ES CLAIMS TRIBUNAL

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CASE NO. 264
CHAMBER ONE
AWARD NO. 264-264-1

HENRY F. TEICHMANN, INC. and
CARNEGIE FOUNDRY AND MACHINE
COMPANY,

Claimants,

and

HAMADAN GLASS COMPANY,

Respondent.

AWARD

Appearances:

For the Claimants:

Mr. Richard G. Kotarba,
Mr. Thomas A. Berret,
Attorneys,
Mr. Archie L. McIntyre,
Mr. Gary M. Lucas,
Mr. James M. Veraldi,
Representatives of
Henry F. Teichmann,
Inc.,

For the Respondents:

Mr. Mohammad K. Eshragh,
Agent of the Government
of the Islamic Republic
of Iran,
Mr. Asadollah Nouri,
Legal Adviser to the
Agent,
Mr. Hasan Gholami,
Assistant to the Agent,
Dr. Javad Vahedi,
Attorney for Hamadan
Glass Company,
Mr. Fathollah Khalili,
Representative of
Hamadan Glass Company

Also present:

Mr. Daniel M. Price,
Deputy Agent of the
United States of
America.

I INTRODUCTION

A. The Proceedings

1. On 14 January 1982 the Claimants Henry F. Teichmann, Inc. ("Teichmann") and Carnegie Foundry and Machine Company ("Carnegie") filed with the Tribunal a claim against the Respondent, Hamadan Glass Company ("Hamadan"), seeking payment

of $1,739,435.05 allegedly due under a contract entered into on 19 June 1977 between Teichmann and Hamadan in connection with the construction of a glass factory at Hamadan, Iran. Interest and costs are also claimed. On the same date Carnegie and Hamadan entered into a second, separate contract relating to the engineering work on the project.

2. Hamadan filed a Statement of Defence on 26 November 1982 in which it admitted certain elements of the claim and denied liability for the remainder. Hamadan also raised a number of counterclaims alleging that the Claimants had failed to perform various contractual obligations. One of the counterclaims arose under the contract with Carnegie, and Hamadan seeks to hold the Claimants jointly and severally liable on all of them.

3. A pre-hearing conference was held on 11 January 1984 at which the Government of the Islamic Republic of Iran requested that it be joined as a Respondent. After further exchanges of pleadings and evidence between the Parties, an oral hearing was held on 12 December 1985.

B. Facts and Contentions of the Parties

4. Hamadan entered into two contracts on 19 June 1977. The first, with Teichmann, was for the supply of the necessary materials, equipment and machinery for, and the construction of, a complete glass container plant, in accordance with certain specifications. It was a modified turnkey contract, and the plant, when completed, was to be capable of producing 187 metric tons of container glass per day. The contract incorporated a 76-page proposal prepared by Teichmann, which provided for a contract price of $22,188,537 payable in accordance with a contractual payment schedule. Clause O of the contract dealt with force majeure, providing:

> "If the commencement, progress or completion of the work is delayed by:

...

3. Acts of God, floods, riots, hurricane, strikes, epidemic, acts of public enemy, war or revolution then in this case the two parties (Client and Supplier) will get together immediately and decide on further steps to be taken such as cancellation of the Contract and etc."

5. The second contract was a separate contract for the engineering work on the project, which was to be carried out by Carnegie at the price of $500,000. The work pursuant to the second contract was performed and paid for in full, and no part of the present claim relates to that contract.

6. In respect of the first contract, Teichmann commenced and, it alleges, substantially performed all its design and procurement obligations. Materials were delivered, and construction proceeded. However, Teichmann claims that towards the end of 1978, the climate of unrest and disruption in Iran rendered continued performance impossible. Accordingly, on 7 November 1978, Mr. Archie L. McIntyre of Teichmann had sent a telex to Hamadan which stated,

"A force majeure situation exists in Iran as specified in paragraph "0 - 3" of our contract for supply of materials and equipment. That paragraph stipulates that we are to get together immediately to decide on further steps to be taken regarding this contract. When and where would you like to meet?"

7. Further, Teichmann alleges that its American employees who had been working on the project were unable to return to the project site in 1979, after the Christmas vacation, because Hamadan failed to arrange for adequate entry visas, and that severe difficulties were experienced in obtaining the unloading of equipment and its transportation to the project site.

8. During the first half of 1979, the Parties held discussions in an effort to resolve the continuing difficulties. Teichmann maintained one employee, Mr. John

Afkari, at the project site, who continued to supervise construction to the extent possible, and who periodically sought instructions and reported on progress to Teichmann by telephone throughout this period. In addition, Teichmann maintained contact with Mr. Nader Servat Sharmini, Hamadan's managing director.

9. On 25 June 1979 Mr. Sharmini came to the United States in order to attend a meeting at Teichmann's offices. There, he and officers of Teichmann reviewed a variety of matters relating to the progress of the contract, including the provision of visas, the repayment by Hamadan of the fund of $313,551 held as retention, the extension of current letters of credit and the establishment of new ones to ensure the continuation of the project. Matters progressed to the point where Teichmann obtained a lease of a property in Iran in August 1979 to accommodate a small number of its staff whom it expected to re-enter the country.

10. A further meeting was held at Hamadan on 26 September 1979. Mr. McIntyre, Mr. John Raffaelli and Mr. Gary Lucas of Teichmann travelled to Iran to attend it. The Governor General of Hamadan also attended, and reported to the press that eighty percent of the glass plant had been completed and that some $4,000,000 was owed by Hamadan to Teichmann. Pursuant to that meeting, Teichmann attempted to ship to Iran certain materials which were being held at the port of Baltimore, but this proved impossible after the detention of American nationals in November 1979, whereafter the situation continued to deteriorate.

11. Finally, Mr. Sharmini attended a further meeting at Teichmann's United States office on 20 December 1979. He acknowledged that it would not be possible for Teichmann employees to return to Iran to complete the construction of the glass plant, and certain alternative courses of action were discussed. They principally involved plans to complete

the project using Swedish or German contractors, with Teichmann to play a consulting role. The discharge of Hamadan's financial obligations to Teichmann was also contemplated. These discussions were recorded in a letter from Mr. McIntyre to Mr. Sharmini of 21 December 1979, which Teichmann relies on as evidence of Hamadan's instruction that Teichmann stop work.

12. Teichmann claims to have expended efforts, in pursuance of this arrangement, to procure the completion of the construction by contractors from Sweden and Germany. However, it contends that Hamadan failed to cooperate and, in particular, took no steps to release the retention and pay other amounts that by then were owed to Teichmann. Teichmann finally terminated the contract by telex on 15 May 1980. The telex was addressed to the new managing director of Hamadan, Mr. Cyrus Niknafs. It read:

> "Please consider this telex to be Henry F. Teichmann, Inc.'s formal termination of the above-captioned contract. Termination of the contract is deemed both advisable and justified at this time for numerous reasons, including but not limited to the following.
>
> First, the Iranian Revolution and the political ramifications which have resulted therefrom have made it impossible for our company to complete the project. By way of illustration and not limitation, the political situation in your country has made it impossible to import the required equipment and to transport required technical and administrative personnel to the site. In spite of the adverse political atmosphere, we have employed all possible efforts to complete the project during the last two years and, as you are aware, such completion has been rendered an impossibility.
>
> Second, faced with the Revolution we have on several occasions attempted to invoke the force majeure provisions in the contract. All of Teichmann's good faith efforts in this respect have not been successfully pursued by Hamadan.
>
> Third, your company's continued failure and refusal to promptly pay and discharge outstanding invoices in accordance with the contract's terms and conditions is a breach of the contract. As of the date of this telex, there remains an outstanding balance due and owing to our

> company in excess of $900,000 and demand is hereby made for immediate payment of all outstanding invoices.
>
> The contract is accordingly officially terminated and we assume that you will be in contact with us in order that we may be advised on when payment of all outstanding amounts due and owing to our company will be made."

13. At a subsequent meeting in Frankfurt on 6 and 7 August 1980, Mr. Niknafs invited Teichmann to submit a written statement of the amounts due and owing under the contract. In response to this request, Mr. McIntyre wrote a letter on 18 August 1980 which set out, in eight schedules, details of all outstanding invoices. The total amount claimed was $1,739,435.05. The letter serves as the basis for the amount claimed by Teichmann in the present proceedings.

14. Mr. Niknafs acknowledged receipt of that letter, and in a telex of 2 September 1980, addressed certain of the claims in detail. Further exchanges of telexes followed in an effort to secure completion of the project by an Austrian company, but this in turn was frustrated by the outbreak of the war with Iraq.

15. In the course of the present proceedings, Hamadan has denied, first, that it is an "agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof" within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration. Teichmann contends that Hamadan is so controlled as it is owned by Bank Etebarate, itself a governmental entity, and thus falls within the Tribunal's jurisdiction.

16. The Government of Iran has formally requested that it be joined as a Respondent in order to be in a position to argue the issue of control over Hamadan.

17. As to the merits of the claim, Hamadan largely disputes Teichmann's characterisation of the events which led to the

termination of the contract. It denies having instructed Teichmann to stop work, and, while it admits that conditions of force majeure existed, denies that they continued for more than five months and claims, instead, that Teichmann abandoned the project of its own volition. It disputes certain elements of the claim as detailed in the letter of 18 August 1980.

18. Hamadan raises several counterclaims against Teichmann arising out of the latter's performance of the contract. Hamadan seeks the following relief:

i) 177,885,597 Rials as reimbursement for the cost of obtaining replacements for goods detained in the port of Baltimore ("the Baltimore goods") and subsequently resold by Teichmann;

ii) unspecified damages for delay on the part of Teichmann in handing over the plant. Hamadan requests that the Tribunal appoint an expert to assess these damages;

iii) 1,428,572 Rials representing the cost of items of machinery allegedly damaged in transit, in respect of which Hamadan claims it has been unable to recover under an insurance policy;

iv) approximately 131,000,000 Rials as the cost of correcting errors in design and construction on the part of Teichmann;

v) 7,000,000 Rials in damages resulting from Carnegie's alleged failure to deliver program charts required by the engineering contract;

and

vi) unspecified damages, again to be assessed by an expert, arising out of the use of the wrong type of brick by Teichmann in the construction of the furnace.

All the counterclaims are denied by Teichmann.

II. REASONS FOR AWARD

A. Procedural Issues

19. During the early stages of the proceedings, the Government of Iran requested that it be joined as a Respondent in order that it might argue the issue of jurisdiction over Hamadan. Though no mention was made of this request at the hearing, in the absence of any formal withdrawal, the Tribunal assumes that it is still outstanding. The Tribunal considers that the position enjoyed by the Government of Iran by virtue of Article 15 of the Tribunal Rules renders unnecessary its participation as a respondent in a case such as this. Under Article 15, Note 5, the Tribunal may,

> "having satisfied itself that the statement of one of the two Governments - or, under special circumstances, any other person - who is not an arbitrating party in a particular case is likely to assist the tribunal in carrying out its task, permit such Government or person to assist the tribunal by presenting oral or written statements."

20. In the light of the opportunity thus afforded to the Government of Iran to make representations, and in view of the fact that it does not appear to be a necessary or proper Respondent to a claim directed against a specific entity, Hamadan, which is itself entitled to raise arguments as to jurisdiction, the Tribunal decides not to join the Government of Iran as a Respondent.

21. A further issue of procedure arises out of the filing of a document entitled "Respondent's Rebuttal Evidence", on 15 November 1985, and the filing of an objection thereto by the Claimant on 25 November 1985. In its Order of 10 May 1985, the Tribunal required each Party to file all written evidence by 5 August 1985, and all documentary evidence in rebuttal by 4 October 1985. Teichmann filed its evidence on 5 August 1985. On 15 August 1985, in response to a request made on behalf of Hamadan, the Tribunal extended the time for filing the Respondent's evidence to 30 September 1985, and the time for filing evidence "in rebuttal of previously presented evidence" by either Party to 12 November 1985. That Order noted that no further extension would be granted in view of the imminence of the hearing, already scheduled for 12 December 1985. A request for a further extension was, however, filed by the Agent of the Government of the Islamic Republic of Iran on 30 September 1985. In its Order of 4 October 1985, the Tribunal reiterated that no such further extension would be granted. The Order continued,

> "Should the Respondent nevertheless file such evidence in advance of the Hearing, the admissibility of such evidence will be decided by the Tribunal after the Hearing, also taking into account the Claimants' possibility to examine it and submit rebuttal evidence."

The date for filing of evidence in rebuttal by the Respondent remained 12 November 1985.

22. On 8 October 1985, Hamadan filed a volume of documentary evidence. A second, larger volume, entitled "Respondent's Rebuttal Evidence", was filed on 11 November 1985, and a revised version, with tabs to identify the individual exhibits, was filed on 15 November 1985. It contained documents which were not fully translated, and in some cases, illegible. It is that volume which is now under consideration.

23. On examination, much of what it contains does not appear to fall within the definition of "rebuttal" as being material

submitted in response to specific evidence previously filed. It consists largely of new material, presented in support of Hamadan's defence and counterclaims, and seemingly unrelated to any of the documents filed in evidence by Teichmann. The admission of such a document so close to the hearing date would effectively deprive the opposing party of an opportunity to examine and rebut a large body of new material. The Tribunal, therefore, decides not to admit this document in evidence.

B. Jurisdiction

24. Both Claimants have adduced evidence sufficient to satisfy the Tribunal of their United States nationality within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration.

25. The question remains whether Hamadan is a proper Respondent within the meaning of Article VII, paragraph 3, which defines "Iran" for the purposes of the Tribunal's jurisdiction as

> "the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof."

Teichmann has alleged throughout that Hamadan is a corporate entity whose majority shareholder is Bank Etebarate[1] which was itself a governmental entity even prior to the nationalisation of all banks in Iran by decree in June 1979. Such governmental ownership was initially disputed by Hamadan. However, in response to the Tribunal's Order of 2 February 1984, Hamadan filed, as part of its Rejoinder, a list of

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[1] Otherwise known as Industrial Credit Bank. On 7 June 1979, it merged with three other banks under the title of Bank of Industry and Mines.

shareholders and various other corporate records which confirmed that Bank Etebarate owned a significant majority shareholding amounting to about 62% and that the chairman of the company's board of directors was at all relevant times an appointee of that bank. The Tribunal is therefore satisfied that it has jurisdiction over Hamadan.

26. The only other jurisdictional question raised by the present Case is whether Hamadan's counterclaim can properly lie against Carnegie, even though no part of the claim itself concerns the contract with Carnegie. The Claimants have argued that the relevant part of the counterclaim falls outside the jurisdiction of the Tribunal, as it depends on a different contract from that on which the claim is based. They explain that Carnegie was named as a Claimant only for purposes of clarification.

27. As noted, the contracts between Hamadan on the one hand and Teichmann and Carnegie on the other are separate and distinct. Hamadan has identified no basis on which either named Claimant might be held jointly and severally liable on the contract to which it was not a party. Accordingly, Hamadan must establish an independent basis for jurisdiction over its counterclaim against Carnegie.

28. Article 2, paragraph 1, of the Claims Settlement Declaration grants this Tribunal jurisdiction over "claims of nationals of the United States against Iran", as well as "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim". Therefore, for purposes of determining jurisdiction over counterclaims, the important question is whether a relevant claim exists, not whether the putative counter-respondent has been named as a claimant. See Computer Sciences Corp. and Islamic Republic of Iran, Award No. 221-65-1, p. 56 (16 April 1986) (jurisdictionally invalid claim cannot give rise to valid counterclaim). Carnegie has

never asserted a claim in this Case. Because there is no claim upon which the Tribunal might found jurisdiction over Hamadan's counterclaim against Carnegie, the counterclaim must be dismissed for lack of jurisdiction.

C. The Merits

29. The Tribunal must, at the outset, consider the respective effects of force majeure and any breach by either party of its contractual obligations in the period before Teichmann's letter of 15 May 1980 formally brought the contract to an end.

30. Teichmann has alleged that Hamadan was already in breach of the contract in at least three respects before Teichmann invoked force majeure in its telex of 7 November 1978. It cites Hamadan's failure to open a letter of credit, as required by Clause G on the contract, to enable suppliers to be paid; its failure to release monies retained pursuant to the performance guarantee provided in Clause F of the contract; and its failure to pay invoices submitted in respect of construction supervision services. Hamadan takes the position that, though force majeure was validly invoked in November 1978, it ceased to prevail after five months, after which time Teichmann itself breached the contract by abandoning the project without consent. The characterisation of the legal relationship existing between the parties as either force majeure or breach of contract may in certain circumstances determine the entitlement of the Parties to the amounts claimed.

31. It is common ground between the Parties that a situation of force majeure had arisen by November 1978 and continued for a period of at least five months, preventing performance by both parties of the contract as a whole during that period. Thereafter, though Teichmann did not succeed in reinstating its expatriate workforce at the site, discussions continued

between the parties in an effort to resolve the impasse by arranging for completion of the work by non-American contractors.

32. Between the end of the five months of undisputed force majeure and the eventual termination of the contract in May 1980, however, the situation is less easy to characterise, at least up to November 1979. Clearly, there came a time when force majeure conditions no longer operated to obstruct progress on the contract as a whole, and both Parties hoped to pursue their relationship to a successful outcome by arranging for the completion of the factory. However, it was still open to either Party, faced with a particular allegation of breach, to establish the existence of force majeure in relation to the specific obligation involved.

33. Hamadan appears to have been in continuing breach with respect at least to its payment obligations, which it has not sought to excuse by reference to force majeure. Two letters of credit required by Clause B of the contract were allowed to expire, and one remained expired for close to a year. By the time of the meeting in September 1979, Hamadan was significantly in arrears in its payments to Teichmann. Moreover, though it was agreed in principle that a fresh letter of credit would be established to enable the installation and construction work to proceed under Phase II, no such letter of credit was ever established by Hamadan.

34. It is on the basis of these findings that the Tribunal will proceed to examine the respective claims of the Parties. Teichmann's claim was itemized in its letter of 18 August 1980 to Mr. Niknafs, the new managing director of Hamadan. The letter was headed "Final C-1915 Billing", and was submitted, as noted, at the invitation of Mr. Niknafs. The account was divided into eight schedules, each of which related to a different category of invoices covering, between them, the totality of contractual charges, including some already paid

by Hamadan. The outstanding items will be analysed in turn in the light of the contentions of the Parties.

Schedule 1 - Downpayment

35. Teichmann has made no claim for this item, consisting of an invoice rendered in June 1977 for $1,500,000, the contractual downpayment. It was paid by Hamadan and nothing is now due.

Schedule 2 - Material

36. Similarly, Teichmann has made no claim with respect to materials, equipment and ocean freight. Subject to certain retainages dealt with in Schedule 4, all such billings were paid by Hamadan.

Schedule 3 - Iranian Freight Charges

37. Teichmann has claimed for three outstanding invoices under this heading, amounting to $11,900, which have been admitted by Hamadan to be owing.

Schedule 4 - Retainage

38. Teichmann's claim under Schedule 4 totals $611,678, representing unpaid retainage withheld from shipments of material covered by the invoices described in Schedule 2. Clause F of the contract provided for certain sums to be retained "for guarantee of supply" and provided for their return, for the most part, after "satisfactory commissioning of the plant". Teichmann's letter of 18 August 1980 states,

> "Since we are unable to complete the factory under the contracted terms, and since we have no control over the time required for completion we expect all of our retainage to be paid."

Teichmann takes the same position in the present proceedings.

39. Hamadan concedes that $2,482 of the retainage is owing, but contests the remainder on the grounds that some items were never delivered and that Teichmann never completed the factory. Hamadan's objections concern only the entitlement to the retained amounts; there is no dispute as to their calculation.

40. The retentions were made in respect of invoices for the supply of materials described above under Schedule 2. Hamadan had paid the balance of the invoices, as has been seen. Since these invoices were rendered in respect of services already performed, and since Teichmann would be entitled to be paid for such past services either on the theory of damages for breach of contract, or, equally, as part of a final accounting pursuant to a termination for force majeure, the Tribunal sees no basis on which Hamadan might continue to retain these funds. The claim must therefore be granted in the full amount sought.

Schedule 5 - Engineering

41. Teichmann has made no claim under this head. Its letter of 18 August 1980 recites payment of $500,000, the full amount due under the engineering contract entered into between Hamadan and Carnegie, and notes that credit for this amount had been given in the certificates of completion supporting the invoices under the construction contract.

Schedule 6 - Construction

42. Teichmann claims that a total of $1,042,003 is outstanding under this item which comprises five invoices representing various aspects of the construction work

performed by Teichmann. These invoices constitute the major area of dispute between the Parties.

a) Invoice Nos. 6984 and 7044

43. The first two invoices, No. 6984, dated 19 September 1978, and No. 7044, dated 10 October 1978, are supported by certificates of completion duly approved and signed by Hamadan, and there is no dispute that they are payable. A balance of $41 is due in respect of the first, and $95,359 in respect of the second.

b) Invoice No. 7271

44. The third invoice, No. 7271, dated 27 June 1979, was rendered for $228,324 in respect of installation services performed by Teichmann up to December 1978. A certificate of completion was prepared in respect of this invoice. It bears the date 27 June 1979, and the signature of Mr. Archie L. McIntyre of Teichmann. However, it was never signed by Hamadan. Hamadan relies on the absence of such a signature in contesting its liability to pay the amount of the invoice.

45. While it is acknowledged that it was the regular practice of the Parties that each invoice would become payable upon approval and signature by both Parties of a certificate of completion, the contract itself does not contain any requirement to this effect. The Tribunal must therefore ascertain whether Hamadan's failure to sign Certificate No. 5 reflected a genuine dissatisfaction with the work performed or whether, on the other hand, no such significance can be ascribed to it.

46. There is nothing in the record to indicate that Hamadan had complained of defective workmanship or lack of completion, or expressed its intention not to pay the underlying invoice on the ground of inaccuracy or for any other reason. In the absence of such evidence, it simply remains to establish

whether Teichmann has successfully discharged the burden of proving that it performed the work in respect of which the invoice was rendered, and is thus entitled to receive payment. In that event, Hamadan would be obliged to approve and sign the certificate of completion, and could not rely on its own failure to do so as a defence to the claim now raised. Apart from the invoice itself, there is evidence of performance in the form of an affidavit of Mr. Archie L. McIntyre, then the Executive Vice President of Teichmann, who states that the breakdown shown in the certificates of completion of the value of installation services performed is correct and was never challenged. He attributes the absence of Hamadan's signature to the inability of Hamadan to make the necessary payments because of a lack of funds at the time the certificate was submitted, rather than to any objection by Hamadan to the quality of the work performed. This accords with the words used by Mr. McIntyre in the letter of 18 August 1980, which states that, though the certificate was given to Mr. Sharmini, Teichmann

> "did not attach an invoice or require a signature on the certificate, since no money was passing between Iran and United States at that time and payment was impossible."

The Tribunal accordingly finds, on the balance of the evidence, that Teichmann has established its entitlement to the amount in question, $228,324, and that the mere absence of Hamadan's signature on the certificate does not give rise to a defence.

c) Invoice No. 7701

47. The fourth invoice under Schedule 6 is No. 7701, dated 14 August 1980, which covers field supervision work and totals $139,218. It relates to the salary and expenses of Mr. Afkari, Teichmann's only remaining employee at the site, for the period from 6 December 1978 to 30 November 1979. The amount was not subject to any contemporaneous challenge,

though again, the corresponding completion certificate, No. 6, was not signed by Hamadan.

48. Hamadan contends that the invoice relates to a period after work on the project had ceased, and points to a request it made to Teichmann in a telex of 2 September 1980 for further information, in substantiation of this invoice. The record does not reflect that Teichmann ever provided the information requested. Given this contemporaneous objection, and the absence of any evidence that it was met, the Tribunal cannot accept the invoice and unsigned certificate of completion as constituting, on its face, sufficient evidence to discharge the burden of proof in respect of this element of the claim. The claim based on the field supervision invoice is therefore denied.

d) Invoice No. 7702

49. The fifth invoice under Schedule 6 is No. 7702, also dated 14 August 1980, which bills Hamadan for an adjustment in the price of labour pursuant to a contractual formula. The adjustment, amounting to $579,061, results from the agreed reduction in Teichmann-supplied labour. Under alternative but secondary theories of recovery, Teichmann seeks $681,829.

50. The source of this adjustment charge is a provision in the Teichmann proposal which became part of the contract between Teichmann and Hamadan, as reconfirmed by the Parties at the September 1979 meeting at which they planned resumption of the construction work. The pricing option chosen by Hamadan and incorporated into the contract provided that "[i]f the Client wishes to make increases or decreases in the [specified] crew sizes or time spans, these changes will be made at the rate of $2,700.00 per man week." According to Teichmann, this clause, the product of negotiations between the Parties, resulted from their recognition that Teichmann would need to incur significant fixed and semifixed expenses

for field labour support. These expenses would consist principally of tools not available in Iran which Teichmann would need to purchase and ship there, but would also include tools, equipment and other goods purchased in Iran, transportation costs, living expenses, and communication costs. Theoretically, Teichmann would recoup these expenses if by the end of the project it had billed the budgeted amount of labour. Thus, the contractual adjustment formula was designed to guarantee Hamadan the flexibility to increase its utilization of Teichmann-supplied labour without overpaying for fixed costs, while at the same time protecting Teichmann from under-utilization which would deprive it of a fair opportunity to recoup these costs. For this reason, should the Tribunal decline to apply the contractual adjustment, Teichmann seeks to recover, under alternative theories of breach of contract or unjust enrichment, the full amount of its fixed costs, $681,829, for which it has provided documentation.

51. As confirmation of the contractual obligation, Teichmann contends that at the meeting held in Iran in September 1979, Teichmann and Hamadan officials agreed both to reduce manning and to employ the contract formula to adjust the price. In support of this contention, Teichmann produces an internal memorandum written by Mr. McIntyre shortly after the September 1979 meeting, which states:

> In the near future we expect to receive a letter of credit that will allow us to continue the Hamadan construction. We have agreed with [Sharmini] to reduce erection manning for both political and financial reasons. A credit for unused hours will be issued at the rate of $2,700 per man week .... The $4,000,000 [proposed for the letter of credit] is a budgeted amount based on 50% manning.
>
> Sharmini understands that this agreement is made on a best effort basis and that if additional hours are required he will be billed at the rate of $2,700/man week.

52. Other evidence confirms the existence of this agreement. On 12 November 1979, Mr. Sharmini sent a telex to Teichmann confirming that the Ministry of Industries and Mines had approved the establishment of a letter of credit up to $4 million. The nascent agreement foundered when Teichmann refused to agree to refer any disputes to Iranian courts, as Hamadan requested, instead of to arbitration before the International Chamber of Commerce, as the original contract provided. Nevertheless, this evidence, like the contract itself, reflects the Parties' mutual understanding that in the event that the project did not utilize the originally contemplated level of Teichmann-supplied labour, an adjustment pursuant to the contractual formula would be in order.

53. In a separate document, Teichmann has detailed the calculations underlying the amount claimed. Hamadan has specifically challenged neither the methodology nor the relevant amounts. The Tribunal therefore awards the amount of $579,061 in respect of this item.

Schedule 7 - Extra Work

54. Teichmann claims $1,014.05 under invoices submitted for extra work performed pursuant to change orders. Hamadan does not dispute that this amount is owing.

Schedule 8 - Miscellaneous Unbilled Items

55. The amount originally claimed under this head, $72,760.00 was contained in the letter of 18 August 1980 and covered various items not previously invoiced, including additional storage and transportation and various pieces of equipment and components. Hamadan has admitted that this amount is payable.

56. Teichmann has since sought to increase the amount claimed to $132,802 to reflect information which has come to light since the filing of the Statement of Claim. Over three-

quarters of the incremental amount falls under the heading of Iranian storage and transportation. Three senior corporate officers of Teichmann have attested to the accuracy of this figure in an affidavit in which they offered to make available supporting documentation if requested by the Respondent.

57. Though Hamadan disputes the revised figure in general terms, it has chosen not to seek to examine the underlying documentation in order to put forward a specific rebuttal. The Tribunal considers in these circumstances that Teichmann has discharged its burden of proof with respect to the increased amount and is entitled to be awarded $132,802.

The Baltimore Goods

58. Hamadan seeks a credit for the estimated value, $363,000, of certain goods remaining in Baltimore upon the termination of the contract. It argues that it had paid for the goods and Teichmann should have delivered them. Teichmann denies that it ever invoiced or received payment for the goods and therefore contends that Hamadan is entitled to no credit whatsoever. Teichmann makes no claim in respect of the goods other than for storage charges under Schedule 8.

59. The pleadings and evidence on both sides betray a state of confusion and uncertainty surrounding the Baltimore goods. The goods in question reached the port of Baltimore sometime in 1979. It proved impossible to load them on board ship as the state of congestion in the ports of Iran at that time was such that cargo destined for Iran was not being accepted. They remained in the port of Baltimore until Teichmann was able to resell them at a later date, at a much reduced price. Hamadan has consistently sought a credit for the estimated value of these items, $363,000, on the ground that it has paid for them and Teichmann should have delivered them. Indeed,

Teichmann's letter of 18 August 1980 appears to admit that the Baltimore goods had been paid for by Hamadan under Schedule 2:

> "This Schedule shows the total billings for material, equipment and ocean freight. All of these billings have been paid by you .... The invoices include the value of the material and equipment that is warehoused in Baltimore, leaving a gross invoice value in your material Letter of Credit of $53,924.00, to cover freight on the Baltimore shipment and to cover a few miscellaneous items which remain to be ordered. The approximate cost of the material remaining in Baltimore is $363,000.00."

Hamadan claims to have treated this letter as a formal admission on the part of Teichmann that the goods were paid for; on this basis it seeks to justify its failure to produce any invoice or other evidence to that effect. There is, furthermore, a statement in Teichmann's Reply which implies that it had received payment for the goods.

60. Teichmann's analysis of the factual situation in its pleadings has given rise to some difficulty on the part of the Tribunal. It did not include any claim in respect of the Baltimore goods in its Statement of Claim, a position which was explained by its attorney at the pre-hearing conference as being premised on the assumption that the goods had not in fact been invoiced or paid for; that title to them had never passed; and that Teichmann had retained, instead, the proceeds of the later resale at auction. In other words, Teichmann claims that the letter of 18 August 1980 was erroneous in this respect, arguing that no drawing could have been made on the letter of credit - the only means of obtaining payment - without presenting a valid on board bill of lading, and that no bill of lading was issued since no one would accept the goods for shipment.

61. The issue of whether the Baltimore goods were paid for is one on which the evidence is finely balanced. If the Tribunal were faced with having to decide it, procedural considerations such as shifts in the burden of proof might

assume a decisive importance. In the event, however, such a delicate operation is rendered unnecessary by an examination of the figures themselves, which seem to indicate a reasonable solution. The letter, invoices and other documents produced by Teichmann during the present proceedings show that the amounts received by Teichmann during the course of the contract, taken together with the amounts now claimed, and the balance remaining in the letter of credit, add up to a total which exactly equals the contract price. This can be illustrated as follows:

Amounts received for materials invoiced (Schedule 2)	14,797,083.00
Down-payment received (Schedule 1)	1,500,000.00
Retainage - sum of amounts paid and those now claimed (Schedule 4)	849,000.00
Inland freight - sum of amounts paid and those now claimed (Schedule 3)	274,091.00
Balance remaining on letter of credit (cover letter of 18 August 1980)	53,924.00
	$ 17,474,098.00

62. The total thus arrived at, $17,474,098, corresponds exactly to the price stated in Clause G of the contract with respect to Phase I, the "materials and freight" section - in other words, the full amount Teichmann was entitled to be paid under the contract. Thus, without any determination being necessary as to whether Hamadan made a separate payment covering the Baltimore goods, the end result is that Teichmann will by the end of these proceedings have received a sum amounting to approximately the contract price - to be precise, the contract price for materials minus the residual $53,924. This must be taken to have included an element attributable to the Baltimore goods.

63. On this analysis, Hamadan had - at least notionally - paid for the goods and not received them; Teichmann had for its part manufactured or procured the goods and attempted to ship them to Iran. It was prevented from doing so by circumstances amounting to force majeure. This being so, the Tribunal applies the principle that, as between the parties, the loss must lie where it falls - in this case, with Hamadan. The later resale of the goods by Teichmann was justified once it became apparent that export was impossible, in an attempt to limit the losses suffered. Thus, there was no breach on the part of Teichmann which would require the reimbursement to Hamadan of $363,000 representing the price of the goods. Hamadan is, however, entitled to the benefit of the resale proceeds realised by Teichmann, amounting to $39,974.43. When this amount is credited against the total amount awarded of $1,660,179.05 it leaves a net award to Teichmann of $1,620,204.62.

64. At first sight, to allow Teichmann to retain the $363,000 notionally paid might appear to exceed the relief originally sought in its Statement of Claim. But the Tribunal's conclusion on the facts invalidates the underlying assumption on which the plea for relief in Teichmann's Statement of Claim was based: that the goods had not been paid for. The failure to include a specific plea in the alternative to provide for the opposite contingency should not operate to deprive the Claimant of the benefit of a finding of fact by the Tribunal different from the one originally postulated in the Statement of Claim. Similarly, neither party's entitlement is open to the objection that no claim was outstanding at 19 January 1981.

The Counterclaims

(i) Cost of Replacing Baltimore Goods

65. Hamadan has sought to recover the amount of 177,885,597 Rials which it claims to have expended in procuring replacement components for the goods that remained in Baltimore. The only basis on which such a claim might be entertained would be as damages for a breach of contract on the part of Teichmann. Since the non-shipment of the Baltimore goods was due to conditions of force majeure and not to any such breach, and since - as has been seen - the resale was justified, the counterclaim in this respect is unfounded and must be dismissed.

(ii) Damages for Teichmann's delay in handing over the plant

66. In the light of the evidence on which the Tribunal has based its findings as to force majeure and Hamadan's own breach with regard to the letter of credit, the delay in commissioning the glass factory cannot be ascribed to any fault on the part of Teichmann. Hamadan had the burden of adducing evidence in support of this element of its counterclaim, but it has produced nothing to undermine the Tribunal's conclusion. This counterclaim is therefore dismissed.

(iii) The transit damages claim

67. Hamadan claims 1,428,572 Rials as the cost of 43 items of machinery allegedly damaged in transit. Hamadan made a claim under its insurance policy in respect of these items, but it was unsuccessful. It now contends that Teichmann was under an obligation to provide a second copy of the packing lists used in the shipment of these goods, in order to assist Hamadan in making its claim. The evidence before the

Tribunal indicates that in 1982 the loss adjusters investigating the claim requested additional information from Teichmann to supplement what Hamadan had been able to tell them, and Teichmann duly sent them copies of the relevant invoices and shipping documents. Even were there some obligation which Teichmann failed to fulfill in this regard, there is no evidence to connect Hamadan's failure to recover with any act or omission on the part of Teichmann. In the absence of any such causative link, the counterclaim must fail.

(iv) The cost of correcting design errors

68. Hamadan claims an estimated amount of 131,000,000 Rials as damages representing the cost of correcting errors on the part of Teichmann in the design of the glass plant. Hamadan relies on a report on the state of the sand plant compiled by Sano Consulting Engineers in April 1981, by which time most of the foundations of the furnace had already been demolished to facilitate rebuilding. A further report, compiled one month later, made certain recommendations as to the progress of the rebuilding work. Teichmann was not placed on notice of the alleged defects until the filing of the present counterclaim; there is no reference to any such alleged defects in correspondence previously exchanged with Hamadan. This does not exclude the possibility that the defects may have been latent, or of such a nature as would only come to light once the plant had been in use for some time. However, the report itself makes no reference to defects in design. Further, it appears that it was not Teichmann, but a Swedish company, that won the contract for the sand plant foundation base. At Hamadan's request Teichmann produced design drawings, for which it was never paid, which other contractors then used in carrying out the construction, though they departed from Teichmann's

suggestions in certain material respects. There is therefore insufficient evidence to found a claim for design defects against Teichmann, and this element of the counterclaim must be dismissed.

(v) Carnegie's alleged failure to deliver program charts

69. Hamadan claims 7,000,000 Rials in damages occasioned by the failure of Carnegie to deliver program charts pursuant to the engineering contract. Because Carnegie has made no claim based on its contract with Hamadan, the Tribunal has no jurisdiction over a counterclaim based on breach of that contract. See paras. 26-28, supra.

(vi) Damages arising out of Teichmann's use of the wrong type of bricks in the construction of the furnace

70. Hamadan seeks the appointment of an expert by the Tribunal to assess the extent of the damage it claims to have suffered as a result of the use by Teichmann of the wrong type of bricks in the construction of the furnace. The evidence takes the form of a letter to Hamadan dated 31 March 1982 from a local engineering firm, Abguneh Company, which had carried out reconstruction work and which reported that the bricks originally used were unsuitable for use in a furnace operating at such high temperatures.

71. The first question is not whether difficulties arose - they evidently did - but whether Teichmann can be held liable for having caused them. At the hearing, Mr. McIntyre confirmed that the bricks had been supplied by Teichmann. He explained that the type of brick selected had been arrived at against Teichmann's advice, as that particular type of brick had a problematic history, but the choice was not an inherently unreasonable one. Thus, there is insufficient evidence that the difficulties subsequently experienced could be ascribed to Teichmann. Moreover, it

would be difficult, if not impossible, at this stage to establish any such causative relationship in the light of subsequent repairs that have been carried out to the furnace, including its complete relining. This is particularly so since no complaint was raised until the filing of the Statement of Defence. Thus, the question of establishing the "extent" of the damage cannot be said to arise. The counterclaim in this respect must be dismissed and the request for an expert denied.

Interest

72. Since the award is based on the amount claimed in the letter of 18 August 1980, which contained detailed and complex calculations, the Tribunal considers it would have been reasonable to allow three months before Hamadan might have been expected to make payment. Interest is therefore awarded from 18 November 1980. The currently applicable rate of interest, as determined on the principles laid down in the case of Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), and subsequently applied as a consistent practice by this Chamber, is 10.75 percent per annum. The Claimant is therefore entitled to simple interest at the rate of 10.75 percent per annum on the amount awarded.

Costs

73. Teichmann has requested a total of $92,141.89 as costs of the arbitration. This is broken down into three separate claims, namely $53,821.50 in attorney's fees, $24,854 in travel costs and $13,466.39 as the cost of translations. Each of these items is supported by an affidavit.

74. In view of the fact that Teichmann has not been wholly successful in its claim, and in the light of the principle of reasonableness adopted by this Chamber in the case of

Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), and applied in subsequent cases, the Tribunal considers it appropriate to award costs of $30,000.

III. AWARD

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(i) The Respondent HAMADAN GLASS COMPANY is obligated to pay the Claimant HENRY F. TEICHMANN, INC. the sum of one million six hundred and twenty thousand two hundred and four United States Dollars and sixty-two cents (US $1,620,204.62) plus simple interest thereon at the rate of 10.75 percent per annum (365-day basis) from 18 November 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; plus costs of arbitration of $30,000. This obligation shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

(ii) the counterclaims of HAMADAN GLASS COMPANY are dismissed.

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

Dated, The Hague,
12 November 1986

Karl-Heinz Böckstiegel
Chairman
Chamber One

In the name of God

Mohsen Mostafavi
Dissenting in part,
concurring in part;
see Separate Opinion

Howard M. Holtzmann
Joining fully in the Award, except joining solely in order to form a majority as to the award of only $30,000 in costs. See my Separate Opinion in Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985).