CASE Nos. 49 and 50
Chamber Two
Award No. 136-49/50-2

CASE No. 49

GOULD MARKETING, INC.,
as successor to Hoffman
Export Corporation,
Claimant,

and

MINISTRY OF DEFENCE OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

CASE No. 50

GOULD MARKETING, INC.,
as successor to Hoffman
Export Corporation,
Claimant,

and

MINISTRY OF DEFENCE OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

OPINION OF DR. SHAFIE SHAFEIEI
CONCURRING IN PART,
DISSENTING IN PART

A. The claim of the Claimant in Case No.49 arises, as does the counterclaim of Iran, out of a sales agreement entered into on 12 May 1975 by Gould Inc., through

its subsidiary Hoffman Export Corporation (Hoffman), and the Ministry of Defence of Iran. The Agreement is entitled, "Purchase Agreement for AN/ARC-98 (V21) and VCS-801-1 HF/SSB Radios and Related Test Equipment and Services." The subject of the sales agreement is a quantity of special radio equipment, apparently intended for establishing a communications system. In addition to selling these goods, Hoffman undertook to install the equipment in Iran, to provide technical services and training and, in particular, to guarantee provision of factory repairs and supply of spare parts for a period of ten years. In this way, Hoffman guaranteed that the system would operate efficiently, and the Ministry of Defence would benefit from the equipment, for a minimum of ten years.

The Agreement was, naturally, based upon reciprocal obligations. The Seller (Hoffman) undertook to deliver certain specified goods and services to the Buyer (the Ministry of Defence of Iran) in accordance with the terms set forth in the Agreement; and the Buyer was obligated to make payments in accordance with the terms-- and at the times-- provided for in full by the Agreement. The price of the goods and services is set forth in full in the Agreement, and its total price was $23,934,030. The equipment and services which the Seller was obligated to deliver and provide, and the prices therefor, are enumerated in Article I of the Agreement under 11 headings.

The equipment, at a total price of $11,342,688, is specified in the first five items, and the services are designated in the following items. It is worth noting that in the Agreement, the price set for services in relation to spare parts and factory repair and overhaul is fully equal to that of the equipment itself. Pursuant to Item 7, the Seller guaranteed to supply the Buyer with

spare parts for ten years (commencing as from 16 months from the date of the Agreement), and provision was made for a consideration of $8,125,120 in exchange for said guarantee. Furthermore, pursuant to Item 9, the Seller undertook to provide factory repair and overhaul for a period of four years, for a consideration of $3,467,677. Further particulars of the latter two obligations are set forth in the Minutes to the Meeting of 13 December 1975, and in particular in Modification A, which was signed on 19 December 1978. Article IV of the Agreement makes express provision for the delivery and payment schedule. As stated above, the total price of the Agreement was $23,934,030. The Buyer was required to make two payments, each for the sum of $5,983,507, at the initial stages of the Agreement: one immediately upon execution of the Agreement, and the other in the 10th month of the Agreement. These two payments did not depend upon (the Seller's) fulfilling any conditions whatsoever. The remaining payments commenced as from the 16th month of the Agreement, starting with which, provision was made for seven $1 million payments in the 16th, 17th, 18th, 19th, 21st, 22nd, and 24th months of the Agreement. Provision was made for the remaining payments as follows: $422,000 in the 25th month, $900,000 in the 49th month (30 June 1979), $1 million in the 73rd month (30 June 1981), $766,976 in the 96th month (30 May 1983) and lastly, the final payment of $1 million, in the 108th month of the Agreement (30 May 1984).

It is important to note that unlike the first two payments, one of which was to be made upon execution of the Agreement and the other in the 10th month, the subsequent payments, which commenced as from the 16th month of the Agreement, were by no means automatic; they were entirely conditional and depended upon the carrying out of fully specified conditions. The payments were to be made

through the opening of a letter of credit.

Only the Buyer was accorded the right to terminate the Agreement; the Seller enjoyed no such right. Provision was made that in case of late payment, the Seller was entitled to receive a 10% (per annum) service charge, while conditions of force majeure would justify any failure on the part of the Seller to perform upon its contractual obligations.

B. In its Statement of Claim, the Claimant has asserted that because neither the instalment for the 49th (month), due on 30 June 1979, nor the subsequent instalments, were paid, the Respondent (the Ministry of Defence) was therefore in breach of contract. Hoffman also alleged later that the Ministry of Defence had not paid the salary of its field representative, totalling $117,072.

In its Counterclaim, the Ministry of Defence of Iran also contended that Hoffman was in breach of contract and demanded damages.

Careful analysis of the Agreement and the subsequent agreements, as well as of the rights and duties of the Parties, has demonstrated that the Ministry of Defence met all of its obligations to make payment throughout the time that Hoffman was in Iran, and that it was Hoffman, on the contrary, who was in breach of contract. Through the 25th month of the Agreement (30 June 1977), all of the payments therein provided for were made. The next payment was due in the 49th month of the Agreement (30 June 1979), but was contingent upon the completion and carrying out of the first two years of factory support. As is expressly provided in

the above-cited schedule under Article IV of the Agreement, the first two years of the said (factory) support ended on 30 June 1979. However, Hoffman quit Iran in December 1978 and suspended performance of its contractual obligations relating to presence of its field representatives (in Iran), factory repairs and overhauls, and (provision of) spare parts. Hoffman is therefore not entitled to receive any compensation.

Because the equipment was apparently highly advanced technologically and it was imperative that Hoffman have a technical representative in Iran, Hoffman undertook pursuant to Item 10 of Article I of the Agreement to provide a field service representative in Iran for ten years, whose annual salary was to be $87,804. It was also provided in the Minutes to the Meeting of 13 December 1975 that Hoffman was to send representatives to Iran at its own expense, in order to perform factory repairs, so that these representatives might carry out whatever factory repairs could be done in Iran itself and send to America only such equipment as required major repairs which could not be performed in Iran. However, performance on the Agreement, especially the mechanism for repairs-- which was essential for operating the equipment-- was placed in total disarray by the departure of the field service representatives in December 1978. Moreover, Hoffman refused to return the equipment which had been sent to America for repairs.

There is a basic problem here, specifically with respect to Hoffman's obligation to guarantee provision of spare parts. Hoffman undertook to guarantee supply of spare parts for ten years, namely from 1976 until 1986. The Ministry of Defence has asserted that from the very outset of the Agreement there were inadequacies regarding the spare parts. Hoffaman did not send a sufficient number of spare

parts to Iran and did not fulfill this guarantee properly and in an appropriate manner, and this fact resulted in problems in operating the radios. In order to eliminate these problems, Hoffman undertook in Modification A, which was executed in December 1978, promptly to "inventory in-country spare parts within 60 days, and within 180 days will ship from U.S. stock the necessary parts to bring the in-country level to that required for a 12-month period." However, Hoffman did not carry out its undertakings in this respect. Hoffman alleged in the course of the proceedings, of course, that in 1977 it sent large quantities of spare parts to Iran, equalling a ten-year supply or at least a seven or eight-year supply. Hoffman referred in this regard to a communication sent from Tehran on 14 June 1977 by one of its staff to the president of the logistics office, wherein it is stated that "spare parts by and large sufficient for a ten-year period, have been shipped to Iran."

However, Bill of lading No.13766, which Hoffman has presented to the Chamber in order to prove that it had shipped a ten-year supply of spare parts, is dated 5 October 1977. In addition, on principle this bill of lading is an internal document and does not satisfy the Chamber in this connection, and Hoffman has not submitted other, compelling evidence of its having performed upon its obligations with respect to the spare parts. At any event, Modification A, which was executed in December 1978, indicates that the spare parts in Iran were inadequate and insufficient; in any case, Hoffman did not make any performance whatsoever upon the obligations which it had undertaken in the latter Modification. Therefore, Hoffman discharged the Agreement in December 1978 by bringing back its field service representatives from Iran, by failing to perform upon its obligations with respect to the spare parts, and by not returning the

equipment which had been sent to America from Iran for major repairs. In such circumstances, Hoffman should not have expected the Ministry of Defence of Iran to make a further payment in the 49th month (ie. on 39 June 1979). Furthermore, as has already been noted, this payment was not automatic; it was contingent upon completion of the first two years of factory repairs, which period was to end on 30 June 1979. Hoffman left Iran in December 1978, or roughly six months prior to the end of the first two-year period, and refused to carry out the factory repairs. Therefore, it was not entitled to receive any consideration on 30 June 1979; and even if the Ministry of Defence had opened a letter of credit on 30 June 1979, Hoffman would certainly have been unsuccessful in obtaining the money from the bank since it was unable to obtain the necessary affidavit for proving that it had carried out factory repairs up to that date.

Throughout the time that Hoffman was in Iran, the Ministry of Defence made all of its payments; up to December 1978, it had paid Hoffman approximately $19,476,818. This amount is many times over the value of the goods and services which Hoffman had provided up to that time. Therefore, no justification whatever remained for the Ministry of Defence to continue making payments gratuitously and in a vacuum, once Hoffman had quit Iran in December 1978 and had refused to perform upon its obligations-- in particular its obligation to provide factory repairs, to supply spare parts, and to return the radios belonging to the Ministry of Defence, which had been sent to America for repair.

One of the other grounds propounded by Hoffman in assertion of breach of contract, is that the salary of its field service representative ($87,804 annually), whom Hoffman had sent to Iran in conformity to Item 10 of Article I of the Agreement, had not been paid. The salary for the first

year was paid, but that for the second year was not. However, the explanations, and in particular the documentation, presented by the Ministry of Defence prove that the nonpayment of the second year's salary resulted from (the representative's) failure to comply with administrative procedures. The affidavit of completion of services, which was submitted in order to receive the salary, lacked the necessary signature (the same defective document was submitted to the Chamber as well). Apart from this defence, the said amount is on principle insignificant in the context of the Agreement as a whole and cannot be relied upon as evidence of breach of contract by the Ministry of Defence. Therefore, there are no grounds for alleging that the Ministry of Defence was in default on the Agreement. The Ministry of Defence fulfilled all its obligations in connection with making payments, and after Hoffman left Iran in December 1978 and refused to carry out or continue meeting its obligations, it was no longer entitled in the least to receive the June 1979 payment or the following instalments.

In reality, the Ministry of Defence of Iran is the only party to the present Agreement which has been injured. The total price of the Agreement was $23,934,030. In light of the fact that Hoffman had guaranteed and undertaken to carry out factory repairs, provide spare parts, and send field service representatives to Iran for technical cooperation for a ten-year period, the Ministry of Defence rightfully expected to enjoy the use of this technical equipment for a minimum of ten years. So long as Hoffman was in Iran, the Ministry of Defence met all of its obligations, paying a total of approximately $19,476,818 to Hoffman. However, the Ministry of Defence was able to avail itself of Hoffman's equipment and services for only about two years; and with Hoffman's curtailment of delivery of spare parts, its non-

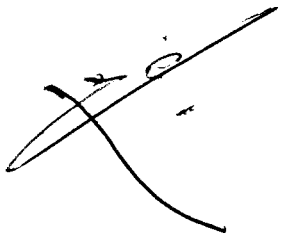
performance of factory repairs, and the absence of its field service representatives and their failure to provide technical services in Iran, the Ministry of Defence was no longer able in any way to derive those benefits from the Agreement which it had rightfully anticipated, and all of the investment which it had made in this connection was in vain. Worst of all, equipment had been sent from Iran to America for repairs, and Hoffman held this equipment in trust. The principles of morality and trusteeship would have required that Hoffman restore this equipment to its owner, and yet Hoffman has refused to do so. Therefore, the Ministry of Defence has suffered injury and is entitled to demand damages thereupon from Hoffman, which is in default.

C. The theory of "breach of contract" is the legal theory which ordinarily applies in such cases. According to this theory, even the slightest violation suffices for us to deem a party to a contract to be in default on the contract as a whole, and to hold that said party is liable for all damages resulting from nonperformance of the contract. Nevertheless this theory, which the American arbitrators invariably advance and rely upon, is entirely superficial and artificial, and it completely fails to address the facts, in addition to disregarding human factors. Enforcement of this totally materialistic and unmerciful formula leads to totally unjust and unreasonable results which a judge cannot easily accept. In light of these factors, the former Chamber Chairman and I proposed another formula during the deliberations on this case last year, one which better conforms to the facts and realities of the case; this formula is "faire le compte" (settling of accounts). In reality, the nonperformance of the contract was occasioned by external events and occurrences. The

contractual relations of the Parties were severed, and now their account should be settled equitably. Hoffman has provided certain goods and services, and the Ministry of Defence has made certain reciprocal payments. An assessment and appraisal should be made of the goods and services which Hoffman has provided the Ministry of Defence. If the monies paid by the Ministry of Defence exceed the value of Hoffman's goods and services, then Hoffman should make restitution of the excess monies it has received. On the other hand, if the value of the goods and services provided exceeds the monies received, then Hoffman is entitled to receipt of additional monies. Although this theory creates difficulties regarding assessment of the goods and, more especially, the services, it is nonetheless the legal construction of the Chamber itself, and it is more compatible with the particular facts and realities of the present case. I concurred, and continue to concur, with a fully equitable settling of accounts in Case No.49. Unfortunately, however, the majority in Case No.50 has failed to act in accordance with the principles of justice and equity. In Case No.49, it has been established that the Ministry of Defence suffered injury as a result of Hoffman's breach of contract, and that the Ministry has lost all of the investment which it made by virtue of the Agreement and now has nothing to show in exchange for all the monies it paid Hoffman. The Ministry of Defence would have been entitled to recovery of damages and lost profits. Yet, notwithstanding all this, we refrained from awarding against Hoffman for payment of damages to the Ministry of Defence and merely agreed to an equitable settling of its account. The same policy and procedure ought by rights to have been adopted in Case No. 50. Instead, however, the majority in Case No.50 has awarded Hoffman all the damages it demanded, even including compensation for lost profits. I hold this action to be unjust and prejudiced, and deem it to be highly regrettable. Now, in light of the above, the least that should be expected of

Hoffman is that it comply in good faith with the award (for payment of the monies awarded and restitution of Iran's property).

Dated, The Hague
22 June 1984



Dr. Shafie Shafeiei