mind, were the issues on which I had originally intended to dissent. But the appearance and granting of an assumed claim at the last moment in the Award-- an exceedingly worrying development-- belongs to an entirely different category, and calls for a separate treatment.

[2] The Navy has now produced evidence in support of its assertion that the services were both defective and rendered with delays, causing the Navy considerable damages. But that is

however, Unidyne begins to withdraw its personnel from Iran, though it does maintain an office there, and on 2 January 1979, it writes to declare a state of force majeure:

> 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.... 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....

As for those elements of the work which, unlike the Element 12L at the Shipyard, are not affected by force majeure, Unidyne proposes the implementation of an "Emergency 3MP2 Management Plan".

On 19 January 1979, the Technical Directorate of the Navy writes to instruct Unidyne "to delete work" at the Shipyard, and to send to the Navy's offices an authorized representative to discuss and finalize the ordered change. In doing this, the Navy is fully justified. Apart from the fact that Unidyne has by then declared a state of force majeure and withdrawn its personnel from the site, the Navy is expressly authorized, under Article 3.4.14 of the Contract, to order for its convenience the deletion of any part of the Contract by giving a ten-day notice.

This is then followed, apparently[3], by a meeting at which Unidyne is further instructed to submit its assessment of the scope and the value of the work performed at the Shipyard.

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outside the scope of this Dissent.

[3] The lack of certainty is, as we shall see shortly, due to the fact that, there being no claim before the Tribunal in this respect, a complete record of what has happened is not provided. Instead, it is only from other scattered documents, submitted in support of wholly different propositions, that a rough picture may be drawn.

Unidyne's valuation of the work, together with the "relevant documents" are later submitted to the Navy, through a letter dated 22 July 1979. The value of the work is put, again apparently, at $378,088.00.

In its letter of 18 August 1979, the Technical Directorate of the Navy writes, inter alia, that the submitted documents will be "reviewed and assessed" within three months. There follows, still apparently, a number of meetings in October and November 1979, at which the Parties' representatives review the scope and the value of the work performed at the Shipyard. The result of the Technical Directorate's assessment is then transmitted to Unidyne through a letter dated 14 November 1979. The value of the work is determined to be $152,503.98.

On the same day, 14 November 1979, Unidyne writes to object to the Directorate's evaluation, and to request the Directorate to either offer "a more satisfactory" offer or allow Unidyne "to complete the Shipyard effort". Considering the complete withdrawal of its personnel from Bandar Abbas, Unidyne's alternative suggestion to be allowed to "complete the Shipyard effort", is difficult to understand. At any rate, the Navy, being expressly authorized by the Contract to limit the scope of the work at any time during the life of the Contract, had no contractual obligation other than to compensate Unidyne for the performed work.

II. No trace of a claim either then, or subsequently before this Tribunal

According to the Contract's "Disputes Clause":

> [A]ny 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....[4]

It will be noted that on any question of fact, the decision by the Technical Directorate (T.D.) of the Navy would become "final and conclusive" unless, within 30 days after its receipt, a written appeal is made to the Navy's Commander-in-Chief. So would the decision by the Commander-in-Chief , made on appeal, unless a further written appeal to the Commander himself is made within 30 days, in which case the dispute, if unresolved, must be referred to arbitration.

In the event, Unidyne chooses not to take any of these steps, exclusively provided by the Contract for settling a dispute. It does not appeal from the decision by the Technical Directorate to the Navy's Commander-in-Chief. Instead, as evidence submitted in a wholly different connection shows, it submits Invoice No. 79-0632 dated 30 January 1980. There, the Navy is charged, and it pays, the amount of $152,503.98, the exact value put by the Navy on the work at the Shipyard. The Invoice is not marked "under protest", nor is it preceded, or followed, by any other means of recording an objection.

This is worth repeating: Unidyne signs a Contract under which a failure to appeal from a decision by the Technical Directorate to the Navy's higher echelons has the effect of rendering that decision "final and conclusive". Yet, with regard to a decision by the Technical Directorate, with which Unidyne initially disagrees, it chooses not only not to appeal to the higher echelons, but to submit an Invoice in the amount assessed for the work by the Technical Directorate. This establishes,

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[4] Article 3.4.12.

surely, not only a willingness on the part of Unidyne to accept the Navy's valuation of work but also, and more importantly, that the decision having become "final and conclusive", Unidyne is no longer legally entitled to pursue any claim in that regard, even if it wants to.

From 30 january 1980, when Unidyne volunteers to charge the Navy for the offered amount, to 18 January 1982, when Unidyne refers its other claims to this Tribunal, is a period of nearly two years. Yet, there is not a word recording Unidyne's objection, or otherwise suggesting that Unidyne still considered itself entitled to additional compensation for the work at the Shipyard; and this in spite of the fact that at least for a considerable part of that period the Parties maintain a fairly regular contact, and exchange letters on the performance of other parts of the Contract.

The Statement of Claim, submitted on 18 January 1982, contains Unidyne's detailed description of where and how the Navy has allegedly breached the Contract. Each count is separately identified and explained. There again, not a single reference, however remote, to the existence of an earlier dispute between the Parties in respect of the services rendered at the Shipyard; and no suggestion, however remote, that Unidyne still seeks additional amount on that ground. Indeed, there is, even at this stage, no reference to the Parties' letters of 14 November 1979, which are the only documents recording the existence of a disagreement between the Parties prior to the submission of the Invoice.

Indeed, the only two references in the Statement of Claim to Invoice No. 79-0632 show, affirmatively, that Unidyne considers the work as having been satisfactorily compensated. The first reference is made at page 4, where it is stated that "NIRI/IIN paid an invoice on January 30, 1980 and thereafter refused to pay Unidyne the total amount due for services performed." (emphases added.) The Invoice which was paid on 30

January 1980 is, of course, the Invoice in question. The second reference is made at page 7 where Unidyne, under the title of "[f]ailing to make timely and complete payment on invoices", provides a list of certain invoices. The last item on the list refers to Invoice No. 79-0632. The complaint is, albeit unjustifiably, about a delayed payment, and not about an ~~incomplete payment~~.

This, again, is worth repeating. In a Statement of Claim submitted two years after the Navy's valuation of the work in question, and in which every minor instance of the Navy's alleged breach of the Contract is described in detail, there is not a single reference to the existence of a prior disagreement between the Parties in that regard. The Invoice, on the other hand, is twice referred to in order to establish, first, that it was after its payment that the Navy refused to pay for Unidyne's services and, secondly, that the Invoice had been approved with some delay.

The Claimant's next Brief, submitted on 16 May 1983, is a "Reply" to the Respondent's counterclaims. There, Unidyne sets to "respond to the specific allegations of the counterclaim in the order in which they appear" in the Respondent's Brief on counterclaims. Once again, no suggestion, however remote, that a claim on the work at the Shipyard is still pending and is being pursued.

This is the Brief in which the Navy's letter of 14 November 1979, reflecting the Navy's assessment of the work, is first referred to and submitted as an exhibit. Yet this is done so not to show that the Navy had underestimated the work, not to show that there had been an earlier disagreement between the Parties in that regard, but to establish, in answer to an specific counterclaim, that the Navy had acknowledged the installation of PMS on some of its vessels; a point to which the Navy's letter of 14 November 1979 does indeed refer. Here is the relevant

passage in which Unidyne itself determines the purpose for which the letter is referred to and submitted:

> Iran has already received complete installation packages for forty-three (43) of the sixty-eight (68) ships covered by the contract, and has acknowledged that it received the complete installation, training, and training material for those ships as shown in Exhibit C....

Exhibit C to the Brief is the Navy's letter of 14 November 1979.

This, again, is the Brief in which Unidyne's letter of 14 November 1979, reflecting Unidyne's objection to the Navy's valuation of the work, is first submitted as an Exhibit (Exhibit L). Yet, this too, is done not to demonstrate that Unidyne was dissatisfied with the Navy's assessment, or that this had been objected to, but to establish, in Unidyne's own words, the "termination of work on Bandar Abbas Naval Shipyard for convenience of Navy"[5]; a point to which Unidyne's letter does indeed refer.

Finally, this is the Brief through which Invoice No. 79-0632 is first submitted. But once again it is done so for the specifically stated purpose, and nothing else, that the Navy has:

> received and accepted a vast majority of the forms, manuals, and training material necessary to implement the program as evidenced by Exhibits E-13 through E-18.

Exhibit E-18 is Invoice No. 79-0632 dated 30 January 1980 through which Unidyne is compensated for its work at Bandar Abbas.

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[5] There is one further reference, at page 7 of the Brief, to Exhibits C and L. This will be dealt with shortly.

The importance of all these cannot be overemphasized. In a Brief which, by the Tribunal's Order and in Unidyne's own words, is limited to replies to specific counterclaims, the Navy's and the Unidyne's letters of 14 November 1979 as well as Invoice No. 79-0632 are submitted, for the first time in the proceedings, as Exhibits C, L, and E-18, respectively.

Exhibit C, the Navy's valuation of the work, is specifically said to have been submitted in support of the proposition that the Navy has been provided with complete installation packages. Exhibit L, Unidyne's letter of 14 November 1979, is expressly said to have been submitted for the specific purpose of demonstrating that the Navy has terminated the work for its convenience. Finally, Exhibit E-18, the Invoice in question, is explicitly said to have been submitted for the exclusive objective of establishing that the Navy has approved of and paid for certain services. The conclusion to be drawn is simple enough. But for Unidyne's attempts at establishing these points, and but for the fact that the two letters happen to refer to other issues as well, this Chamber would not have become incidentally aware that at some point in time and before the payment of Invoice No. 79-0632, the Parties had disagreed on the value of the work performed at Bandar Abbas Shipyard.

There is no other reference, of whatever nature, to this issue in any other submissions subsequently filed by the Claimant. Indeed, in response to the Chamber's Order of 12 December 1986, in which the Parties were directed 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 Claimant limited itself to the submission of a "List of Documentary Evidence". There again, Exhibits C, L, and E-18 were said to have been submitted for the specific purposes referred to above, and no suggestion that these were intended to support any other propositions, including the existence of a claim by Unidyne on the work performed at the Shipyard.

The Hearing in the Case was held on 7 September 1990, at which the Parties presented their oral arguments in support of their respective positions. No suggestion, however remote, that a claim on the work at Bandar Abbas was being pursued.

This was immediately followed by the Chamber's oral deliberations. Still no suggestion, from any corner, that any such claim was before the Tribunal for decision.[6] It is important to note here that this was not a complicated Case involving voluminous briefs and a multitude of controversial issues. It was, rather, a simple case of contractual disputes involving no more than a few claims and counterclaims. A claim on the Shipyard work, which would have constituted a major part of the Claimant's entire case, could not have easily escaped the attention of all the participants, had it been presented to the Chamber in any form.

The deliberations on the Case were followed, on 27 December 1991, by a Draft Award prepared by a Member on facts and contentions. No reference was there made to the existence of a claim on the Shipyard work before the Chamber. A second suggested Draft, this time on the merits of the Parties' contentions, was distributed on 27 March 1992. Still, no allusion to such a claim. Finally, the Chamber's First Draft Award was prepared and submitted to the Members on 19 May 1993. Once again, no trace of such a claim being before the Chamber for determination. By then, of course, some three years had passed since the Hearing.

The facts referred to so far may now be summarized. Having seen that its initially suggested assessment of the work performed at the Shipyard is rejected by the Navy, Unidyne writes to object. This, of course, is both common and understandable. An objection of this type is customarily made, if not for

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[6] I am well aware of, and intend to observe, the rule on the confidentiality of deliberations. It is for that reason that references in that regard will be made in most general terms, and only when they are absolutely necessary for the present purposes.

financial gains, in order at least to support the credibility of the initial assessment. As to what takes place between the Parties during the two ensuing months, there is no evidence before the Tribunal. Evidence submitted in support of entirely different contentions shows, on the other hand, that at the end, Unidyne voluntarily consents to the Navy's valuation, and on its own accord issues Invoice No. 79-0632 in the amount offered by the Navy. That Unidyne accepts this in full satisfaction of its work on the Shipyard, and does not regard itself entitled to any further compensation in that respect is evidenced, inter alia, by the facts that:

-- There is not a word on the Invoice, or in any other contemporaneous communication with the Navy, indicating that the Invoice is submitted "under protest", or the money is received without prejudice to Unidyne's initial position; and this in spite of the fact that, under the express terms of the bargained for Contract, a failure to appeal results in the Navy's decision becoming "final and conclusive". The absence of any objection, therefore, not only shows Unidyne's willingness to accept the offer in full satisfaction of its claim, but that no claim on that ground can be legally pursued thereafter.

-- There is not a single word in any subsequent correspondence with the Navy; and this is in spite of the fact that Unidyne maintains an active and vocal representative in Iran and fairly regularly communicates with the Navy on the performance of other parts of the Contract.

-- There is not a single word in an otherwise detailed Statement of Claim-- in which every minor instance of the Navy's alleged breach of the Contract is described-- to the effect that a claim on the work at the Shipyard is being presented.

-- There is not a single word in any other of the Claimant's submitted documents, throughout eight years of written pleadings, or at the Hearing, to the effect that Unidyne still regards

itself entitled to any additional payment on that ground. Indeed, had it not been for the Claimant's offer to prove other facts, the Chamber would not have become cognizant of the fact that sometime in the past the two Parties had suggested different values for the work at the Shipyard.

Such was the case before the Chamber, and these were the reasons why the Chamber in its oral deliberations, which immediately followed the Hearing, and in its preparation of the earlier Draft Awards, which lasted for over three years, did not as much as refer to a possible claim on the work performed at the Shipyard.

III. A claim is nevertheless asserted to have been before the Chamber

The Award, following a later Draft, asserts that "There is a dispute among the Parties about the sum due for work performed by the Claimant on Bandar Abbas Shipyard." With Unidyne's earlier conduct, and with no trace of such a claim in the pleadings, what is the basis of this contention? This will now be dealt with.

Failing to realize that Unidyne's decision not to object to the Navy's assessment did not merely indicate a "waiver" but, by the very terms of the Contract, had the additional effect of making the Navy's decision "final and conclusive", the Award limits itself to addressing the question of whether or not Unidyne's conduct constituted a waiver. The answer, says the award, is in the negative, and that for the following two reasons, both gratuitously advanced on behalf of the Claimant:

-- That Unidyne, having first objected, in extenso, to the Navy's assessment of the work, "it would be rather odd" if it "suddenly would have collapsed and given up its entitlement to extra amount."

-- That considering the deteriorating relationship between the United States and Iran after 4 November 1979 (the incident in the United States embassy in Iran), the "fact that the Claimant did not include any language on the invoice 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 disputed amount."

This, says the Award, "is consistent with Mr. Connor[sic]'s testimony at the Hearing according to which "Unidyne attempted to get what it could" by issuing the invoice in the lower amount.[7]

One can only marvel at these suggestions. First, having no evidence before them, and thus knowing nothing about what took place between the Parties in those two and a half months, what justifies the Majority to characterize Unidyne's acceptance of the Navy's assessment as a "sudden collapse"? With the Parties being in regular contact, is it difficult to conclude that Unidyne was eventually convinced that the Navy's assessment had been justified? More importantly, faced with the Claimant's failure to explain the relevant facts, can this judicial forum take upon itself the task of speculating what would, or would not be odd for the Claimant to do?

Next, as for "the deteriorating relationship between the United States and Iran" after 4 November 1979, the fact is evidently overlooked that Unidyne's letter of 14 November 1979, reflecting Unidyne's objection to the Navy's assessment of the work, was written 10 days after the embassy incident on 4 November 1979. What particular event had occurred between 14 November 1979, when the objection was raised, and 30 January 1980, when the Invoice was issued, to prevent Unidyne from

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[7] This asserted testimony at the Hearing will be shortly dealt with.

submitting the Invoice "under protest"? More fundamentally, how could "the deteriorating relationship between the United States and Iran" have possibly prevented Unidyne from writing a line of objection from its seat, Norfolk, Virginia? If, as it is suggested, Unidyne declined to record its objection for fear of not receiving even the undisputed amount, why did it fail to record its objection after the collection of the invoiced amount? Sometime, for instance, between 30 January 1980 (when the invoiced amount was received), and 18 January 1982 (when Unidyne commenced proceedings before this Tribunal?[8] The duty to object was not merely a general imposition by law but also, it is worth recalling, an express term of the Contract.

As for the fact that there is in the pleadings not a word remotely indicating that a claim in this respect has been presented, the Award maintains a conspicuous silence. In the absence of any explanation, of whatever nature, in support of the Award's conclusory remark that "there is a dispute among the Parties" on this issue, I propose to deal with two paragraphs, in eight years of pleadings, through which the Claimant is suggested to have asserted this claim.

The first is paragraph 12 in the Statement of Claim, where it is stated that:

> During the period of the performance of the contract, Unidyne performed services and provided materials to NIRI/IIN pursuant to the obligations under the contract, and the reasonable value of the services performed and the equipment and material furnished for which Unidyne has not been compensated is One Million Eight Hundred Ninety-Seven Thousand Four Hundred Twenty-Three U.S. Dollars (U.S.$1,897,423.00).

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[8] It should be noted that on 9 April 1980 Unidyne, in response to a request made by the Navy, submitted a detailed review of the final status of the Contract performance. Nowhere in this detailed communication is there a slightest reference to any outstanding amount for the services rendered at the Shipyard.

It is suggested that this is broad enough to cover the assumed claim for the work performed at the Shipyard. The suggestion is exceedingly misleading.[9]

A cursory review of the Statement of Claim will show, readily, that in this paragraph 12 the Claimant does not seek to assert a general claim in addition to its previously listed and explained claims, but to offer a conclusion on its preceding discussion and to set a figure for the total relief sought. For the benefit of those who do not have access to the Statement of Claim, it must be explained that the Statement, having first dealt with a few preliminaries, sets to itemize and explain, with references to the relevant provisions in the Contract, every instance in which the Navy has assertedly failed to meet its contractual obligations. There is, as already mentioned, no reference in this to an alleged failure by the Navy to pay additional compensation for the work at the Shipyard.[10] Having so enumerated and explained, exhaustively, the alleged instances of breach, the Statement of Claim comes to paragraph 12 where, by way of summing up the submissions and in order to assert the sum total of the relief sought, it says that "the reasonable value of the services performed... for which Unidyne has not been compensated is... $1,897,423.00". As repeated in paragraph 14 of the Statement of Claim, this figure represents the total sum of the relief sought. The statement in paragraph 12, therefore, cannot possibly constitute a claim in the amount of $1,897,423.00 in addition to the claims listed earlier.

The second, and the last, basis on which a claim on the Shipyard work is suggested to have been presented is a passage

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[9] To say nothing of the fact that claims cannot be asserted through statements broad enough to cover them, but must be specifically stated and supported by evidence.

[10] It will be recalled that in this very Statement of Claim, Unidyne specifically admits that "NIRI/IIN paid an invoice on January 30, 1980 and thereafter refused to pay Unidyne the total amount due for services performed." (emphases added.)

in the Claimant's Reply to the Navy's Counterclaims. There, the Navy is asserted to have refused

> to pay for any of the adjustments required by the contract due to their delay and hinderance of Unidyne's ability to perform, or lost profits as a result of their termination for convenience of certain items of contract. (See Exhibits B, C, K and L and § 3.4.14(d) on p. 3-13 of Contract).

It is suggested that Exhibits C and L being respectively the Navy's and Unidyne's letters of 14 November 1979, the reference to the Navy's refusal to pay for the adjustments must be taken to refer to the work performed at Bandar Abbas. This, too, is equally misleading.

Quite apart from the fact that this is a Brief submitted for the expressly stated purpose of responding to specific counter-claims and is not, therefore, a place in which new claims may be presented, the contention in the passage has absolutely nothing to do with a claim on the work at the Shipyard. This may be briefly explained.

Article 3.4.14(d) of the Contract, invoked by Unidyne in the above-quoted passage, stipulates that when the Navy effects a part termination for its convenience, "the contract shall be equitably adjusted to compensate for any such termination and the contract modified accordingly". This "equitable adjustment" or "modification" is to compensate the Contractor, as Unidyne itself correctly submits, for not being allowed to complete the omitted part of the Contract, despite its readiness to do so. It is a compensation, in the words of Unidyne itself, "for hinderance of Unidyne's ability to perform or lost profits"; a claim which has, indeed, been pursued by Unidyne in the present proceedings. That being the case, the claim referred to in the passage has no relevance to an assumed claim on the services performed at the shipyard, for which Unidyne becomes entitled to compensation not as the result of an "equitable adjustment" to, or a "modification" of, the Contract, but on the basis of the terms

of the existing Contract, under which Unidyne must be paid for the value of the services performed and approved.

What Unidyne seeks to argue in this passage is, in short, that the Navy, having for its convenience terminated the Shipyard element of the Contract, as evidenced by Exhibits C and L, has failed to compensate Unidyne for the equitable adjustment required by Article 3.4.14(d) of the Contract. That is why in this very Brief, Unidyne itself twice identifies Exhibit C as a document submitted to establish the "Status of Completion of PMS Installation, Training and Training Material", and Exhibit L as a document tending to prove, exclusively, the "Termination of Work on Bandar Abbas Naval Shipyard for Convenience of Navy".

Indeed, this very passage in which a claim for loss of profits resulting from the termination of work at Bandar Abbas is specifically asserted, while no reference to a claim on the past services is made, is yet another direct evidence that Unidyne does not seek any additional compensation for services rendered prior to the termination.

The remarks attributed in the Award to the Claimant may now be examined. There are two short statements the Claimant is alleged to have made at the Hearing in reference to the assumed claim. First, the Award states that a Mr. Conner, Unidyne's vice-president, testified at the Hearing that "Unidyne attempted to get what it could" by issuing the Invoice in question in the lower amount. Second, it is stated that "At the Hearing the Claimant maintained that an amount of U.S.$176,304.02 was still outstanding for MPS Development at Bandar Abbas."

My notes of the Hearing, taken rather carefully, do not show that any such things were ever stated, or that a claim on the Shipyard work was ever referred to, at the Hearing. Nor do the notes taken by my legal assistant.

Further, if such a claim had been presented, albeit at the Hearing, it could not have easily escaped the fresh minds, and notes, of all those who participated at the deliberations which followed, immediately, the Hearing. The notes, at any rate, could not have completely escaped the attention of those who prepared successive Draft Awards in this Case. It is worth repeating that a demand by Unidyne to be compensated for its initially suggested value of the work would not have represented an insignificant part of an inordinately large relief. Quite to the contrary, such a claim, if it had been made, would have constituted a major component of the entire Case and, as such, could not have remained unnoticed until the release of a fourth Draft some three and a half years after the Hearing.

The fact remains, in any case, that by the very directives of this Chamber in this and other cases, claims cannot be held back and presented for the first time at the Hearing. In other words, Unidyne, having failed to appeal from the decision by the Navy's Technical Directorate, having failed to record its objection either on the Invoice or in any other of its communications with the Navy prior to present proceedings, having failed to state and specify a claim either in the Statement of Claim or in any other of its pleadings, may not be allowed to rely on a statement at the Hearing that it issued the Invoice in the lower amount in an attempt "to get what it could".

Finally, it should be noted that the statement is attributed to Unidyne's vice-president, who appeared before the Chamber as a Party witness. There is no suggestion that the counsel, who represented Unidyne in these proceedings, himself referred to such a claim at the Hearing.

IV. No shred of evidence on the merits

Assuming, arguendo, that a claim for work at the Shipyard had in fact been presented, what is there in the pleadings to

justify the Award's finding that Unidyne is entitled to the full initially asserted value of the work? The answer, I suggest, is none whatsoever.

The Award itself admits that "only part" of the evidence is before us.[11] In fact, what is before the Chamber is only a small fraction of what is needed for at least a crude understanding of the pertinent facts. from references here and there, it may be gathered that Unidyne's initial assessment of the work is first submitted to the Navy with-- and this is to be expected-- "relevant documents". Yet these "relevant documents", the only means by which the merits of Unidyne's assertion could have been examined, are not before the Chamber. And that for a very good reason: there has been, as suggested, no claim in this respect before the Chamber. Unidyne's initial assessment and "relevant documents" are then examined, as the Award admits, in a number of meetings attended by the Parties' representatives. But as to what is exchanged there, and what evidence is discussed, the Chamber is wholly innocent. What is known is that at the end Unidyne does not pursue the issue any further and volunteers to submit an invoice in the amount offered by the Navy.

The Navy, on the other hand, has had no reason to justify its own assessment of the work before this Chamber. Having explained its valuation in those meetings with Unidyne's representatives, having received and paid the Invoice in the amount it had suggested, and having been served with no appeal as required by the Contract, or presented with any claim here, it could not have logically been expected to challenge the merits of Unidyne's assessment in these proceedings.

In short, the evidence before the Tribunal in this respect consists of no more than two letters, both submitted, as mentioned earlier, in support of wholly different propositions. The first is the navy's letter of 14 November 1979. The letter,

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[11] Though it does not concern itself with why this should have been the case.

in addition to the point for which it is submitted, happens to show the Navy's valuation of work at $152,503.98. The second is Unidyne's letter of the same date. This, too, in addition to the point for which it is submitted, contains Unidyne's objection to the Technical Directorate's valuation of the work, and a request for a "more satisfactory" offer.

As such, the letters at most reveal the two Parties' assertions on the value of the work in question. In the absence of any evidence of whatever nature in support of the Parties' respective positions, the Award's proposed method to nevertheless pronounce itself on the merits is most interesting:

> 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 Award then proceeds to conclude that since the Navy's objections, contained in its letter of 14 November 1979, are rather "conclusory", while Unidyne's reactions, contained in its letter of the same date, are more "elaborate", it is the latter which provides "the more persuasive evidence on this point". This novel approach to determining the merits of unsupported assertions must be rejected summarily, if only for the following two reasons:

First, the Navy's letter of 14 November 1979 does not contain the Navy's "objections" to Unidyne's assessment, so as to require "elaboration". The letter reflects, on the contrary, the result of the Navy's own valuation of the work based on the "relevant documents" submitted by Unidyne. The very nature of the letter is thus wholly misunderstood.

Second, if the outcome of the Navy's valuation of the work is reflected in "conclusory" form, the valuation itself has certainly not been "conclusory". The Navy's letter of 14 November 1979 indicates a three month review of all the "relevant

documents", and the Award admits that this valuation was preceded by a number of meetings between the Parties' representatives. It is true of course that the evidence of what transpired between the Parties at those meetings are not before the Tribunal. But that is no fault of the Navy which, confronted with no claim, has naturally seen no reason to provide the Chamber with irrelevant evidence.

One final point in this respect deserves attention. Unidyne originally valued the work at $378,088.00. The Navy, on the other hand, valued the work at, and paid, $152,503.98. That leaves a difference of some $226,000 as a possible outstanding claim. Where did the figure of $176,304.02 -- assertedly suggested by the Claimant at the Hearing and awarded by the Majority-- come from remains a mystery. So does the justification for the awarding of this figure while Unidyne itself, in its only letter of objection, asks for no more than "a more satisfactory" offer.

V. A final word

It had been my intention, primarily, to offer in this Dissent a short review of the Cases in which the claims mainly of the Respondent Government have, one after the other, been summarily dismissed by this Tribunal for not being accompanied

with "contemporaneous objections"[12] or for not being clearly "specified and supported by evidence".[13]

Instead, I have decided to say this: Assume that such a claim, if there was any, had been presented not by Unidyne, of assertedly United States nationality, but by an entity of the Respondent Government. A claim with respect to which the claimant, in disregard of the clear terms of the contract, had decided not to object to the other party's assessment of the work. A claim in respect of which the claimant had subsequently decided to submit an invoice in the amount offered by the other party. A claim in respect of which the claimant had failed to record any complaint either on the invoice or through any other means for years thereafter. Would this Chamber have held that this did not constitute a waiver? That this did not constitute a contractual bar to the claim? Would this Chamber have been prepared to explain away the claimant's decision not to write a line of objection by reference to "political situation" in the respondent country?

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[12] See, for instance, the rejection of a counterclaim in Ford Aerospace & Communications Corporation and Government of the Islamic Republic of Iran et al., Award No. 289-93-1, para. 62 (29 Jan. 1987): "[T]he Tribunal notes that until this proceeding the Respondent did not raise any specific objections to the invoices.... Under the Contracts the Respondent was obliged to raise any objections to invoices submitted within four weeks. Even if this four-week rule may have no longer applied under the circumstances when the contractually required cooperation between the Parties ceased, the Tribunal finds, as in Touche Ross... that the Respondent's failure to respond to the invoices within a reasonable period raises the presumption that they were, or at least should have been, accepted. The Tribunal finds that the Claimant should have been placed on notice of any objections within a reasonable time...."

[13] See, for instance, Ford Aerospace & Communications Corporation et al. and Air Force of the Islamic Republic of Iran et al., Award No. 236-159-3, para. 95 (17 June 1986), in which it was held that: "The Tribunal notes, however, that the counterclaim is based solely on the assertions and calculations submitted by the Respondent and that no evidence has been submitted in support of these assertions. In view of the foregoing... the Tribunal dismisses this counterclaim."

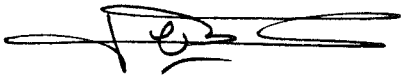
A claim, further, which had not been at any rate specified throughout eight years of proceedings, so much so that its asserted basis had to be traced, at best, to an irrelevant paragraph in a Brief submitted exclusively to rebut the respondent's counterclaims. Would this Chamber have held that there was nevertheless a stated claim before it?

A claim, finally, which had not been supported by a shred of evidence in support of its merits. Would this Chamber, relying exclusively on the "more elaborate objection" by the claimant, have found sufficient evidence to pronounce itself on the merits? Would this Chamber have granted the full amount of the claimant's valuation while, in the only letter in which the respondent's valuation had been objected to, the claimant had asked for no more than "a more satisfactory" offer?

For a ready answer to these questions, one need not go further than the present Award. There, a Navy's complaint, clearly specified and supported by a wealth of evidence, including Unidyne's written admissions, is nevertheless rejected for being "generally... less well documented". The Navy's yet another complaint is in this very Award rejected because "a party's actions (i.e., payment) may imply acceptance of the other party's performance."

As I have said elsewhere, in this Chamber what is sauce for the goose is not sauce for the gander.

Dated, The Hague,
12 November 1993



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