IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 395 395_319 Date of filing: 20 Dec 1989

** AWARD - Type of Award _____

- Date of Award _____

_____ 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

** DISSENTING OPINION of Judge Ansari

- Date 22 Sept 1989

4/4 pages in English — pages in Farsi

** OTHER; Nature of document: _____

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- Date _____

_____ pages in English _____ pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

Persian version
Filed on 25 Sep. 1989

CASE NO. 395
CHAMBER THREE
AWARD NO. 431-395-3

COMPONENT BUILDERS,INC.,
WOOD COMPONENTS CO. and
MOSHOFSKY ENTERPRISES, INC.,
Claimants,

and

ISLAMIC REPUBLIC OF IRAN,
BANK MASKAN IRAN [SUCCESSOR TO
BANK RAHNI IRAN] and
INSURANCE COMPANY OF IRAN,
Respondents.

DISSENTING OPINION OF JUDGE PARVIZ ANSARI

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1. A number of aspects of the instant Award compel me to dissent to the majority's decision. This dissent arises either from its incorrect interpretation of the facts -- whether from the viewpoint of how those facts are reflected and described, or from that of how the evidence has been assessed -- or else it arises from the majority's erroneous conclusions and arguments, whether as to how the judgment conforms to the issue at hand, or as to how the majority

deviates from its own premises and arrives at inconsistent findings. Below, I shall discuss a number of such instances and points, avoiding undue prolixity in the process. For the same purpose of brevity, I neither set forth nor criticize the more tangential matters, albeit such silence does not signify my concurrence therein. For the sake of constituting a majority, I concur in the dismissal of the claim relating to reimbursement of increased Social Security costs, and in the acceptance of the counterclaim for late delivery of the housing units. I do not, finally, deem it necessary to reiterate my previous views in connection with the issue of the Tribunal's jurisdiction and the Claimant's nationality. See: Dissenting and Concurring Opinion of Parviz Ansari to Interlocutory and Partial Award No. 51-395-3 (18 July 1985) in Component Builders, Inc., et al and Islamic Republic of Iran, et al, reprinted in 8 Iran-U.S. C.T.R. 228-35.

TERMINATION OF THE CONTRACT

2. The manner in which the Contract was terminated constitutes a basic issue in this Case and, depending on whether the termination took place due to the Contractor's default (termination for cause) or without cause (termination for convenience by Owner), it is a determining factor in the fate of the claims brought and of the Parties' financial obligations. Although Bank Maskan (the Respondent) terminated the Contract due to the Claimant's default and in reliance on the relevant contractual provisions, the present Award has interpreted the Respondent's action as constituting termination without cause. There is sufficient evidence in the present Case to demonstrate that the Respondent justifiably terminated the Contract due to default and delay on the part of Component Builders, Inc. and Wood Components Co. (the Claimant) in performing on the Contract. The records of the correspondence between the Parties, which continued until the Respondent gave notice

of the termination of Contract, and the fact that there is no trace of any reaction or response by the Claimant to the said termination notice, reinforce the conclusion that the Claimant itself conceded that it was in default in its performance on the Contract.

3. When performance on the Contract was suspended due to force majeure on 24 January 1979, the Claimant was already in considerable delay in delivering the units according to the schedule which had been adjusted and extended several times, [and most recently] through Addendum No. 4 to the Contract. According to Addendum No. 4, the Rasht units and Shahin Shahr units should have been ready for provisional acceptance by 20 September and 21 October 1978, respectively. Not only was the Claimant to be assessed liquidated damages for failure to deliver the units on the specified dates, but also, according to Article 10.4 of the Contract, any delay in excess of 45 days after the specified date would entitle the Respondent to terminate the Contract. In relevant part, the said Article reads as follows:

> If Provisional Acceptance is delayed by more than forty-five (45) days beyond the appropriate Completion Date, as adjusted, Owner may, in its discretion ... terminate this Contract as a whole for default...

In view of the above-referenced dates, it is clear that this forty-five day time-limit had expired for a large number of units before notice of force majeure was given on 24 January 1979; and it is thus equally clear that the Respondent was already entitled to terminate the Contract due to the Claimant's failure to comply with the delivery schedule for the units.

4. In its letter No. 2544 dated 25 April 1979, the Respondent notified the Claimant that the force majeure conditions (which had been declared on 24 January 1979 by

agreement of both Parties) had expired, and it invited the Claimant to resume work:

> ... We hereby inform you that the special conditions on which the force majeure was based now expired, therefore you are asked to start within 10 days after receipt of this letter all work that was suspended from 24.1.79.

Although the Claimant took no action whatsoever to meet the above ten-day start-up period, in its subsequent correspondence the Respondent, acting in good faith, repeatedly invited the Claimant to resume work. Inter alia, in its telex dated 26 June 1979, the Respondent stated:

> We do believe that the conditions in Iran have completely returned to normal and as stated in our letter No. 2455 dated 5.2.58 nothing now prevents the resumption of works of the project.

In the several pieces of correspondence which were subsequently exchanged between the Parties, the Claimant, resorting to various excuses, refrained from returning to the work site and implementing the Project. The Claimant's views - as reflected, inter alia, in the telexes dated 4 and 15 June and 10 July 1979- are set forth in paras. 41-45 of the Award and need not be repeated in full here.

5. The problems and excuses advanced by the Claimant in the aforementioned correspondence regarding its return and resumption of work, pivot around certain specific matters which are manifestly irrelevant to the reasons for the stoppage of work and the declaration of force majeure on 24 January 1979. Therefore, the Claimant's recitation of those problems and excuses can only be interpreted as a subterfuge or as an implicit expectation on its part that some of the Parties' mutual obligations specified in the Contract be changed. In actuality, the Claimant was demanding conditions more advantageous than those provided

for under the Contract. Inter alia, in its telex dated 4 May 1979, the Claimant refers to the settlement of insurance claims and the provision of paint and materials, as its conditions for resuming work, stating as follows:

> 2. Insurance claims with Bimeh Iran, must be settled including damage claims on the marine policy, fire claims on the site policy and (most important) claims for damage due to the flood...
>
> 3. We must have on hand all supplies from customs now in Iran and assurance of supplies from Iran (such as paint) before work can commence...

Yet, it was the Claimant's duty to perform on the above, among other duties, and the Respondent had no contractual obligation to fulfill the Claimant's expectations, inter alia that the Respondent guarantee that it could recover under the claims against Bimeh Iran, and that the Respondent provide certain supplies. Therefore, in adducing the above issues as its precondition for resuming work, and in expecting the Respondent to undertake a part of its duties and obligations, the Claimant was manifestly in breach of its contractual obligations and requirements.

6. Another example of the requests and expectations put forth by the Claimant in violation of the Contract is the issue of the possibility of transferring the [surplus] funds collected under the Project out of Iran. This expectation is set forth as follows in the Claimant's telex dated 4 May 1979:

> We need adequate guarantees from the Government that payments for progress billing, provisional billings, and final billings will be made when due, and assurance that surplus funds collected can be transferred [abroad]...

The Respondent was obviously under no obligation to guarantee that any [surplus] funds collected under the project could be transferred out of Iran. Nevertheless, in its letter dated 28 July 1979, the Respondent endeavored to remind the Claimant of this truism:

> In connection with the question of transfer of funds abroad, we would like to remind you that the government, even in the past, has always had the power of imposing certain restrictions and the absence of such restrictions at the time of the signature of the Contract did, by no means, mean that such restrictions could not be imposed. However, under the present circumstances transfer of surplus funds earned by foreign contractors is, under certain conditions, permitted. For further information we suggest that you check it with your Iranian lawyers.

7. The other issue raised by the Claimant is the financial situation of the Project and the Contract. In this connection, the Respondent replied as follows in its telex dated 2 June 1979:

> (I) Your statement for month of Aban has already been paid.
>
> (II) As to payment of your statement for month of Azar (which has been approved by us) and other items of your last statement (which are being reviewed by us) considering that due to elimination of the 22 housing units from the scope of your work under the agreement, the total price of the agreement will have, as agreed, to be adjusted. The amount of the foregoing statements will be taken into account in determining the financial picture of the project this also will be discussed and determined in the course of the proposed meeting and should, after taking into account the above referred adjustment. Then [sic] still be any amounts payable to you, such amounts will be paid upon resumption of works.

In the same telex, the Respondent invited the Claimant to meet with it in order to examine and resolve these issues:

> We repeat again that a meeting with you in Tehran will greatly help to reach a final understanding for resumption of works. Thus we are awaiting to hear from you as to the date of your arrival to Iran in order to fix the meeting.

The Claimant did not agree with the proposal to meet and negotiate with the Respondent.

8. The other problem raised by the Claimant was the issue of the liability of its expatriate employees. This matter is reflected in its telex dated 4 May 1979, as follows:

> 1. Considering what appears to be a continued unsettled condition in Iran it is essential that any of WCC or CBI expatriates must be exempt from any personal liability that may have accrued as a result of our company's presence in Iran.

The Respondent's reply to this condition put forth by the Claimant may be found in the former's telex dated 2 June, which states:

> Though it is not clear for us what is meant by ... personal liability ... of WCC or CBI expatriates, we would like to adivse [sic] you that the conditions in Iran have now setteled [sic] to the normal and there should not be any problem concer[n]ing those expatriates that are authorized by the Government of Iran to stay and work in Iran.

9. The Respondent replied to every single problem advanced by the Claimant as an obstacle to its resumption of the works under the Contract, and even went beyond the terms of its contractual duties, in offering the necessary assurances of its assistance to, and cooperation with, the Claimant in order to complete the works. Inter alia, in its telex dated 26 June 1979, the Respondent informed the Claimant as follows:

> Naturally should you resume the works of the project this bank, shall, as always, extend its full assistance to you in accordance with the contract and should there be any matters to be settled, such matters will be settled by mutual understanding but without this affecting the continuation of the works.

When the Claimant refused the Respondent's repeated requests that the former meet with it and resume the works, the Respondent sent a letter dated 28 July 1979, wherein it

fixed a thirty-day pre-termination time-limit for the resumption of works, and enumerated the Claimant's violations. In the said letter, the Respondent refers, inter alia, to the Claimant's delay in completing the Project before the occurrence of force majeure:

> ... One of these items, however, that we will refer to only by way of example, is your delay in completion of the Project, drawing your attention to the fact that if it was not for your delay, the Project would have been completed much before the conditions causing suspention [sic] of the works occurred.

Further on in the letter, the Respondent granted one last chance to the Claimant to resume work:

> Pursuant to the foregoing we do hereby and in accordances [sic] with Article 13.5 of the Contract notify you that unless you have rectified your default and resumed the Works of the Project within 30 (thirty) days from the date hereof, the Contract shall be terminated for cause pursuant to and in accordance with Article 13.2 of the Contract on the expiry of such thirty (30) days...

The Claimant responded neither to the above letter, nor to the Respondent's letter dated 28 August 1979, in which it declared the Contract to be terminated due to the Claimant's default and invited the Claimant to nominate its representative for the preparation of the final statement of works. However, the Claimant did not nominate a representative, either.

10. In light of the foregoing, I believe that the termination of the Contract due to the Claimant's default was justified and in accordance with the Contract, and I therefore hold that the Parties' disputes and financial obligations should have been resolved in accordance with the contractual provisions covering termination of Contract due to default on the part of the Contractor (Claimant).

CLAIM FOR THE EXPROPRIATION OF PROPERTY

11. In examining this claim, it is necessary first of all to consider the measures taken by the Respondent with respect to the property at issue after the termination of the Contract. With regard to these measures, the available evidence shows beyond any shadow of doubt that every step and measure taken by the Respondent regarding the property conformed exactly to the approach and procedure specified in the Contract, and was for the purpose of safeguarding, protecting and disposing of the said property.

In announcing the termination of the Contract in its letter dated 28 August 1979, the Respondent requested the Claimant to nominate its representative for the preparation of the final statement of works, in accordance with Article 13.7 of the Contract. The said letter, in relevant part, reads as follows:

> In performance of the provisions concerning actions following termination of the Contract in accordance with Article 13.7 of said Contract, this Bank hereby nominates Mr. Borhani for preparation of the final statement of works and your Companies are also requested to nominate your representative for this purpose within the period of one week referred to under the foregoing Article 13.7 and to perform the obligations which your companies have in case of termination of the Contract.
>
> In case you do not nominate your representative within the stated period or your representative fails to appear at time for preparation of the final statement of works and/or you fail to perform the obligations which persuant [sic] to the Contract you have in case of termination, of the Contract, this Bank shall act in accordance with the provisions of the Contract through legal channels to preserve all its rights and interests.

The Claimant did not respond to the Respondent's notice of termination or to its request for designation of a

representative for the purpose of preparing an inventory, and it never laid claim to the property at issue prior to the present proceedings. In light of the fact that the Parties were engaged in on-going and repeated correspondence up to the time of the above-mentioned notice, and since the Respondent kept the Claimant fully informed of the course of events through the said notice, it is obvious that the Claimant's failure to react accordingly ought to be construed to its disadvantage.

As provided for in Article 13.7.1 of the Contract, the Respondent referred to the competent local court in order to have a final statement of works prepared, and requested that an inventory of the property be made. Para. 2 of Article 13.7.1 states as follows:

> In order to prepare a final statement on the completed Works, Owner (or the Contractor as the case may be) shall notify the Contractor requesting the designation of his representative within one week for making an inventory of all the Construction Equipment, Materials and Supplies and any other belongings of the Contractor or Owner available at the Site. Should either party's representative fail to appear at the appointed time, the other party may proceed to make the inventory in presence of the Chief of the District Court or the latter's representative and cause the inventory to be signed by him...

Thus, the Respondent took the necessary measures to safeguard and protect the property, in accordance with its contractual obligation. The said protective measures, which were necessary under the Contract and in the Claimant's absence, in order to safeguard and protect the property, did not constitute confiscation or appropriation of the property, and cannot be made a basis for liability on the part of the Respondent. For its part, however, the Claimant failed to take any action in return, either during this period or afterwards; it did not reply to the Respondent's notice, nor did it nominate a representative for the preparation of the inventory.

12. In accordance with the Contract, the Respondent was entitled to take possession of any quantity of the supplies and materials available at the site, as well as any construction equipment, that it needed. In this respect, para. 4 of Article 13.7.1 of the Contract provides as follows:

> The Owner [Respondent] will accept, and credit the Contractor's account with the price of any quantities of the materials available at the Site that he may require to complete the Project, and the price of such materials shall be determined pursuant to the price breakdown set forth in Annex F hereof. The Owner shall also take possession of any of the Construction Equipment available at the Site that may be required for completion of the Project, and credit the Contractor's account with the price thereof as agreed by the parties. (Price of such Equipment shall be determined pursuant to the terms set forth in Paragraph 5.3 herein).
>
> The Contractor shall remove from the Site within three (3) months the remainder of his materials, Construction Equipment and other belongings, failing which shall entitle Owner at no cost to Owner, to dispose of them as he may deem fit and debit the Contractor's account with the cost involved.

In the present Case, there is no evidence to indicate that the Respondent ever had any intention to accept or to appropriate all or part of the property at issue. Thus, the Respondent has no contractual liability to pay for the value of the Claimant's property, either. On the other hand, under the Contract the Claimant was required to remove the materials, supplies, and construction equipment from the site within three months, if the Respondent did not need them. In light of the fact that the Respondent did not accept or retain any portion of the "materials and supplies" or "construction equipment," and did not inform the Claimant that it needed or intended to use them, it can be inferred that the three-month period foreseen in the Contract was triggered on the date the inventory was made. As stated hereinabove, not only did the Claimant not

remove its property from the site within three months, but it also failed to demand it thereafter, or to take any measures to dispose of it; indeed, prior to the present proceedings it never demanded its property or informed the Respondent of its intentions regarding same. Consequently, the property at issue remained at the site due to the Claimant's failure to demand it or to remove it therefrom -- and in actuality as a result of the Claimant's breach of its contractual obligations -- without there having been any action on the part of the Respondent which could be deemed to constitute confiscation and appropriation of the property in general, or acceptance and retention of the property under the Contract, and which would make the Respondent liable for payment of the value of the property.

13. The majority is not justified in invoking, in para. 62 of the Award, Mr. Katirai's expert opinion dated 10 April 1982, which states that "[S]ince [the Isfahan Court report was] prepared, such materials have been disposed of and used for completion of the unfinished buildings," in order to find grounds for the Respondent's liability to pay for the value of the property, because the said opinion is dated more than one year later than 19 January 1981, i.e. the date on which the Claims Settlement Declaration came into force. Obviously, to establish the Respondent's liability, it is necessary to prove that the alleged seizure of the property took place before the date on which the Claims Settlement Declaration was executed, in order for it to follow that a claim had arisen and was outstanding before the said date. In view of its date, Mr. Katirai's expert opinion does not help to prove such a point; nor does it provide any indication as to the quantity or type of the materials used. On the other hand, the Award accepts the Claimant's allegation to the effect that the materials and supplies which are the subject matter of the claim for expropriation were the extra materials and supplies pertaining to the 22 units which were eliminated

from the scope of the work under the Contract and were, as such, neither needed nor useable for the completion of the 478 units under construction. The Award furthermore concedes that the other materials and supplies necessary to complete the 478 units under construction have not been included in the property which is the subject matter of the claim for expropriation.

Having accepted this proposition, the only logical inference which the Award can draw from the aforementioned expert opinion without being inconsistent with the other conclusions reached therein is that any reference to materials used can relate solely to the construction materials pertaining to the 478 unfinished units, and not to the materials pertaining to the eliminated 22 units which form the subject matter of the Claimant's claim for expropriation.

Accordingly, by virtue of the above reasoning, the other point i.e., the part of Mr. Eslami's affidavit which reads, "the completion operations of the residential units commenced... in a period of much less than one year since the abandonment of work by the contractor [Claimant] ...", invoked in para. 62 of the Award to establish the Respondent's liability, is inconsequential, for the use of the remaining materials and supplies which pertained to the 478 units under construction to complete those same units has nothing to do with the Claimant's claim for expropriation which, by its own allegation, is strictly limited to the materials pertaining to the 22 eliminated units. In particular, it must be inferred from the Claimant's telex dated 19 June 1979 addressed to the Respondent, in which the non-completion of the 478 units under construction is said to have been caused, inter alia, by the non-availability of necessary supplies, that the extra supplies pertaining to the 22 eliminated units which form the subject matter of the Claimant's claim for expropriation could not have been used to complete the 478 unfinished

units. It must be explained that in view of the finding reached in that section of the Award which relates to provisional delivery and final delivery, 100% of the value of the "materials and supplies" pertaining to the 478 unfinished units was paid to the Claimant, irrespective of whether they were used in the construction of the units or remained at the site; thus the Respondent may not be held liable once again, for having used the very materials and supplies for which it has already paid.

14. A further point which seems to be among the grounds on which the Award has found the Respondent liable on the expropriation claim is the reference made, in para. 62 of the Award, to the fact that "... prior to termination, Bank Rahni [Respondent] had telexed the Contractors [Claimant] asserting that none of the goods were to be removed from the site ...", whereupon the Contractors objected to the Bank's interference. As stated in the Award, this occurred before the Contract was terminated, namely, during the period of suspension and at a time when the Respondent was requesting the Claimant to resume work on the Project, while the Claimant was refusing for various reasons. Under such circumstances, the Respondent was entitled, in order to protect its rights, to prevent the Claimant from removing and selling the property. In this regard, Article 13.1.2 of the Contract provides: "For such time as may be stipulated in the Suspension Order, Contractor shall store, secure and protect all aspects of the Work, whether completed or not, and all Materials and Supplies..." In its telex dated 16 July 1978, the Respondent reminded the Claimant that in case of any action on its part to remove the property from the site, "Bank Rahni Iran [Respondent] shall be forced to take appropriate legal action". This reminder by the Respondent, which it gave for the purpose of preserving its contractual rights, cannot under any circumstances be construed as evidence of expropriation of that property.

QUANTITY AND VALUE OF THE PROPERTY

15. The only evidence available in the record regarding the existence and abandonment of the "equipment" and "materials and supplies," in the quantity and at the value alleged by the Claimant, consists of property lists prepared by Mr. Russell D. Krueger and submitted to the Tribunal together with his affidavit. Mr. Krueger states that he was one of the Claimant's key personnel responsible for implementing the Project under the Contract, and that he worked on the Project as technical adviser and as the resident engineer in charge at the site. Due to his close links with the Claimant, Mr. Krueger's statements cannot be regarded as the testimony of an impartial and disinterested person. The lists prepared by Mr. Krueger are not an inventory of the property, and as such they do not reflect the property existing at the Shahin Shahr site. As Mr. Krueger states, he prepared the said lists after his departure from Iran, with the help of his memory and the documents and records that were at his disposal. In his written statements filed as an affidavit, Mr. Krueger states: "after leaving Iran, I was asked to prepare a detailed inventory of the equipment and materials belonging to WCC and CBI at the job site at Shahin Shahr as of the date of my departure." Mr. Krueger subsequently explains that he prepared the property lists and the prices mentioned therein with the help of his memory and his personal information, and through the use of documents such as purchase orders, vendors' vouchers, accountancy records, shipping documents and other similar records which were at his disposal in the United States. The lists submitted by Mr. Krueger include only the nomenclature, serial number and purchase number of each item, and its cost price for the Claimant. In any event, none of the aforementioned documents and records such as purchase orders, vendors' vouchers, accountancy records and shipping documents, etc. which, he alleges, provided the basis for the preparation

of the property lists and for the determination of its cost for the Claimant, have been submitted to the Tribunal. Although the Respondent, acting in due course, expressly refuted and rejected the accuracy of the lists submitted by Mr. Krueger since they were unsupported by any probative evidence and merely constituted allegations on Mr. Krueger's part, the Claimant made no effort, subsequent thereto, to produce the documents invoked and enumerated in Mr. Krueger's affidavit. Although Mr. Krueger submitted a second affidavit to the Tribunal together with the memorial filed on 7 April 1986, he neither referred to the said deficiencies nor endeavored to document his statements. Under such circumstances, and in the absence of supporting evidence to prove the purchase and the existence of property, in the quantity and at the value alleged by Mr. Krueger, his statements and the lists prepared by him are, with respect to any amounts in excess of what is conceded by the Respondent, nothing but a mere allegation in so far as their probative value is concerned. In particular, Mr. Krueger has stated that the aforementioned documents (purchase orders, vendors' vouchers, accountancy records and shipping documents, etc.) were extant and that he had seen and utilized them. In similar cases, the Tribunal has rejected the allegations and assertions of a party to the proceedings, or of persons who expressed an opinion as a witness or an expert, and who yet refrained from submitting to the Tribunal the records, documents, or evidence which was allegedly their source of information or the basis of their statements.[1]

16. In determining the value of that portion of the property claimed by the Claimant which is entitled "equipment," the Award has relied on Mr. Edward L. Mobley's report dated 2 October 1984. To determine the quantity and

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[1] See, e.g., Award No. 377-261-3 (18 July 1988), in AVCO Corporation and IACI, et al, paras. 32, 38, 39-43, 47, 71-73, 97, 99, 104, 105.

type of that "equipment," the said report was based specifically on the lists prepared by Mr. Krueger. Therefore, since as explained hereinabove the lists prepared by Mr. Krueger are not supported by documentation, Mr. Mobley's report is, ab initio, based on a false premise. In any event, Mr. Mobley has not helped to clarify the ambiguities in the Claimant's claim, and indeed he has even added to them, by adding unjustifiable sums to the amount of the relief sought. After adopting the "equipment" lists prepared by Mr. Krueger and the prices that Mr. Krueger had mentioned in front of every item as its cost, Mobley increased the value of those items purchased in the U.S. by 64%, which value consists, in his view, of the following costs:

Procurement and documentation costs	6%
Packing, crating for overseas shipment	4%
Inland freight to port	7%
Port charges	3%
Ocean freight and insurance	15%
Port charges, unloading	8%
Port clearance charges	3%
Port clearance	5%
Loading and trucking to site	10%
Unloading, uncrating, assembly and warehousing at site	3%
Total	64%

With regard to the equipment purchased in Iran, Mr. Mobley also added 11% to the prices stated in Mr. Krueger's lists, which prices, according to Mobley, represent the following costs:

Procurement and documentation costs	6%
Loading and trucking to site	5%
Total	11%

According to Mr. Mobley's statements, the above multipliers represent costs such as packing, transportation, insurance, etc. which the Claimants have incurred; and the above multipliers have been applied, and the value of every item increased by 64% or 11% (depending on the case), in order to compensate for these extra costs. In any event, neither Mr. Mobley nor the Claimant explains in any way the basis on which the above multipliers have been calculated, the sources and data utilized to derive them, or the method of calculation and the logic followed. The only explanation which can be found in Mr. Mobley's report and taken as the proof, basis, raison d'être, or necessity for applying the multiplier of 64% for the property purchased in the U.S. is limited to the following lines:

> In order to establish the fair market value for the U.S.- purchased equipment items, I reviewed the relevant documents and based my equipment list on Mr. Russell Krueger's inventory list ... as a basis for verification of the US ex-yard or warehousing price. A multiplier of 1.64 was then used to arrive at the on-site cost of the equipment at Shahin Shahr. (emphasis added).

As for the "equipment" purchased in Iran, his explanation is also limited to the following:

> To determine the value of Iranian-purchased equipment, I examined WCC/CBI's record of check and payment vouchers for locally purchased items and site inventory records. The results of this examination established the ex-yard or warehouse price in Iran. A multiplier of 1.11 was then used to determine the on-site delivered cost. (emphasis added).

As one may observe, Mr. Mobley does not provide any explanation as to how, and on the basis of what documents, the multipliers of 64% and 11% and their component elements have been derived and established.

17. The other issue on which no clarification can be found either in Mr. Mobley's report or in the Claimant's [submissions] is that if, as Mr. Mobley states, multipliers of 64% and 11% were used to compensate for the other costs borne by the Claimant -- i.e., those costs in excess of the purchase price of the "equipment," such as procurement, packing, shipping, insurance, port charges, release from the customs, inland transportation, etc. -- why were those costs not calculated independently, and demanded on the basis of the supporting documents? Saying that he had access to all the relevant documents and records, Mr. Mobley states, inter alia:

> To assist in determining a fair market value of the expropriated equipment and materials, I have had access to, and have examined, WCC/CBI's correspondence files, original purchase orders, invoices, vouchers, shipping documents, bills of lading, master equipment and material lists, receiving documents and site inventory records. These documents, combined with my personal observations on site at the Shahin Shahr project, enable me to reliably place a value on the U.S.- purchased equipment and materials listed on the inventory lists. WCC's and CBI's purchasing and accounting records and other documentation proved to be accurately kept and were a model in establishing clear documentation of all aspects of the supply process. (emphasis added)

In light of the foregoing, and also the fact that Mr. Mobley explicitly declares that all the cost documents and records relating to procurement, purchase and shipping of the equipment were at his and the Claimant's disposal, the normal procedure for making and quantifying demands would require that the subsidiary costs, for compensating which Mr. Mobley has used the conjectural multipliers of 64% and 11%, be calculated and demanded on the basis of the said documents. As an indisputable and obvious principle observed by all judicial fora, inter alia this Tribunal, such costs, if any, must be substantiated through presentation of evidence, such as documents, records and

receipts related to procurement, shipping, insurance, costs, port charges, etc. Mr. Mobley's mere assertion, as the Claimant's expert or witness, that such costs existed, and what is more, his application of a multiplier to the value of every item of the goods to reflect such costs, are absolutely inadmissible.

In addition to the absence of proof for the existence of such costs, the Claimant has made no explicit claim that such subsidiary expenses were actually incurred, either. The Claimant has not expressly alleged to have incurred any costs other than the values reflected in the lists prepared by Mr. Krueger, and such costs are referred to for the first time in Mr. Mobley's valuation report. The only explanation provided by the Claimant to justify its position and the submission of Mr. Mobley's valuation report, which presents a figure higher than that of the relief sought in the Statement of Claim and the amounts set forth in Mr. Krueger's lists, is as follows:

> Claimants have engaged an expert on contract management, Mr. Edward L. Mobley, to evaluate Claimants' properties at Shahin Shahr and in Customs at the time of BRI's and Iran's seizure in the summer of 1979. Mr. Mobley has set values as follows:
>
> List A (1) $593,240 for U.S. - Purchased Equipment
> List A (2) $174,841 for Iran - Purchased Equipment
> List B $406,412 for Construction Materials and Supplies.
>
> Thus Claimants have established a total value of $1,174,493 on Claimants' properties expropriated by Iran.2

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2 See Claimant's Pre-hearing Memorial and Summary of Evidence, Doc. No. 55, pp. 31-32, filed on 8 Oct. 1984. The phrases within brackets [in the Persian text of this Opinion] do not appear in the Persian version of the Memorial, and have thus been translated and quoted from the English version thereof.

18. Aside from the foregoing, the other important exception which can be taken to the basis and origin of the said valuation is that the valuation is based on the erroneous assumption that the prices reflected in Mr. Krueger's lists, which form the basis of the valuation and have been increased by Mr. Mobley by 64% and 11%, depending on the case, are solely purchase prices, whereas the prices set forth in Mr. Krueger's report are mentioned as "Cost", i.e., cost price for the Claimant, and not as the purchase price; and as such, they thus represent the costs incurred by the Claimant, including shipping, insurance, and other costs. Thus, aside from the exceptions taken to the assumptions and grounds used in Mr. Mobley's valuation report, accepting that report and issuing an Award on the basis thereof will be tantamount to double payment of subsidiary costs to the Claimant. By his own account, Mr. Krueger, who prepared the property and price lists which formed the basis of Mr. Mobley's report, had access to all the documents and records relating to the property in question, including purchasing and shipping documents; and based on them, he prepared the lists of the items and the aforementioned prices, under the heading of "Costs." In his affidavit, Mr. Krueger states:

> For list A (1) I have relied on documentary sources and information with which I am thoroughly familiar because of my involvement in (a) purchase and assembly of equipment in U.S. for shipment to Iran; (b) use and maintenance of the equipment in Iran; and (c) my assignment in organizing the final storage and securing of equipment prior to our departure from Iran. These sources are:
>
> 1- WCC and CBI purchasing, shipping and accounting records which have been made available to me and which I have personally authenticated ... (Emphasis added)

It is clear that Mr. Krueger himself tells of having had at his disposal all the documents and records, including purchasing, shipping and accounting records, and that on the basis of those documents, he determined the prices

reflected in his lists as "cost" and not as the purchase price in the U.S. Therefore, there can be no doubt that shipping and insurance costs and the like were already included in the prices reflected in Mr. Krueger's lists, and that there was no need for Mr. Mobley to add 64% and 11% to the prices determined by Mr. Krueger, in order to compensate for them once again. Neither the Claimant nor its other witnesses have expressly alleged that it incurred any other costs than those reflected in Mr. Krueger's lists.

CLAIM FOR PROVISIONAL AND FINAL ACCEPTANCE

The Progress of Works Percentage

19. The sine qua non for the Claimant's submission of any unit to the Respondent for provisional acceptance was that the said unit be at least 97% completed; and before it could demand the monies payable for final acceptance according to the Contract, all units had to be 100% completed and the one-year guarantee period under the Contract was to have expired. Thus, the important point regarding this portion of the Claimant's claims is to determine the progress of works percentage.

The Claimant's statements in this connection are not supported by probative evidence; they are also, in part, mutually contradictory. The Claimant has presented its claim as being based on 99.3% completion of the Project. The Claimant has not explicitly mentioned this figure, but the slightest attention to the amounts demanded under the heading of provisional acceptance and final acceptance (Mr. G.S. Moshofsky's first affidavit), and to the fact that the Claimant has demanded the remainder of the Contract price less $145,376 (the price of the work not performed), will make evident that the Claimant is alleging that it is

entitled to receive approximately 99.3% of the total Contract price, even though Mr. Krueger, the Claimant's witness, stated that the Shahin Shahr project was, as a whole, 97% completed. Subsequently, at the Tribunal Hearing, Mr. Krueger asserted, as did counsel for the Claimant, that 60 of the Project's units were only 92% completed; at the same time, however, they also alleged that as at the date of the Claimants' departure, the over-all Project was 97% completed. In spite of these contradictions in the statements of the Claimant and its witnesses, the majority has unfortunately not deemed it necessary to give any weight to those contradictions, or to the testimony of the Respondent's witnesses, who declared that the progress of works percentage was much lower than the above figures, and who further testified that even the work carried out, to the extent that it was done, was incomplete and defective. Nor has the majority at least given equal weight to the affidavits submitted by each Party, or paid more attention to the other documents in the Case which were prepared in the course of the performance on the Project, so as to determine the percentage of the work completed by the Claimant.

20. In this connection, there is a revealing document in the Case which establishes that the Claimant's allegations regarding the progress of the work are unacceptable, and that the majority's decision is injudicious. This document is report No. 27 by TCSB (the Consulting Engineer on the Project). The said report, which relates to November 1978, fixes the percentage of the work completed by the Claimant by the end of November of that year at 93.1%. In view of the Claimant's statements to the effect that most of its employees had left Iran towards the end of November 1978, and given the references in the report to the extremely slow pace of the work during the month of November, it would seem very unlikely -- or rather impossible -- that the Claimant could have succeeded in making any noticeable progress after the period mentioned in the report, and

during 1-3 December 1978. Thus, the report reflects the sum total of work actually performed under the Contract. In relevant part, the report states as follows:

A. The in place construction for the month of November 1978 continued at an extremely slow rate and continues to fail to meet the latest schedules proposed by Component Builders Inc. (the monthly invoice indicated that less than twenty percent (20%) of the scheduled work was completed).

B. The contractor continued to reduce both of his expatriate (American Supervisors) and his local hired forces.

C. Badly needed replacement material has not arrived at the site.

D. the progress at the University of Gilan site is at a near stand-still and negligible progress was noted this month.

E. The Contractor received Provisional Acceptance for 40 additional units this month.

II. Specific Observations

A. The building progress schedule reflects that the contractor continues to "slip" badly and the anticipated completion date of this project is now, March 1979. This "slippage" is largely due to the contractor's "Cash Flow" problems; the reduction of supervisory and labor forces, and the shortage of materials.

B. The Financial Disbursement Schedule reflects that the contractor increased his in place construction by only 1.38% raising the total percentage of completed works 93.1%.

In para. 120 of the Award, the majority states that the 93.1% work progress reflected in the Consulting Engineers' report "was calculated on the basis of a total of 500 units in the project and not the reduced figure of 478 units." The majority's interpretation of the said report is incorrect and untenable, due to the following reasons:

A. The last amendment to the Contract, dated 30 August 1978, fixed a delivery schedule for only 478 units; and as indicated by documents in the Case which are undisputed by either Party, not only was there no delivery schedule for the other 22 units as of that date, but no location had been fixed for their erection, either. Thus, at the time when the Consulting Engineers prepared report No. 27, the work progress schedule related to only 478 units, and the Consulting Engineers were well aware that they were commenting on, and preparing a report about, a 478-unit project, and doing so on the basis of the existing schedule. Therefore, it was quite logical that in preparing their report, the Consulting Engineers would bear in mind the progress made in a project consisting of 478 units, for which a schedule already existed.

B. It is also evident from the language and contents of the said report that in referring to the percentage of work completed, the Consulting Engineers had in mind only the 478 units for which a delivery schedule had already been fixed. For example, the report states in Para. A: "The in place construction for the month of November ... continued at an extremely slow rate and continues to fail to meet the latest schedules proposed by Component Builders... (the monthly invoice indicated that less than twenty percent (20%) of the scheduled work was completed." Para. A of the second part of the same report reads: "The building progress schedule reflects..." These references to "scheduled work" and the "building progress schedule" are very telling, in that they reveal that the report was prepared for that portion of the Contract work for which a work progress schedule had been fixed, which work was supposed to progress and to be completed and delivered according to a particular schedule -- i.e., for the same 478 units for which a delivery schedule was fixed through Change Order No. 4, and not for all 500 units, since

neither a delivery schedule for, nor a location for erecting, the 22 units had been envisaged as of that date.

C. In their report, the Consulting Engineers state that "less than twenty percent (20%) of the scheduled work [for the month of November] was completed." Para. B of the second part of the report states, further on, that "the contractor increased his in place construction by only 1.38%, raising the total percentage of completed works to 93.1%." Taken together, these two statements make two points very clear: one is that the work progress percentage at the end of October 1978 was 91.72%; the other is that the 1.38% progress during the month of November was equal to 20% of the work which should, in accordance with the schedule, have been completed during November. Therefore, the total amount of the work scheduled for the month of November was five times the above rate, namely, 6.9%.

Thus, if the work had progressed at the rate of 6.9% during November in accordance with the existing schedule, the total work progress, including the progress previously made, would have reached 98.62% by the end of that month. Achievement of such progress (i.e., 98.62% Project completion by the end of November in accordance with the existing schedule) could have been envisaged only if the target of the report were the 478 units under construction, and not the 500 units foreseen in the Contract. This is because the 22 units, for erecting which no schedule was yet fixed, by themselves constituted more than 4% of the volume of work under the Contract; and if the Consulting Engineers' report had also included those 22 units, it would have been categorically impossible to attain more than a 96% work progress level for the over-all Project by the end of November, even if the 478 units had been 100% completed. Therefore, the projected 98.62% Project completion could have been feasible only on the assumption that the Project consisted of the 478 units under construction.

D. In addition to the above, if the Consulting Engineers' report covered all the 500 units under the Contract, in that case the 93.1% progress made by the end of November, which is indicative of, and equivalent to, approximately a 97% work progress rate for the 478 units under construction, should have been deemed entirely satisfactory from the Consulting Engineers' point of view, because in view of the delivery schedule fixed in Change Order No. 4, the Claimant would not in fact have been lagging appreciably behind schedule. Under such circumstances, and assuming that the majority's theory were correct, the use of such highly critical phrases as "[the work] continued at an extremely slow rate", "less than twenty percent (20%) of the scheduled work was completed", "the contractor continues to 'slip' badly," and "the anticipated completion date of this project is now, March 1979" in the Consulting Engineers' report would seem totally unjustifiable and meaningless. For the foregoing reasons, the Consulting Engineers' report for November 1978 can relate only to the 478 units under construction; it also indicates that when the Project shut down, the work progress percentage could not have been more than 93.1%. This also means that as of the said date, most of the units were not at least 97% completed so as to qualify for provisional delivery.

21. In addition to the foregoing, while the majority has considered the Claimant's allegation regarding provisional delivery, it has ignored the requirements set forth in paras. (a), (b) and (c) of Article 12.1.1 of the Contract, which specify the necessary arrangements and conditions for submitting units for, and effecting, provisional delivery, so as to make the Respondent liable for payment. While the majority has not bound the Claimant to observe the contractual arrangements and provisions for submitting units to the Respondent for provisional acceptance, it has at the same time held that the Respondent is bound by the time limit set forth in para. (d) of Article 12.1.1 of the

Contract. That is to say, the majority has held that provisional delivery of the units occurred, as alleged by the Claimant, simply because the Respondent did not object to the Claimant's request within the 90-day period prescribed by the said Article. Pursuant to the Contract, the Claimant first had to request provisional delivery, in order to set in motion the necessary arrangements for effecting it. In the absence of such a request -- which should, under the Contract, have been presented under certain conditions and in observance of specific arrangements -- no obligation would, in principle, be created for the Respondent, and the 90-day period envisaged in the Contract would not be triggered. In any event, the majority's decision is illogical, at least in so far as it does not bind the Claimant to observe those provisions of Article 12 which determine the Claimant's duties, while at the same time it does bind the Respondent to comply with another section of the same Article. As such, the decision has also led to an unfair conclusion, for the Respondent has in fact been held liable because of an omission on the part of the Claimant. The other point is that when the 90-day period envisaged in the said Article was due to expire, the Contract was already suspended due to force majeure; and since the Claimant failed to return to work, it was never resumed after that date, either.

22. Apart from my dissent to the majority's decision regarding the percentage of the work completed under the Contract, the procedure followed in the Award to establish whether the Claimant is entitled to the amount claimed is inconsistent with the findings of the Award itself, and also with the Claimant's statements, the approach taken by it in presenting the claim, and its quantification of the relief sought. In this connection, I must single out the Award's defects in calculating the Claimant's claim for the cost of "materials and supplies" (supply price) and for the necessary "services" (service price) provided for the erection of the buildings.

PRICE OF "MATERIALS AND SUPPLIES"

23. Going along with the Claimant's statements, the majority holds that 60 units were 92% completed, and that work on the other 418 units was at least 97% completed. Nevertheless, and despite the fact that even the Claimant itself had declared the level of work completed on the total Project as a whole to be at most 97%, the majority has based the Award on 100% of the contractual price, in order to determine the Claimant's entitlement regarding the price of "materials and supplies" provided for the Project. The reason for the majority's decision, which is inconsistent with the premises and assumptions of the Award and also with the Claimant's claim, is apparently a phrase appearing in para. 127 of the Award: "It is not disputed that Wood Components supplied all of the materials required for 500 units...". Based on this premise, the majority has drawn the conclusion that Wood Components is entitled to receive the total contractual price for the value of the "materials and supplies". The said decision is objectionable for numerous reasons, and it is inconsistent with the existing facts and evidence.

24. Under the Contract, and in so far as it pertains to the contractual rights and obligations of the two Parties, the Claimants - or according to the majority's decision, one of them, namely Wood Components - is not entitled to receive 100% of the value of those materials and supplies merely by virtue of having shipped them. According to the Contract, the price of the "materials and supplies" was only partly payable at the time of shipment. The remainder was payable only after the "materials and supplies" had been utilized in the buildings, and such payment was to be contingent on compliance with Article 12, which sets forth the arrangements for provisional delivery and final delivery, and also with Article 9.5, entitled "Terms of Payment," and Article 11.2, which pertains to "Withholding

Guarantees." In addition to the fact that the said contractual arrangements were agreed upon by both Parties and ought to be respected, they were, at the same time, necessary and inescapable, in light of the subject matter of the Contract. The Contract under discussion, i.e., the "Building Supply and Erection Agreement," was concluded for the purpose of erecting 500 construction units; its primary purpose was not the purchase and sale of "materials and supplies." Article 2.1 of the Contract, entitled "Object and Scope of the Agreement," provides as follows:

> The object of this Contract is the supply and importation, construction, erection, installation, equipping, testing and delivery to Owner of the Buildings, consisting of five hundred (500) individual housing units to be built on the Site provided by Owner, as more fully described in this Contract.

Furthermore, the performance of works under the Contract, as described hereinabove and explained in the Contract, was jointly entrusted to Wood Components and Component Builders, acting together as the "Contractor." Article 1 of the Contract, entitled "Definitions," defines "Contractor" as follows:

> "1.1.2. Contractor: Wood Components Co. and Component Builders Inc."

Moreover, throughout the Contract, wherever reference is made to the obligations and duties of the Parties, Component Builders and Wood Components are mentioned jointly under the single title of "Contractor". Even where the relevant work was, depending on its nature, to be performed by only one of those two companies, the Contract holds both companies responsible under the single title of "Contractor." For instance, under the Contract's provisions relating to "materials and supplies," the "Contractor" -- and not Wood Components alone -- is mentioned as the obligee and as the supplier of the materials and supplies. It is only in the section on "Terms of

Payment" that the Contract permits separation [of the two entities] for payment of the contractual monies, once these were determined to be payable under the Contract, and provides that Wood Components shall be compensated for the price of "materials and supplies." However, this does not mean that Wood Components is entitled to receive 100% of the value of the construction "materials and supplies," solely by virtue of having shipped them, and without having observed the contractual conditions and arrangements specified for payment, or having met the other obligations relating to the performance of all the contractual duties which it undertook as "Contractor."

25. It appears that neither Component Builders nor Wood Components alleges or believes that Wood Components' role under the Contract was limited to the sale of "materials and supplies," or that its obligations were only those of seller. They themselves have not argued that since the "materials and supplies" were shipped, the total price thereof is payable to Wood Components.

26. Nor has it been established by the available facts and documentary evidence that the Claimant provided all the "materials and supplies" needed for the Project or for the 478 units under construction. Merely by way of example, I refer to the Claimant's telex dated 19 June 1979, which indicates that even during the last stage of its performance on the Contract, the Claimant was allegedly unable to bring all units to 97% completion, because it could not provide the necessary "materials and supplies". In relevant part, the telex reads as follows:

> The reason we could not complete all units 97% is that the customs closed shutting off the supply of the necessary items...

It must be noted that after the first shipment of the "materials and supplies" needed for construction of 500 units in 1977, the Claimant allegedly shipped an extra consignment of "materials and supplies," to replace those materials and supplies which had been damaged during the first shipment or in the course of the work. Nevertheless, it has not presented any evidence, such as purchasing or shipping documents, etc., to prove that the new consignment was actually shipped; nor has it even clarified the quantity or value thereof. Under such circumstances, and in view of the aforementioned telex, the interpretation that the Claimant provided all the "materials and supplies" required under the Contract is untenable. Moreover, in his affidavit Mr. Krueger, who testified as the Claimant's witness, admits that when the Project was abandoned at the beginning of 1979, approximately $91,000 more still had to be spent on "materials and supplies" in order to complete the Project, even after including all the "materials and supplies" allegedly tied up in Customs.

SERVICE PRICE

27. As set forth in the Claimant's memorials, and particularly in the statements made by Mr. G.S. Moshofsky in his first affidavit, the amount claimed by the Claimant under the heading of monies payable for the "service price" during "provisional delivery" and "final delivery" is predicated on the assumption that the Claimant is entitled to receive the total Contract price for the construction of 478 units. By his own account, Mr. Moshofsky was the President and chief executive of Wood Components and Component Builders throughout the time when the Contract was being negotiated, agreed upon, and implemented. In presenting the headings under which claims were brought and

the amounts sought therein on pp. 19-22 of his affidavit, he states:

> I was personally involved in the preparation and submission of all billings to BRI during the course of the Project. I kept track of all payments received and supervised the accounts. Except for the fees due listed below WCC and CBI received all payments due under the Agreement.... (emphasis added)

After quantifying the claims - which equal the difference between those amounts already received and 100% of the contractual price for the construction of 478 units - Mr. Moshofsky deducts and credits to the Respondent an amount called the "price of the work left incomplete" which, according to the Claimant, is $53,700. This amount equals 0.9% of the total contractual "service price." In essence, then, Mr. Moshofsky and the Claimant initially claim 99.1% of the total "service price" of the Contract. At the same time, as explained above, Mr. Russell D. Krueger states in his affidavit that the work at Shahin Shahr was 97% completed; and finally, the Claimant alleged at the Hearing that the over-all Project was 97% completed. Even if we grant this premise and accept, in arguendo, the Claimant's allegation that the Project was 97% completed, the amounts demanded in Mr. Moshofsky's affidavit (representing 100% of the price of 478 units) would still have to be reduced by the percentage by which the Project remained incomplete, in order to determine the amount of the Claimant's entitlement. Although aware of these facts, in calculating the amount to which the Claimant is entitled the majority has unfortunately resorted to a highly unusual method, one which is inconsistent with the facts, the documents in the Case and even the approach taken by the Claimant in presenting its claim. Moreover, by inventing novel arguments and relying on documents not invoked by the

Claimant, it has arrived at an amount which is, in view of the foregoing, in effect higher than the amount sought by the Claimant.

28. To justify the said procedure, and in addressing the claim for the monies due upon final acceptance, the majority writes in para. 126 of the Award that:

> The Building Supply and Erection Agreement was terminated by Bank Rahni on 28 August 1979. Thus the Tribunal considers this claim as one for payment of monies due for work performed and goods supplied up to the date of termination, rather than for release of retention monies on expiry of the guarantee period.

Apart from my objections to such an argument, which disregards the contractual provisions agreed upon by both Parties and disrupts the balance arrived at in the transaction and between the reciprocal considerations agreed upon by the Parties, at the same time the majority's reasoning as described hereinabove - even supposing it were acceptable - does not lead to the conclusion reached by the Award. This is because in any event, the monies demanded by the Claimant as being payable for "final acceptance" represent the final 5% of the price agreed to under the Contract; and upon payment thereof, the Claimant will in effect have received 100% of the contractual price for the 478 units. Thus, no matter what appellation the said 5% is given - whether we call it "contractual withholdings" or something else - it is not payable to the Claimant unless the 478 units have been 100% completed. Therefore, when the Claimant itself quotes 97% as its highest figure for the percentage of work completed, it is manifestly erroneous to adopt a procedure which leads to payment of the total price, i.e., one hundred percent of the agreed contractual price, to the Claimant.

29. The majority has relied on Invoice No. 18 in calculating the amounts demanded by the Claimant for "final delivery," which the majority calls "monies due for work performed and goods supplied up to the date of termination." Besides being unreasonable and unfounded, this action by the majority is totally unfair to the Respondent and prejudicial to its right to a defense.

The Claimant itself has submitted Invoice No. 18 to the Tribunal solely as evidence for that part of the amount under the said invoice (namely Rials 2,831,571) which was allegedly payable when the invoice was prepared. By so doing, by not raising any other demands under the invoice, and also by expressly stating that "except for the fees due listed below WCC and CBI received all payments due under the Agreement", the Claimant in effect concedes that it has no claims in connection with the said invoice, other than its quoted figure of Rials 2,831,571; and this, in effect, is an admission that it received the rest of the monies under that invoice. The aforementioned amount has been dealt with in para. 73 of the Award where the claim relating to Invoice No. 18 is taken up, and it has there been awarded to the Claimant in the following terms: "... therefore [the Tribunal] awards Component Builders the full amount of Rls. 2,831,571 claimed for Invoice No. 18." Nevertheless, while it has awarded the full amount demanded by the Claimant under the said invoice, in taking up the Claimant's claims under "final acceptance" the majority has also, under the heading of monies related to "work performed up to the date of termination" of the Contract, in effect awarded for payment of the other items of invoice No. 18, which the Claimant never demanded.

30. The Claimant has never invoked this invoice as proof or evidence of non-payment, or as a ground for a claim for "contractual withholdings" due at the time of final

delivery, or in connection with any other demand. Consequently, it was neither necessary nor, practically speaking, possible for the Respondent to respond to a claim which was not filed by the Claimant and was in actuality initiated by the majority. For this reason, the Respondent has been deprived of its right to a defense.

OVERPAYMENTS

31. In its pleadings, the Respondent has asserted that the Claimant was paid monies in excess of those to which it was entitled, or even demanded. As evidence of such overpayments, the Respondent has relied primarily on its books, and has submitted to the Tribunal a copy of its accounting ledgers, which provide information about the amounts paid to the Claimant or credited to its account. The Claimant has not disputed the authenticity of the said documents; nor has it mounted any specific defense regarding those monies which, as alleged by the Respondent and according to the latter's accounting ledgers have been paid. In a few instances, the Claimant has even relied upon the Respondent's ledgers[3] in order to substantiate its own claims. Furthermore, Mr. G.S. Moshofsky explicitly states in his second affidavit that "we have apparently received some payments that are not reflected in these BRI [Bank Rahni, Respondent] records at all."

Under these circumstances, the accounting ledgers presented by the Respondent are in fact uncontroverted proof of the payments reflected therein and, consequently, evidence that the Claimant was paid more than it was entitled to receive

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[3] Claimant's Rebuttal Memorial No. 256, and Mr. G.S. Moshofsky's second affidavit, attached to Claimant's Memorial No. 257.

under the Contract. Regrettably,, the majority has for all practical purposes ignored this evidence, dismissing it with two brief phrases in para. 122 of the Award: "the Tribunal finds it impossible to relate the evidence submitted to the amounts claimed and is therefore unable to determine whether any adjustment is, in fact, warranted." Aside from the fact that the evidence presented by the Respondent is unambiguous and that every item recorded in its accounting ledgers is clearly accompanied by the amount, date, and subject of payment, the least that can be argued is that the amount paid to the Claimant exceeds the sum total of the items claimed by the Claimant in this Case and of what it itself admits to having received. The obvious consequence is that none of the Claimant's claims can be addressed.

THE COUNTERCLAIMS

32. The majority has dismissed all the Respondent's counterclaims relating to defects in the buildings, whereas the evidence presented by the Respondent in substantiation of its counterclaims is more compelling and reliable than that submitted by the Claimant in proof of its own claims. Reference to defects in the work, such as in the interior and exterior painting of the buildings and in the facades and the interior finish of the utility services and the floors of some of the units, and also to shortages of some of the necessary items, may be found in the report prepared by the Isfahan court on 4 November 1979. The foregoing, as well as the other defects enumerated in the Respondent's counterclaims and briefly referred to in the Award, are confirmed by the affidavit of Mr. Nakhshab, who visited the site in May 1979, and by the affidavit of Mr. Eslami, who was in charge at the site on behalf of the Respondent during and after the performance on the Project; the details thereof are thus clear. Some of the defects

relating to the painting and the exterior facades of the buildings are confirmed by the [Claimant's] witness, Mr. Krueger, albeit he asserts that the defects were removed afterwards. Since no proof has been submitted to substantiate that the defects related to the facades were later remedied, the Claimant is in principle bound by the above admission that defects did exist.[4]

In his written opinion, Mr. Katirai, the Ministry of Justice's independent expert, has also confirmed the existence of defects. In addition, the Respondent has submitted to the Tribunal the minutes of several meetings held to determine the extent and nature of the defects, the degree and amount of damage, and the cost of removing the defects.

33. The majority does not appear to have evinced any doubt as to the authenticity of any of the documents submitted; nor has it attempted to reject them. In actuality, the majority relies on a few brief phrases and certain procedural and formalistic considerations, and does not acquaint itself with the merits or particulars of the counterclaims; in this way it does not properly address the counterclaims. Rather, it in effect disregards and passes over them, in that most of the counterclaims relating to defects and deficiencies in the buildings have been dismissed on the grounds that they are covered by Article 7 of Amendment No. 4 to the Contract, i.e., the waiver of claims and disputes. However, the defects enumerated in the counterclaims, such as deterioration of the exterior facades of buildings, fallen facades, faulty painting, cracks in the wooden roof cornices, and defective and weak aluminum windows which subsequently had to be changed, are

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[4] Mr. Russell D. Krueger's second affidavit, in Claimant's Memorial No. 257, pp. 7-9.

not the type of defects which could conceivably have been patent on the date of Amendment No. 4, i.e., 30 August 1978, the date on which, even according to the majority's opinion, most of the buildings had not yet been provisionally delivered. Nor, therefore, is there any room for the erroneous notion that the Respondent waived its rights in this connection by virtue of consenting to the waiver of claims. By nature, such building defects become patent with the passage of time, at some time after erection of a building.

34. The majority's other argument is that there is no evidence that the Respondent duly protested to the Claimant because of such defects. As stated hereinabove, some time was naturally required before the defects would become patent, and it is thus illogical to suppose that the Respondent waived its rights by not immediately objecting to the existence of the defects. In this connection, it must be pointed out that as shown by the facts in this Case, after abandoning the Project the Claimant did not consent to resume work and perform the Contract, despite the Respondent's repeated notices; it did not even reply to the Respondent's pre-termination notice dated 28 July 1979, or to the termination notice dated 28 August 1979. Therefore, when the Respondent terminated the Contract for default on the part of the Claimant, there was, logically, no longer any need to issue a separate notice to the Claimant about the defects in the buildings, since it had not heeded or responded to the termination notice. Meanwhile, the Respondent did whatever it deemed necessary to preserve its rights under the Contract, in that it referred to the competent Iranian judicial fora, requested the conservation of evidence, asked that the site be visited and examined by an expert in accordance with the Contract, and made arrangements to have the buildings visited on 4 November 1979 by a representative of the Isfahan court. Subsequently, on 18 March 1982, the Respondent brought a claim for damages against the Claimant

before the Tehran Public Court; according to the documents submitted by the Respondent, the case was assigned to Chamber 29 of the Tehran Public Court. Thus, the Respondent duly took the necessary legal measures to preserve its rights. This being the case, I can only interpret the majority's recourse to the excuse that the Respondent failed to protest in writing about the existing defects, as being a baseless pretext for not fully addressing the counterclaims. The unfairness and unreasonableness of the majority's decision regarding the counterclaims are most clearly felt when the majority's approach taken thereto is compared to its approach in examining the Claimant's claim and the documents and evidence relating thereto, which it has treated more indulgently than is reasonable or admissible, or as ought to be expected of a judicial forum.

CLAIMS AGAINST BIMEH IRAN

Claim Relating to Marine Insurance Policy

35. Both the claim relating to the marine insurance policy and to the damage inflicted on the construction materials and supplies during shipment, and the assessment of the extent of the damage and the value of the damaged goods, are based solely on the affidavits of Mr. G.S. Moshofsky and another person called Mr. P.O. Hansen, whom Mr. Moshofsky allegedly employed in 1978 to draft and prepare the Claimant's insurance claim. The only available independent evidence in the record concerning the occurrence of the damage is Bimeh Iran's letter dated 1 July 1978 to the Claimant's attorney, Mr. Katirai. In that letter, wherein it responds to an inquiry by Mr. Katirai, Bimeh Iran informs him as follows of the contents of another letter, dated 26 June 1978, which it had received from one of its subsidiary departments:

> "Since Dr. Rassekh the Technical Expert of the (Insurance) Company has reported that some time ago he went to Shahin Shahr and was conducted by the engineers to the location of the open storage area of your company and saw that the damaged goods for which a claim was filed by company were jumbled into boxes in various places in the storage area, and were not in condition to be surveyed and examined as required, consequently, it was arranged that your company will notify Bimeh Iran after organizing the boxes and making it feasible to inspect, so that arrangements can be made for the expert to carry out the inspection. Therefore, if provisions for the inspection have been made, please notify this office so that the expert may then proceed to take the required actions."

It is neither disputed nor denied that up to the above date, the Claimant had failed to specify the damaged goods or to prepare them for inspection by the insurance expert. The Claimant alleges that it did thereafter succeed in specifying the damaged goods and in arranging them as required by the insurance expert, and that finally, on 1 December 1978, it informed Bimeh Iran that it was ready for the inspection. The insurance expert, Mr. Rassekh, allegedly examined the damaged goods at the Shahin Shahr site on 5 December 1978 and confirmed the inventory of those goods. No evidence has been submitted to substantiate the above assertions and allegations; there are no letters or correspondence with Bimeh Iran, nor is there any trace of such a visit or of any actions taken by Bimeh Iran's expert, Mr. Rassekh. The only evidence that the above events occurred consists of statements made by Mr. Moshofsky who, as stated earlier, was the Managing Director and chief executive, and in actuality the main owner, of Wood Components and Component Builders, and therefore the main beneficiary in this Case. Bimeh Iran has rejected the Claimant's contentions, stating that after the first visit by the insurance expert, Mr. Rassekh, "The contractor company [Claimant] has never declared its readiness to present for inspection the claimed damaged items."

36. Moreover, the only document presented in connection with the extent of the damage inflicted and the value of the damaged goods is the property list allegedly prepared by Mr. Hansen in November 1978, i.e., almost two years after the damage occurred, in which he has personally valuated the damaged goods. No independent document has been submitted to indicate the extent of the damage to the property or the value of the damaged property. Under these circumstances, there is no evidence that damage in the degree alleged by the Claimant actually occurred, and this claim must therefore be dismissed for lack of evidence.

37. Bimeh Iran has further argued that the claim pertains to the year 1977, and that since the insurance policy was concluded in Iran and is subject to Iranian insurance law, and since "on the other hand according to Article 36 of Insurance law, the statute of limitation for disputes arising from insurance is two years, consequently the claimed indemnities, were they by any remote assumption true, are subject to statute of limitation, therefore, the claim must not have been brought and cannot be taken into consideration. And taking into account the statute of limitation, there existed no claim on January 19, 1981 to be covered by the Algerian [sic] Declaration." In para. 179 [of the Award], the majority has rejected the above argument, on the pretext that "Bimeh Iran has not submitted in evidence the text of the Iranian Insurance Law upon which it bases its defense." The majority's decision is illogical, particularly because the Claimant has not denied the existence of such regulations and has in fact confirmed their existence by its own statements. In response to Bimeh Iran's defence, the Claimant alleges that "after the revolution of 1979, all the regulations of prescription of time were nullified due to the fact that they were inconsistent with Islamic principles and standards." As can be observed, the Claimant does not question the

existence of time prescription regulations; it merely alleges that they have been nullified, while at the same time, it does not submit any evidence to prove their nullification.

38. In light of the foregoing, it is obvious that even if there were proven damage, no cognizable claim was oustanding as of the date of the Claims Settlement Declaration, because the Claimant failed to act duly to demand compensation therefor, and because the insurance policy was subject to Iranian Law and to the statute of limitations.

CLAIM RELATING TO ALL-RISK INSURANCE POLICY

39. As for the Claimant's claim in connection with damage inflicted on a number of housing units as the result of a fire, the aforementioned exceptions taken in connection with marine insurance policy are maintained; moreover, another matter which must necessarily be proven to establish Bimeh Iran's liability to compensate for the said damage has not been substantiated. That is to say, as Bimeh Iran has pointed out in its pleadings, the insurance policy provides that in the event of damage due to fire, a certificate must be obtained from the fire authorities so as to establish that the necessary preventive measures were taken, and that the fire was not due to arson or to fault, carelessness or negligence on the part of the insured party; the said certificate must then be submitted to the insurance company together with the claim for damages. So far as the records show, neither this certificate nor any other document has been submitted to prove that the above provisions, which are among the conditions that had to be fulfilled in order to receive compensation for damage, were observed.

40. As for interest and costs of arbitration, I see no need to reiterate my earlier opinions. See: the Separate Opinion of Judge Parviz Ansari in McCollough & Company Inc. and The Ministry of Post, Telegraph & Telephone, et al, Award No. 225-89-3 (22 April 1986), reprinted in 11 Iran-U.S. C.T.R. 45-72; also the Concurring Opinion of Judge Parviz Ansari in H.A. Spalding, Inc. and Ministry of Roads and Transport of the Islamic Republic of Iran, Award No. 212-437-3 (24 February 1986), reprinted in 10 Iran-U.S. C.T.R. 35-36.

Dated, The Hague
22 September 1989/31 Shahrivarmah 1368

Parviz Ansari