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CASE NO. 814

CHAMBER ONE

AWARD NO. 430-814-1

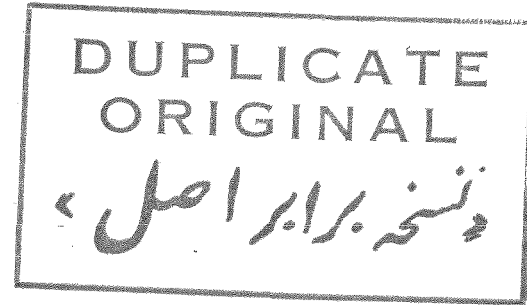
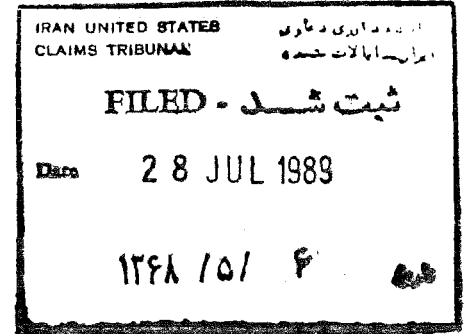
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ELECTRONIC SYSTEMS INTERNATIONAL, INC.,
CLAIMANT,

and

THE MINISTRY OF DEFENCE OF
THE ISLAMIC REPUBLIC OF IRAN,
MILITARY INDUSTRIES ORGANIZATION,
RESPONDENTS.

AWARD



Appearances:

For the Claimant:

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Attorney,
Mr. W.K. Radcliffe,
Vice President of Electronic
Systems International, Inc.,
Mr. G.E. Mankser,
General Counsel of Electronic
Systems International, Inc.

For the Respondent:

Mr. Mohammad K. Eshragh,
Agent of the Government of the
Islamic Republic of Iran,
Mr. A. Nobari Heyrani,
Deputy Agent,
Dr. A.A. Riyazi,
Legal Adviser to the Agent,
Mr. M. Asbahgi,
Assistant to the
Legal Adviser,
Mr. M.H. Sharif,
Representative of Defence
Industries Organization.

Also Present:

Mr. T. Ramish,
Agent of the United States of
America.

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1. The Claim in this Case arises out of two contracts under which the Claimant ELECTRONIC SYSTEMS INTERNATIONAL, INC. ("ESI") was to provide the Respondent MILITARY INDUSTRIES ORGANIZATION ("MIO") with certain military items. In its Claim on the first Contract ESI seeks U.S.\$30,525 as the contract price for the alleged final shipment of 2500 firing devices to Iran in June 1979 plus U.S.\$4058 as damages. The Claim on the second contract is comprised of two parts. In part one, the Claimant seeks U.S.\$374,410.50 reimbursement for extra expenses it incurred on a shipment of fuze mines. In part two, ESI requests a total of U.S.\$157,240 for the purchase price and storage fees of a shipment of mine detonators. The Respondents deny any liability. A Hearing was held on 9 February 1988.

I. FACTS AND CONTENTIONS

1. First Claim

2. On 19 June 1978, the Respondent MIO issued Purchase Order No. 334/1401-11175-12 to the Claimant for delivery of 75,000 pieces of "M57 Firing Devices" for M18A1 mines to the Iranian port of Bandar Shahpur. The terms of delivery were "C&F" with a total contract price of U.S.\$915,700. Payment was to be secured by an irrevocable letter of credit issued by Bank Markazi Iran ("Bank Markazi").¹ The Purchase Order specified the documents that

¹ General Condition 7.B of the Purchase Order stipulates:

Sight Draft: Payment will be made against your Sight Draft. Please draw your Sight Draft and present it together with the Shipping Documents to Bank Markazi Iran through your bankers. Please make sure to mail a complete set of the non-negotiable Shipping Documents to us directly.

were to be presented with a request for payment on the letter of credit.² It designated Arya Line, an Iranian shipping company, as the carrier. ESI accepted all terms and conditions of the Purchase Order by its Order Acknowledgement dated 11 July 1978, although the total value of the order was increased to read U.S.\$915,750 at U.S. \$12.21 per unit. Delivery was to start within four months (or 120 days) after receipt of the letter of credit and was to be completed within ten months.

3. On 28 September 1978, Bank Markazi opened an irrevocable letter of credit in the amount of U.S.\$915,750 in favor of the Claimant. Manufacturers Hanover Trust Company ("MHTC"), Bank Markazi's correspondent bank in New York, was the "advising bank." The letter of credit

² General Condition 10 lists the required shipping documents:

10. SHIPPING DOCUMENTS:

Unless instructions are given to the contrary, the Shipping Documents normally consist of the following:

.

- B) Shipment by sea:
 - 1. Bill of Lading
 - 2. Seller's Invoice
 - 3. Packing List
 - 4. Inspection Certificate
 - 5. Certificate of Origin
 - 6. Affidavit (if requested)

In addition, General Condition No. 11 states:

11. DIRECT MAIL OF COPY OF SHIPPING DOCUMENTS TO US:

Everytime a shipment is made a complete set of the non-negotiable copy of the Shipping Documents should be airmailed to us directly.

specified the documents that should accompany the Claimant's sight draft in order to obtain payment.³ In addition, it confirmed the conditions of the Purchase Order that partial shipments and transshipment were not permitted. Furthermore, in compliance with the provisions of Section 6 of the Purchase Order, the letter of credit was to become operative only upon Bank Markazi's confirmation that it had received a good performance bond from the Claimant, issued by Bank Melli Iran, equal to 10% of the credit amount. The expiry date of Bank Markazi's letter of credit was 31 June 1979.

4. On 25 October 1978, MHTC informed ESI that the letter of credit was amended to allow for partial shipments. On 15 December 1978, the Claimant made a first shipment for 10,000 pieces of the ordered items, although no good performance bond had yet been produced and consequently the letter of credit had not yet become operative.

³ Credit was available by the Claimant's sight drafts,

TO BE ACCOMPANIED BY

FULL SET OF CLEAN ON BOARD BILL OF LADING MARKED FREIGHT PREPAID ISSUED OR ENDORSED TO ORDER OF BANK MARKAZI IRAN.

INVOICE IN 4 COPIES 2 CERTIFIED BY THE LOCAL CHAMBER OF COMMERCE. CERTIFICATE OF ORIGIN IN 2 COPIES ISSUED BY THE LOCAL CHAMBER OF COMMERCE CONFIRMING GOODS, ORIGINATED IN U.S.A.

MANUFACTURERS CERTIFICATE FOR QUALITY AND QUANTITY OF GOODS EVIDENCING GOODS ARE IN COMPLIANCE WITH THE RELEVANT ORDER IN 2 COPIES.

COVERING: 75000 PCS FIRING DEVICE, AS PER SELLER'S ORDER CONFIRMATION DATED JULY 12/78 CUSTOMS TARIFF NO. 93/06 C&F.
PACKING MARK: VEZARATE JANG SAZEMANE SANAYE NEZAMI
CODE: 01 L/C NO. 12/95832
ORDER: 334/1401-11175-12.

5. The Claimant alleges that, on 28 December 1978, First Pennsylvania Bank issued the good performance bond to Bank Melli in the form of an irrevocable letter of credit for the account of the Claimant in the amount of U.S.\$91,575. Bank Melli advised MIO of this on 17 March 1979. On 4 May 1979, MHTC advised ESI that the letter of credit issued by Bank Markazi on 28 September 1978 securing payment was declared operative.

6. In mid-May 1979, ESI arranged for a second shipment of 62,500 pieces, leaving a balance of 2500 pieces to be shipped to complete performance. There is no dispute that the Claimant was paid for both this shipment and for the first one made in December 1978.

7. On 22 May 1979, MHTC sent a telex to ESI reporting that MHTC had received a telex from Bank Markazi requesting on behalf of the Respondent the cancellation, subject to the Claimant's consent, of the balance of the letter of credit.

8. The Claimant alleges that in a letter submitted to MHTC on 15 June 1979, it enclosed shipping documents concerning the alleged shipment of the remaining 2500 pieces. Also enclosed with the letter was a sight draft in the amount of U.S.\$27,483, calculated as U.S.\$30,525 for the contract price for the 2500 pieces, less a "cancellation credit" of U.S.\$3042.

9. ESI further alleges that in a letter dated 21 June 1979, it informed MHTC that it was prepared to accept the cancellation requested by MIO, subject to the payment of a late cancellation charge in the amount of U.S.\$27,483 for which ESI offered to ship the "balance of goods due to complete the order," and to MIO's acceptance of the full cancellation of the performance bond. ESI explained that the charge was levied because the items had already been manufactured when it received MIO's request for

cancellation. The firing devices were components of a system being manufactured in Iran and ESI stated that it had no other potential customers for the order. ESI offered, however, to ship the balance of the goods in spite of the cancellation. ESI requested MHTC to convey the proposal "through Bank Markazi to the principals." It resubmitted shipping documents and a draft for final payment under the letter of credit, leaving a cancellation credit in the amount of U.S.\$3042 for the account of the Respondent.

10. In a letter dated 1 July 1979, MHTC acknowledged that it had received the Claimant's letter dated 21 June 1979. MHTC stated, however, that in view of the Respondent's request for cancellation of the credit it was "not in the position to negotiate drafts and documents presented." Furthermore, the letter stated:

In an effort to assist you in this matter, we have examined the document[s] and found that they complied with the terms of Bank Markazi's letter of credit. We have relayed this information as well as the contents of your proposal of June 21 to them by our cable of June 28.

11. The Claimant contends that its offer to cancel the Contract was rejected. It asserts that, on 15 June 1979, it delivered the 2500 firing devices to Norton, Lilly & Company, Inc., agents for ARYA LINES, and paid the freight costs to Bandar Shahpur to these agents. ESI maintains that, under C&F terms, this constituted delivery to the Respondent. It alleges that it presented all the documents required for payment to MHTC in a timely manner, but that MHTC refused to pay on the instructions of the Respondent's bank. In the Claimant's view, this constituted a breach of contract.

12. The Claimant seeks an award of U.S.\$30,525 for the value of the shipment plus U.S.\$4058 for "management time" allegedly allocated to the project before 14 January 1982.

13. The Respondents deny that the goods were actually delivered and shipped. They allege that the Claimant failed to present the required full set of shipment and bill of lading documents, including a set of clear on board documents. Moreover, the Respondents maintain that the Claimant has failed to produce any evidence of the actual loading of the consignment on board the vessel. They contend that the bill of lading dated 15 June 1979, submitted by the Claimant as evidence, was subsequently cancelled by the Claimant because the place reserved for the signature of the captain or his representative is crossed out with an "X."

14. Furthermore, the Respondents contend that the contents of the Claimant's letter dated 21 June 1979 show that, contrary to the bill of lading dated 15 June 1979, the goods had not yet been put on board any ship, which was a requirement of both the law and the contract. Moreover, the Respondents argue that if the documents had been duly presented, MIO's bank would have paid the Claimant under the letter of credit. They further argue that the Claimant, by its letters of 15 and 21 June 1979, requested a cancellation fee, while if its allegation about the shipment was true and correct it could have asked for the value of the shipment instead of bargaining a cancellation fee. This would have been more appropriate in the face of the Bank Markazi's telex dated 22 May 1979 which had asked for a cancellation if the "beneficiaries consen[ted]" to it.

15. The Respondents also contend that, in accordance with trade usage, the Claimant should have notified MIO that the Bank had refused to pay.

16. Finally, the Respondents argue that the Claimant never raised or followed any claim concerning the alleged final shipment from the time the letter of credit expired until this Claim was brought before the Tribunal. They

request that the Tribunal dismiss the Claim, due to lack of both jurisdiction and substantiation.

2. Second Claim

17. The second Claim concerns two parts of Purchase Order No. 334/140-1695-80 issued by MIO to ESI on 14 April 1978. The Purchase Order covered four items with a total price of U.S.\$4,210,000: (1) 200,000 fuze mines, (2) 200,000 detonator mine holders, (3) 200,000 detonator mines, and (4) 200,000 detonator mines. The Claim involves only items (1) and (3).⁴

18. The items were to be delivered "C&F Bandar Shahpur" with payment by irrevocable documentary letter of credit. The terms of payment and documentary requirements were identical to those of the Purchase Order in the First Claim. See para. 2, supra. The Purchase Order specified the date of delivery as "120 days after this order until 12 months." Shipment of approximately 40,000 pieces of each item per month was to start 14 August 1978 "subject to availability of port facilities."

19. On 11 May 1978, the Claimant acknowledged the Purchase Order and accepted the Order's terms and conditions, which included opening a performance guarantee in favor of MIO at Bank Melli.

⁴ After an explosion at the factory of ESI's supplier in January 1979, the Parties agreed to cancel the order for items (2) and (4) for reasons of force majeure. ESI states that it incurred no losses or expenses with respect to these items and it asserts no claim concerning them.

20. On 15 June 1978, MHTC advised the Claimant that its correspondent bank, Bank IRANSHAHR, had issued a letter of credit in favor of the Claimant on behalf of MIO for the total contract price of U.S.\$4,210,000, with an expiry date of 21 April 1979. The letter of credit listed the documents required to be presented by the Claimant in order to obtain payment, which were again identical to those required in the First Claim. See para. 3, supra. It also provided that part shipments were permitted, whereas transshipments were not. On 8 December 1978, MHTC informed the Claimant that the letter of credit was amended to substitute Bank Markazi for Bank IRANSHAHR as the issuing bank.

a) Part One

21. ESI commenced shipping item (1), the fuze assemblies, to MIO. Although the general conditions of the Purchase Order provided that the goods should be carried by Arya Lines, ESI alleges that MIO accepted on several occasions goods that were shipped via STAR LINES, another Iranian flag carrier. It refers to the following four partial shipments of fuze assemblies:

- on 1 September 1978 by "STAR ABADAN"
(shipment value: U.S.\$516,364.80);
- on 27 October 1978 by "STAR SHAHPUR"
(shipment value: U.S.\$860,608.00);
- on 7 December 1978 by "STAR ABADAN"
(shipment value: U.S.\$860,608.00);
- on 23 December 1977 by "STAR SHIRAZ"
(shipment value: U.S.\$344,243.20).

22. The Claimant contends that the goods transferred by the above shipments had a total invoice value of \$2,581,823.20 [sic] and were all paid for by MHTC as the correspondent bank of Bank Markazi upon presentation of the shipping documents specified in the letter of credit. It asserts that these four shipments covered 134,400 pieces of fuze assemblies out of the 200,000 pieces ordered as Item 1 of the Purchase Order, leaving a balance of 65,600 pieces still to be shipped. It maintains that, on 8 February 1979, a fifth shipment of a further 35,849 fuze assemblies was delivered to STAR LINES. The Claimant alleges that it presented to MHTC a clean "on board" bill of lading, together with the other documentation called for by the letter of credit, for payment of its sight draft in the amount of U.S.\$688,486.40, the contract price of the fifth shipment. MHTC did not pay.

23. On 23 February 1979, the Claimant received a letter dated 15 February 1979 from STAR LINES, informing ESI that the fifth shipment was being held at Dart Line Container Terminal in Antwerp, Belgium. The letter advised that:

Due to unsettled conditions in Iran, Star Lines Overseas Shipping Ltd., the carrier, cannot effect delivery of the cargo to consignee or notify party named in the Bill(s) of Lading, and hereby declares the applicable voyage(s) frustrated and abandoned.

The letter indicated that a copy had been sent to Bank Markazi.

24. The Claimant contends that it thereby became aware that after its delivery of the fifth shipment to the carrier line STAR LINES, the latter had allowed or caused goods to become diverted and subsequently abandoned at a port which was not the original destination shown on the bill of lading. Although these events occurred after ESI had delivered the goods and therefore under the C&F terms of the

Purchase Order it was no longer contractually responsible for them, ESI alleges that it recovered the goods and returned them to the United States in an effort to insure that they would finally reach the Respondent at Bandar Shahpur.

25. The Claimant further contends that because of possible additional delays and in view of the difficulties it had encountered in finding Iranian flag carriers for its shipments it sent a telex to MIO on 13 March 1979 seeking two amendments to the letter of credit. It requested an extension of Bank Markazi's letter of credit to 21 October 1979 and authorization for transshipment of goods shipped after 1 December 1978. The telex noted that:

INTERRUPTION OF SHIPPING SCHEDULES TO IRAN ON CARRIERS SPECIFIED IN SUBJECT ORDER ARE DELAYING SHIPMENT OF PRODUCT UNDER REF ORDER AND CAUSING NON-PAYMENT TO US.

It concluded with the message:

WE ARE PROCEEDING WITH ALL TERMS AND CONDITIONS OF OUR CONTRACT WITH YOU IN GOOD FAITH IN SPITE OF PAYMENT PROBLEMS AND REQUEST YOUR URGENT HELP IN CORRECTING THIS PROBLEM.

The Claimant contends that in view of force majeure circumstances frustrating timely and direct shipments to Bandar Shahpur on Iranian flag carriers at the time, these amendments were necessary to increase the opportunities to ship the goods under the Contract to their ultimate destination.

26. The Claimant asserts that, although the Respondent failed to reply in time to the 13 March 1979 telex before the payment letter of credit expired on 21 April 1979, ESI was able to find a carrier to deliver the goods previously sent as the fifth shipment. On 16 April 1979, the goods

were loaded on board a Waterman Steamship "lash barge," which was lifted on board the "SAM HOUSTON" on 25 April 1979.

27. On 16 April 1979, ESI presented to MHTC a sight draft in the amount of U.S.\$676,192.00 with a bill of lading and the other documents required under the letter of credit. The original sight draft for the fifth shipment was for U.S.\$688,486.40, but ESI alleges that this amount was reduced because a number of pieces had been damaged when the goods were returned from Antwerp and reloaded in Baltimore on board the "SAM HOUSTON."

28. The Claimant alleges that MHTC questioned the documents submitted by the Claimant and once more refused payment. It continued to refuse payment in spite of a letter dated 23 April 1979 from ESI explaining the accuracy of those documents.

29. On 9 May 1979, MIO replied by telex to the Claimant's telex of 13 March 1979 seeking amendments to the letter of credit. MIO indicated that:

DUE TO SOME CHANGES OCCURRED IN THE ROUTINE WAY OF THE PRODUCTION LINE AT OUR FACTORY WE DO NOT REQUIRE THE REMAINDER OF OUR P/O NO 33/1401-1695-80 DTD 14.4.78. THEREFORE L/C NO 11/95059 DOES NOT NEED TO BE EXTENDED.

30. In a letter dated 26 July 1979, Waterman Steamship Corporation informed the Claimant that "[d]ue to the turmoil in Iran," the "SAM HOUSTON" had to discharge the goods in Dubai on 20 May 1979, but that they were eventually taken to Bandar Shahpur by another vessel, the "ROBERT E. LEE," and unloaded on 28 June 1979.

31. ESI contends that Bank Markazi continued to refuse to honor its sight draft in spite of the fact that MHTC asked Bank Markazi on a number of occasions for authorization to effect payment.

32. In a letter dated 30 July 1979 to the Iranian Chargé d'Affaires in Washington, the Claimant sought diplomatic assistance in obtaining payment for that shipment, explaining that

Iran still owes us \$676,192 for shipments made under Letter of Credit # 11/95059 dated April 4, 1978.

33. On 22 October 1979, the Legal Department of the Embassy of the Islamic Republic of Iran responded to ESI's letter as follows:

We have been informed from Tehran that the arrangements to make full payment to you were approved on August 14, 1979 through Bank Markazi, Iran.

Would you be so kind as to inform us if all has been satisfactory? If there is anything further with which we may assist you, please do not hesitate to contact us.

34. ESI delivered the balance of the goods due under Item 1 of the Purchase Order by shipments on 4 and 12 April 1979. Its corresponding sight drafts were duly honored. Eventually, the Claimant also received payment for the fifth shipment after Bank Markazi issued a payment instruction on 21 August 1979. However, the Claimant contends that this occurred only after it expended considerable efforts and incurred extra costs for performance "well beyond its contractual obligations." For these efforts the Claimant seeks compensation for its extra expenses in connection with the fifth shipment and for the costs of obtaining payment on

the letter of credit as follows:

-	for freight and repacking:	
	from Antwerp to New York	\$ 44,575.00
	from New York to Baltimore	\$ 10,417.00
	from Baltimore to Iran	\$ 41,675.00
-	for legal fees	\$ 21,519.00
-	for professional and consultant fees	\$204,287.50
-	for telephone and telex expenses	\$ 1,275.00
-	for management time expenses allocated to the fifth shipment	\$ 50,662.00
	total amount:	<hr/> \$374,410.50

35. The Respondents deny that the Claimant faced any difficulties in finding a shipping line to ship the goods to Iran. They contend that, at the time and at least until the year 1980, ships from Arya line were frequenting U.S. and Iranian ports, that in addition to Iranian ports, other ports in the Persian Gulf were open to vessels with cargo for Iran and that such goods actually reached their final destinations.

36. Moreover, the Respondents refer to the fact that they, with good faith, paid the Claimant for all shipments it made even if arranged with other Iranian or non-Iranian flagged ships, such as S/S Sam Houston. They further argue that the Claimant failed to take action to deliver the goods "on the alleged date or thereafter." The Respondents also contend that the documents submitted to MHTC "were

discrepant, as otherwise it would have received payment under the regulations governing irrevocable letters of credit."

37. The Respondents further argue that under the C&F terms of the contract ESI was liable for all risks only until the goods were loaded on board the vessel. They contend that ESI's alleged actions to retrieve the goods from Antwerp and deliver them to Bandar Shahpur went beyond its obligations under the Contract, not mentioning the fact that transshipment was not allowed under the letter of credit.

38. Furthermore, the Respondents note the Claimant's admission that under the Purchase Order and the letter of credit the goods should have been carried by ARYA LINES and not by Star Lines without MIO's approval. They acknowledge that they did not protest earlier shipments made on carriers other than ARYA LINES, but they argue that they should not be liable for damages if a carrier unauthorized by the Purchase Order abandoned the goods.

39. The Respondents also note that the Purchase Order and the letter of credit determined that the goods should be shipped by a "vessel." They assert that the fifth shipment was not transferred to a vessel, but to a lash barge, which was not loaded on the "SAM HOUSTON" until 25 April 1979, four days after the letter of credit expired. The Respondents contend that this was the reason why MHTC, as stated in its telex of 8 May 1979 to Bank Markazi, refused to pay the sight draft presented by the Claimant.

40. Furthermore, the Respondents claim that ESI waived any claim for its additional expenditures. They refer to a telex dated 24 July 1979, from the Claimant which stated, in part:

OVER THE PAST SEVEN MONTHS WE HAVE EXPENDED AN EXTRAORDINARY AMOUNT OF ADDITIONAL MONEY IN RE-SHIPPING, DAMAGE, ATTRITION, AND LOGISTIC SUPPORT ON THESE GOODS. WE HAVE ABANDONED ALL THOUGHT OF PROFIT OR DAMAGES ON THIS PROGRAM BUT SEEK AT LEAST THE BASIC AMOUNT DUE US.

The Respondents argue that this constitutes a waiver of any claim for damages once the Claimant actually received payment on 21 August 1979 following the Respondents' receipt of the telex.

41. The Claimant takes the position that delivery of the shipment to Waterman Steamship Company, allegedly an agent of the Respondent, constituted delivery as required under the contract. It characterizes the lash barge as a "vessel" belonging to the "SAM HOUSTON" and argues that the date it was lifted on the mother ship is irrelevant. Moreover, ESI argues, the goods were "on board" when loaded on the lash barge on 16 April 1979 and the subsequent lifting of the barge onto the "SAM HOUSTON" did not constitute a prohibited transshipment of goods.

42. ESI also rejects MIO's argument that ESI waived any right to the damages it now seeks. It contends that the telex of 24 July 1979 must be read in its entire context and that, as such, it does not constitute a waiver.

b. Part Two

43. The second part of Claim Two concerns Item 3 on the Purchase Order: 200,000 mine detonators. ESI alleges that the goods were ready for shipment in early February 1979, but, due to reasons mentioned in the 13 March 1979 telex, see para. 25 supra, it was unable to find a suitable carrier before the letter of credit expired. Following that, it received MIO's telex of 9 May 1979 cancelling the Purchase Order. See para. 29 supra. The Claimant further

asserts that, although a booking had been arranged to ship the goods by ARYA LINES, it was impossible to complete the shipping arrangements because the crew of the ship ARYA TAJ refused to load explosives at the height of the crisis in Iran.

44. The Claimant alleges that it had purchased the goods comprising Item 3 for resale to the Respondents and that they were retained in storage until 1983, when they were taken to Utah and destroyed. It alleges that the goods were specially produced according to MIO's specifications and that they could not have been used for other purposes or sold for salvage value. The Claimant seeks a total of U.S.\$157,240: U.S.\$154,000 for the purchase price and U.S.\$3240 for storage fees.

45. The Respondents deny that the goods were ready for shipment in time. They contend that the Claimant could have shipped them by other vessels belonging to ARYA LINES, or other shipping lines as it did with respect to the fifth consignment of item 1 goods, if the ARYA TAJ was not prepared to ship them. They argue that MIO was under no obligation to extend the letter of credit because Section 9 of the conditions of the Purchase Order provided that

[a]ll delivery dates should remain firm during execution of Order. Your [seller's] later request for prolongation of delivery dates and/or extension of the validity of Letter of Credit may result in cancellation of the lot in question
.....

and that the Claimant failed to ship the goods, as contractually required, under C&F terms and to present the corresponding shipping documents.

46. The Respondents further argue that these items, even if manufactured, would have had the same fate as those

other items (items 2 and 4) which exploded in the factory of the Claimant's supplier.

47. The Respondents further contend that the Claimant has admitted that it could not arrange for shipment of the item 3 goods either before or after the expiration of the letters of credit. Therefore, the Respondents conclude that the Claimant had and has no contractual right to claim. They, finally, argue that, if, as it is alleged by the Claimant the latter could consider itself relieved from the consequences of non-delivery of the goods due to force majeure, it should a fortiori be as well a cause of relieving the Respondents from the obligation to pay any alleged damages.

3. Interest and Costs

48. The Claimant also contends that it is entitled to interest on the amounts due to it. The Respondents deny this.

49. Finally, the Claimant seeks compensation of U.S.\$37,988 for the costs it incurred in litigating the Claim. The Respondents also oppose this Claim.

II. REASONS FOR AWARD

A. Jurisdiction

50. The Tribunal is satisfied on the basis of the evidence submitted by the Claimant, including the copies and originals of the share certificates, that it is a company controlled by a Delaware corporation whose majority of shares belonged to U.S. nationals, in particular, James Howard and Harvey Frederick Guerin and, therefore, is a

national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration.

51. The Tribunal is also satisfied that the Claim was outstanding on 19 January 1981 within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. According to the Tribunal's practice, a claimant need not have submitted a claim or instituted proceedings before 19 January 1981 in order for a claim to be "outstanding." It suffices that the claim is ripe, so that a cause of action existed prior to that date. See Oil Field of Texas, Inc. and Government of the Islamic Republic of Iran, Award No. 258-43-1, para. 22 (8 Oct. 1986), reprinted in 12 Iran-U.S. C.T.R. 308, 314; Mobil Oil Iran Inc., et al. and Government of the Islamic Republic of Iran, et al., Partial Award No. 311-74/76/81/150-3, para. 46 (14 July 1987) reprinted in 16 Iran-U.S. C.T.R. 3, 17 (citing Amoco Iran Oil Co. and Islamic Republic of Iran, Interlocutory Award No. ITL 12-55-2 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 493); Phillips Petroleum Co., Iran and Islamic Republic of Iran, Interlocutory Award No. ITL 11-39-2 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 487.⁵

⁵ For the Tribunal's practice in the particular circumstances of bank account cases, see Harza Engineering Company and Islamic Republic of Iran, Award No. 19-98-2, pp. 8-9 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 499, 504; Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, et al., Award No. 141-7-2, p. 7 (29 June 1984) reprinted in 6 Iran-U.S. C.T.R. 219, 223; Computer Sciences Corporation and Government of the Islamic Republic of Iran, et al., Award No. 221-65-1, p. 39 (16 Apr. 1986), reprinted in 10 Iran-U.S. C.T.R. 269, 299-300; Training Systems Corporation and Bank Tejarat, et al., Award No. 283-448-1, para. 24 (19 Dec. 1986), reprinted in 13 Iran-U.S. C.T.R. 331, 337.

52. Furthermore, based on the documents before it, the Tribunal is satisfied that the Claim was owned by the Claimant from the date it arose until 19 January 1981, in accordance with the requirements of the Claims Settlement Declaration. The Claim is directed against the Ministry of Defence of the Islamic Republic of Iran and MIO over whom the Tribunal has jurisdiction in accordance with the Claims Settlement Declaration. Finally, the Claimant bases its claim on breach of contract, which is subject to the Tribunal's jurisdiction pursuant to Article II, paragraph 1, of the Claims Settlement Declaration.

B. Merits

1. First Claim

53. The Tribunal finds that the Claimant is entitled to U.S.\$30,525 for the contract price of the firing devices that it shipped in June 1979 in accordance with the terms of the Contract. The Tribunal denies, however, the part of the First Claim that requests compensation for "management time" because no evidence was submitted in support of it.

54. As a starting point, the Tribunal notes that the Parties failed to reach an agreement on the cancellation of the Contract. ESI accepted MIO's request to cancel the remainder of the order, but it made its acceptance contingent on receipt of a "cancellation fee." This qualifying condition was never accepted by MIO. Hence, the Parties continued to be bound by the terms of the Contract.

55. There is no dispute that, under the Contract, delivery of the goods was to be made "C&F Bandar Shahpur." The designation C&F means that the shipper must deliver the goods to a carrier and pay the freight costs to the named destination. The documentation required under the Purchase

Order and letter of credit is sufficient to indicate that this delivery has been accomplished.

56. The Tribunal is satisfied on the basis of the evidence submitted by the Claimant in connection with its letters to MHTC dated 15 and 21 June 1979 that ESI actually submitted all documents necessary to show delivery in the contractually required form. See paras. 2 & 3, supra. At the Hearing the Claimant presented the original of the bill of lading dated 15 June 1979 and explained to the Tribunal's satisfaction the "X" marking on the copy of the bill of lading submitted in its Hearing Memorial. The notification "OCEAN FREIGHT PREPAID" signed by Norton, Lilly & Company, Inc. on the bill of lading carries the date of 20 June 1979, which indicates that the shipping documents could not have been complete by 15 June 1979. However, by resubmitting the completed documents with its 21 June 1979 letter, the Claimant, to the Tribunal's satisfaction, fulfilled its obligations under C&F terms as stipulated by the Contract. Moreover, MHTC acknowledged in its letter of 1 July 1979 that ESI's documents complied with the terms of Bank Markazi's letter of credit. See para. 10, supra. It is therefore entitled to receive the contractual price of U.S.\$30,525.

2. Second Claim

a) Part One

57. The Tribunal denies the Claim for extra shipping expenses and damages with respect to the "fifth shipment" under the Purchase Order dated 14 April 1978 because ESI has failed to establish a legal basis for the claim. Under the C&F terms of the contract, ESI's responsibility for the goods ended when it first delivered the shipment of fuze assemblies to Star Lines and paid the shipping charges to

Bandar Shahpur. ESI itself admitted that the actions it took in retrieving the goods were outside the contractual requirements and represented an attempt to maintain a good business relationship. Given the large amount of costs claimed relative to the value of the shipment, the Tribunal finds that ESI was not entitled to hold MIO liable under the contract for its extra costs without prior consultation on the actions taken.

58. Nor can the Claimant seek the reshipping expenses and related costs on the theory that they are damages related to a breach of contract by the Respondents. Even if the delay in payment for the fifth shipment could be considered a breach of contract -- rather than resulting from force majeure -- ESI has failed to show that this delay necessitated the reshipping. Furthermore, in its telex dated 24 July 1979 to the Respondent, see para. 40, supra, the Claimant expressly renounced any claim for damages which shows that even in the Claimant's view at that time there was no breach by the Respondent. In this connection, it is also significant that the Claimant's letter of 30 July 1979 to the Iranian Chargé d'Affaires in Washington requested "\$676,192 for shipments made under Letter of Credit No. 11/95059." The letter did not mention any additional costs. The Claimant also failed to raise this issue in response to the answer it received from the Iranian Embassy on 22 October 1979, which urged ESI to contact the Embassy if it needed further assistance.

59. There is also no basis to award the shipping expenses under the doctrine of force majeure or on the basis of unjust enrichment. Under the doctrine of force majeure, the loss must "lie where it falls." See Queens Office Tower Associates and Iran National Airlines Corp., Award No. 37-172-1, pp. 14-15 (15 Apr. 1983), reprinted in 2 Iran-U.S. C.T.R. 247; International Schools Services, Inc. and Islamic Republic of Iran, et al., Award No. 290-123-1, para. 30 (29

Jan. 1987), reprinted in 14 Iran-U.S. C.T.R. 65. The Tribunal sees no reason why the Respondent should bear the costs in this Case. As to the doctrine of unjust enrichment, the Tribunal is unable to identify any unjust enrichment of the Respondent because it actually paid the contractual price and did not acquire any benefit beyond the goods it received.

60. The Tribunal also denies the Claimant's request for the costs it incurred in obtaining payment for the value of the fifth shipment. ESI has not established that the delay in payment under the letter of credit constituted a breach of contract by MIO or that the expenses it claims were incidental to such a breach. If the delay in payment was not a breach, but excused by force majeure, then, as discussed above, the costs fall on ESI. Furthermore, the documentation submitted by ESI in support of its claim is not sufficiently detailed to allow the Tribunal to determine that the expenditures were related to ESI's efforts to collect the contractual price of the fifth shipment.

b) Part Two

61. With respect to the part of the Claim for U.S.\$154,000 and U.S.\$3000 relating to "item 3," the Tribunal notes that, as admitted by the Claimant, the goods were never loaded on any ship for delivery to Iran, as required by the contract. Moreover, there is no claim here as to any breach on the Respondents' part. Rather, the performance of the Contract before the payment letter of credit expired was rendered impossible due to force majeure. Because of conditions in Iran at that particular time, no suitable carrier was available to transport explosives. Therefore, in accordance with the aforementioned Tribunal practice, again the loss "lies where it falls." This part of the Second Claim is also dismissed.

C. Interest

62. The Tribunal considers it appropriate to award interest to the Claimant in accordance with the principles outlined in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1, pp. 31-32 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298, 320-22, on U.S.\$30,525 from 20 June 1979, the date of delivery of the goods for shipment to Iran.

D. Costs

63. In view of the fact that the Claimant has successfully discharged the burden of proving only approximately one eighteenth of its total Claim, and in view of the costs incurred by the Respondent in defending itself, the Tribunal considers that the Respondent should be granted U.S.\$5000 as costs of arbitration, and that this amount should be deducted from the amount awarded to the Claimant.

III. AWARD

64. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

- (a) The Respondent MILITARY INDUSTRIES ORGANIZATION is obligated to pay the Claimant ELECTRONIC SYSTEMS INTERNATIONAL, INC. the sum of Twenty Five Thousand Five Hundred Twenty Five United States Dollars and No Cents (U.S.\$25,525.00) plus simple interest at the rate of 10.25 per annum (365-day basis) on the amount of U.S.\$30,525 from 20 June 1979 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.

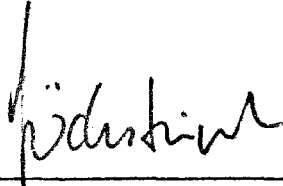
(b) The remaining Claims are dismissed.

These obligations shall be satisfied by payment out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

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

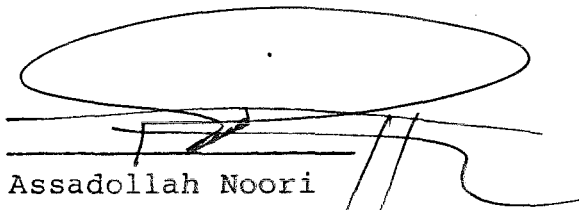
Dated, The Hague

28 July 1989

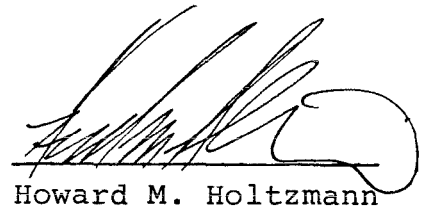


Karl-Heinz Böckstiegel
Chairman
Chamber One

In the Name of God



Assadollah Noori
Dissenting from the
acceptance of the First Claim



Howard M. Holtzmann