IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان ... ایالات متحده

49—123
٤٩—١٢٣

ORIGINAL DOCUMENTS IN SAFE

Case No. 49 Date of filing: 29 JUN 84

** AWARD — Type of Award: FINAL
— Date of Award: 22 JUNE 84
28 pages in English 25 pages in Farsi
+ Concur + dissent of DR. Shafeiei
11 pages English, 8 pages Farsi

*** DECISION — Date of Decision: _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____
— Date _____
_____ pages in English _____ pages in Farsi

*** SEPARATE OPINION of _____
— Date _____
_____ pages in English _____ pages in Farsi

*** DISSENTING OPINION of _____
— Date _____
_____ pages in English _____ pages in Farsi

** OTHER: Nature of document: _____
_____
— Date _____
_____ pages in English _____ pages in Farsi

R/12

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

[redacted]



Case Nos. 49 and 50

Chamber Two

Award No. 136-49/50-2



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

and

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

# AWARD

## Appearances

For Claimant:
- Mr. Philip M. Risik
- Mr. Sheldon I. Matzkin, Attorneys for Claimant
- Mr. James Reed, Director of Contracts for Claimant

For Respondent:
- Mr. A. Shirazi, Legal Adviser to the Agent of the Islamic Republic of Iran
- Mr. H. Payandeh, Attorney for Respondent
- Mr. M. Bahrami
- Mr. A. Daee, Representatives of Respondent

Also Present:
- Mr. John Crook, Agent of the United States of America
- Mr. John Reynolds, Adviser to the Agent of the United States of America

## I. Joinder of Claims

While claims 49 and 50 have proceeded as separate cases, they involve the same parties and related contracts, sequential hearings in the two cases were held by Chamber 2 on successive days, and the two cases can be dealt with together without delaying any award. In view of these considerations and the fact that the Tribunal has decided to render an award in favor of the Respondent in Case 49 and an award in favor of the Claimant in Case 50, the Tribunal considers it appropriate to decide the two cases together so that they can be dealt with in a single award for a net amount.

## II. Claim Number 49

### A. Previous Proceedings and Contentions of the Parties

#### 1. Proceedings

On 27 July 1983, the Tribunal rendered Interlocutory Award No. ITL-24-49-2, in which the Tribunal determined that some of the obligations of Hoffman Export Corporation ("Hoffman") and the Ministry of Defence of the Islamic Republic of Iran (the "Ministry") under a 1975 Purchase Agreement for Radios and Related Test Equipment and Services had, beginning December 1978, been suspended by circumstances amounting to force majeure conditions. It further determined on the basis of the evidence presented in this case that the continued existence of force majeure conditions had by mid-1979 ripened into a termination of the contract by reason of frustration or impossibility of performance. The Tribunal, however, did not decide the

consequences of that conclusion and requested the parties to argue the effect of the termination of their contract and specific questions related thereto.

Following both Parties' submissions of briefs, a hearing was held on 27 October 1983.

2. Contentions of the Parties

Neither Party believes that it should be left in the position in which it was found following the frustration of the contract. The Claimant argues that it should be compensated not only for the contractual obligations it performed prior to the termination of the contract, but also for all costs it incurred with respect to the remainder of its contractual obligations which were not performed because of the frustration of the contract. Under this theory, the Claimant contends that it is entitled to at least U.S. $4,500,000, including interest, compensation for devaluation of the dollar and costs of litigation.

The Respondent and Counter-Claimant, the Ministry, maintains that it is entitled to a reimbursement of U.S. $7,010,870 from Hoffmann, which amount the Ministry claims is the difference between the payments made to Hoffman and the value of the contractual obligations performed by Hoffman and supplied to the Ministry. The Ministry also counterclaims for U.S. $1,707,396, representing the contractual price of items allegedly sent to Hoffman for repair and never returned, and seeks damages for Hoffman's alleged breach of the contract. The total amount to which the

Ministry claims it is entitled is U.S.$43,737,593, including interest and costs.

B. The Merits

1. The Claim

The termination of the contract as a result of frustration has obviously worked a hardship on both Parties. Not only has the Ministry failed to receive all to which it was entitled under the contract, but the Claimant has expended both effort and money attributable to its unperformed contractual obligations. The contract provides that it is governed by American law (California). Under American law, as under English law since 1943, the general principle applied to equitably allocate such consequences of frustration of contract is that amounts due under the contract are to be proportioned to the extent the contract was performed. If no payment has been made, the Party which has performed is entitled to receive payment to the extent of that performance. If payment has been made, the Party which received such payment is entitled to retain that amount of money proportionate to its performance and must return any money in excess of that amount.[1] In applying this general principle, the Tribunal should avoid unduly burdening either party with the hardships arising from the termination. Regardless of how difficult it might be for the Tribunal, as

---

[1] For American law see 6 Corbin on Contracts §1367 et seq. (1962); 18 Williston Law of Contracts §1973 et seq. (1978); For English law, Fibrosa Spolka Akcyjna v. Fairbairn L.C.B. Ltd., (1943) A.C. 32. A similar rule exists in civil law. For French law see Répertoire Dalloz, Droit Civil, Contrats et Conventions par Boyer 271,272.

for any Court, to equitably allocate these burdens and how imperfect might be the justice reached, such difficulty and such imperfection should not be a reason for denying any relief.

The Tribunal must now ascertain the extent to which Hoffman performed its contractual obligations until such performance was made impossible, and whether, based on such performance, it is entitled to receive further payments or, on the contrary, must return to the Ministry part of the payments it received. In ascertaining the value of the Claimant's performance, the Tribunal will apply the relevant provisions of the contract, as both Parties themselves have done.

The contract provided for a price of U.S. $23,934,030 as compensation for the full and complete performance of the contract. From this U.S. $23,934,030, U.S. $23,055,090 was to be paid in two down payments of U.S. $5,938,507 each and in subsequent periodic "milestone" payments. The balance of U.S. $878,040, representing payment for ten years of field service representatives, was to be paid separately in annual amounts of U.S. $87,804 each.

From the date of the contract to the fall of 1978, all down payments and subsequent milestone payments were made in due time by the Ministry. The Ministry also paid one U.S. $87,804 invoice for the field service representative, but failed to pay the invoice for the second year. It is undisputed that when Hoffman withdrew its field service

representative in December 1978 and the Ministry consequently stopped its payments under the contract, Hoffman had received U.S. $19,476,818, representing all down payments and milestone payments up to the 25th month of the contract and one year of field services.

Article 1 of the contract allocated the total contract price among eleven line items that the Claimant was obligated to provide to the Ministry at different dates scheduled in Articles 2 and 4 of the contract. The Tribunal will apply these contract provisions to evaluate the extent to which the Claimant performed its obligations with regard to each of the line items, and to ascertain the further payment to which it is entitled or the restitution it must make.

Line items 1, 2, 3, 4, 5 and 11 related to radio and related equipment which the Claimant was obligated to supply to the Ministry by June 1977. The delivery of all this equipment has been established by the shipping documents submitted by the Claimant, by a telex from the Claimant to the Ministry dated 20 June 1977 reporting the completion of the deliveries and followed by no objection by the Ministry, and by the fact that the Ministry made the 25th month milestone payment, which was conditional upon the completion of deliveries. The Tribunal, therefore, is satisfied that the Claimant has fully performed its obligation with respect to delivery of this equipment and must receive credit for its full value under the contract, i.e., U.S. $11,407,046.

Line item 6 related to technical manuals to be delivered together with the equipment, and the evidence establishes that these manuals were delivered. The Ministry, however, contends that a modification to the contract signed on 19 December 1978 required the Claimant to revise and reissue the manuals. The Tribunal notes that no portion of the contract price was allocated to this line item. The Claimant, therefore, should be neither credited nor debited with respect to line item 6.

Line item 8, which had a contract value of U.S. $56,148, related to training to be provided by Hoffman to the Ministry's employees. The Claimant has submitted a certificate of completion signed by an official of the Ministry and is, therefore, entitled to receive credit for the full amount of U.S. $56,148.

Line item 10 related to the technical field service representative whom Hoffman was obligated to provide for ten years. That service effectively started on 1 September 1976, as established by the 10 November 1976 invoice which the Ministry paid without objection, and stopped on 6 December 1978, when the Claimant's field services representative left Iran. Hoffman is, therefore, entitled to a credit for this item of U.S. $198,702.

Line item 9, relating to factory repair and overhaul, raises more difficulties. Pursuant to Article 1 of the contract, the Claimant was obligated to provide such services on all delivered equipment for a period of four years.

The amount of the total contract price allocated to that guarantee was U.S. $3,467,676. Article 2 of the contract provided that "[f]actory repair and overhaul shall commence with deliveries of Item (sic) 1, 2, 3, 4, and 5 and continue for a period of four (4) years, for each of the above contract line items..." but did not specify whether that four year period would commence on the same date for all categories of delivered equipment or would start individually for each category or each piece of equipment as of its particular delivery date.

The Claimant contends that the guarantee period for all the equipment commenced as of the first delivery in late 1975 and that the contract has thus been fully performed in this respect. The Respondent maintains that the guarantee for all categories of equipment did not start until the last delivery made in June 1977 and that it was, in fact, never performed, Hoffman having failed to return some equipment sent to it in California for repair.

As to the start of the guarantee, the Tribunal notes that the terms of the contract and of the subsequent understandings between the Parties for implementation of the contract are quite unclear and even conflicting. The arguments of the Parties in this case have not clarified this question. In light of the evidence presented, the Tribunal is of the opinion that the best interpretation of the contract is that the factory repair guarantee started for each piece of equipment from the date of its particular delivery.

As to whether that repair service was effectively rendered by the Claimant when requested by the Ministry, there is evidence that items sent by the Ministry to Hoffman in California were returned to the Ministry after repair or overhaul. Moreover, in December 1975 it was agreed by the Parties that, as far as possible, repairs initially within the scope of the factory repair guarantee would be performed in Iran by the Claimant's field service representatives. There is no dispute that the Claimant initially sent its field service representative to Iran, and later, at no cost to the Respondent, sent a second field service representative. Finally, there is no evidence that during the course of the contract the Ministry ever complained about the way in which the factory repair guarantee was performed by Hoffman.

As to the date on which the repair services under the guarantee were discontinued, the Tribunal notes that, after the Claimant's field service representative left Iran, the Ministry was in no way prevented from sending equipment to Hoffman in California for repairs. The Tribunal also finds no evidence prior to 1 September 1979, the date on which the Claimant stopped performance because of non-payment, that the Claimant refused to provide the Ministry with the factory repair guarantee service.

The Tribunal, therefore, concludes that the Claimant provided the factory repair guarantee with respect to each piece of equipment from the date of its delivery up to 1 September 1979. Taking into account the different values of

line items 1, 2, 3, 4 and 5, the different delivery dates for those items and the duration of the guarantee for each item, the Claimant is entitled to a credit of U.S. $2,165,773 with respect to its performance of the factory repair guarantee.

The Ministry contends that, for the purpose of repair, it sent several pieces of equipment to the Claimant in California, including eight ARC radios, two TRN radios, 29 VCS radios, one Siemens teleprinter, nine front panel assemblies, one console, one coupler and one CCA set. Alleging that none of the items was returned, the Ministry seeks reimbursement of their contract value, which it claims to be U.S. $1,707,396. According to the Claimant, most of this equipment related to other contracts and was sent to California for purposes other than repair. The Claimant also maintains that it returned most of the equipment related to this contract to the Ministry and that existing export regulations of the United States Government prohibit it from exporting to Iran any of the Ministry's equipment which is still in its possession.

After reviewing the evidence, the Tribunal finds that 26 VCS radios and the Siemens teleprinter were sent to the Claimant a few days after the signing on 16 April 1978 of a Fixed Ground Stations Contract between the Claimant and the Ministry, which contract required the Ministry to provide such equipment to Hoffman. The claim of the Ministry with respect to these items clearly relates to that separate

Fixed Ground Stations Contract, which is the subject of Case 50. The claim relating to the 26 VCS radios and the Siemens teleprinter shall be decided below in Section III in conjunction with the decision in Case 50.

The two TRN radios were equipment belonging to the Claimant which had been loaned to the Ministry for training purposes and then returned. This is clearly established by the shipping documents submitted by the Ministry itself, which documents bear the notation: "Remarks: return of loan equipment."

Six ARC radios were sent to the Claimant for use on an apparently unrelated program named "Augusta-Bell" to which the Claimant states it was not a party. Other radios and related equipment were returned after repair to the Ministry through Bell Helicopter, pursuant to shipping orders dated 31 October 1977, 21 and 29 November 1977, and 12 and 13 December 1977.

It appears finally from the evidence submitted by both Parties and from the admissions made by the Claimant that, with the exception of the equipment related to the Fixed Ground Stations Contract and the "Augusta-Bell" project, the equipment belonging to the Ministry and not returned by Hoffman includes only one VCS radio and two ARC radios sent for use in a training program, four front panel assemblies and one console.

Out of that equipment, the Claimant still retains the two ARC radios, one VCS radio and one front panel assembly. It does not appear on the record that the Ministry ever claimed for the return of that equipment prior to November 1979, when the crisis between the two Governments and the ensuing regulations of the Government of the United States prevented the return of such equipment to Iran. Hoffman is still prevented from exporting that equipment to Iran by its Government's regulations and policies. Under these circumstances, which are beyond the control of the Claimant, the failure of the Claimant to export the equipment to Iran cannot be considered wrongful on his part. Nor can the Claimant be debited with the value of that equipment. But, as a bailee, the Claimant is under an obligation to make the two ARC radios, the one VCS radio and the one front panel assembly available to the Respondent.

As to the remaining three front panel assemblies and one console, Hoffman admits it sold those items to another customer, but has provided no evidence of the resale prices. On the basis of the allegations by the Respondent with respect to the value of these items which the Claimant has not denied, the Tribunal concludes that in regard to this equipment Hoffman is indebted to the Ministry in the amount of U.S. $18,600.

Line item 7, relating to spare parts support, raises substantial difficulties and is of considerable importance as the contract provides that U.S. $8,125,120 of the total contract price is attributable to the spare parts support service. This service was to be furnished for a period of ten years, beginning 16 months from the date of the contract, that is, from the date of the first deliveries of equipment under the contract. In view of the holdings in the Interlocutory Award in this case, it seems clear that the spare parts service was performed for no more than three of the anticipated ten years. While the Respondents argue that the service ended when the field service representatives left Iran in December 1978, no evidence has been presented that their presence was essential to the spare parts support. Furthermore, the Claimant has established that a quantity of spare parts was available in Iran after the departure of the field service representatives, and there is no evidence that any spare parts not in Iran were requested by the Respondent between December 1978 and September 1979. Therefore, the Tribunal concludes that three of the ten years of spare parts support services were provided. The measure of the value of that performance can be found by dividing the relevant contract price by ten and then multiplying the resulting figure by three. That gives a result of U.S. $2,437,536.

The Claimant argues, however, that this amount does not fully reflect the extent to which it had performed its contractual obligations, because the performance required

under this line item of the contract was more than the mere storage, handling and shipping of spares as needed for repairs. Part of the Claimant's performance, it asserts, was in the procurement and maintenance of a spares stockpile. Maintenance of an inventory of spares in both Iran and the United States was specifically required by the contract (Articles I and II, Item 7). Thus, the Claimant argues that the performance rendered by it with respect to spare parts support was not simply to be determined by the number of years the Claimant provided the spare parts support service.

The contract payment schedule may be considered supportive of the Claimant's arguments in this regard. Of the total contract price (excluding the reimbursable expenses for field service representatives), U.S. $20,288,014 was due to be paid by the 49th month of the contract, that is by 30 June 1979, and only U.S. $2,766,976 was to be paid during the remaining slightly more than seven years until the end of the spare parts support service. Such a payment schedule might suggest that the costs of performance of that service were recognized by the parties to be heaviest in the early years. The Claimant's own internal estimates in 1975 predicted the highest failure rate for the radios in the early months of use with a lessening rate after the first year.

Calculation of the amount of spares procured and thus attributable to Item 7 of the contract is difficult, particularly in view of the incomplete and partially conflicting evidence in this case.

The Claimant has presented evidence in the form of contemporaneous internal memoranda of its employees and of the Program Manager of the Bell Helicopter Co., as well as affidavits by two former Bell employees, which documents indicate first, that the Claimant decided in late 1976 to procure quantities of spares during the production phase of the contract, and to stockpile most of the assemblies and other major spares in Iran, rather than in California, and second, that by 1977-78 there were stored in Iran approximately 12 to 15 containers of unidentified goods, the average weight of which was 1000 pounds. The Claimant, however, has submitted only a few shipment documents that relate to spares, explaining that, as no payments were made as a result of such shipments, complete records were not maintained. Nor has Claimant provided evidence concerning spares in the bond room in California. The Respondent denies that there were many spares shipped to Iran, and it has presented the affidavits of two of its employees in proof of that denial. One of those affidavits states that in 1979 a locked room was opened and a total of 333 spare parts were found.

Considering the evidence as a whole, the Tribunal finds that the Claimant has proved that it procured spare parts dedicated to this contract at an approximate cost of U.S. $420,000. In this regard, the Tribunal notes that the 12 to 15 containers shipped to the Respondent, and which the Claimant has identified as spares, could well have contained spare radio sets, that is, sets not installed in vehicles or aircraft but which were part of the initial equipment purchased under the contract, and not part of the spare parts guarantee.

The Tribunal considers that the procurement of spares and their storage in Iran were simply a mode of performance of the guarantee and, as such, should not deserve a special compensation. Furthermore, while the contract contained an obligation to procure and stock spare parts, the extent of such procurement and stockage in the early years was largely left to the decision of the Claimant. Only one year's supply of spares was required to be in Iran. The contract left the Claimant free to decide how to implement its obligation in this regard. In fact, the Claimant actually chose to implement its obligation, as shown by its internal memoranda of October 1975 and March 1976, by a procurement that cost no more than U.S. $420,000. This cost, as compared with the compensation for which the Claimant is credited for the three years of service it provided, does not indicate a special hardship on the Claimant.

The Claimant assumed a contingency risk in the later years. If the Claimant failed to stock the needed parts in adequate quantity at the outset, it might be required to make disproportionately large expenditures to procure them in the later years, and therefore a significant part of the contract value of the spare parts support service represented that contingent risk. This risk is one from which the Claimant has been relieved by the frustration of the contract. It would be inequitable for the Claimant to retain monies paid to it in advance as compensation for that risk and for the costs of its performance of the spares guarantee during the years following frustration of the contract. Therefore, the Tribunal sees no reason to add all or part of the procurement cost to the value of U.S. $2,437,536 arrived at on the basis of the duration of the spare parts support services or otherwise to deviate from a division proportional to duration of performance.

Finally, the Claimant contends that in connection with its performance of the contract, it left certain test equipment worth U.S. $250,000 in Iran on loan to the Ministry and that such equipment has never been returned. The evidence submitted by the Claimant clearly establishes that such equipment was shipped by Hoffman to Iran by Bell Helicopter on 19 January 1977. The Ministry has produced no evidence regarding this issue and has not denied the Claimant's contentions. The Tribunal, therefore, holds that U.S. $250,000 must be credited to the Claimant with respect to this test equipment.

| | |
|---|---|
| Hoffman has received | $19,476,818 |
| Hoffman has performed | |
| - line items 1, 2, 3, 4, 5 and 11 (equipment) | $11,407,046 |
| - line item 8 (training) | 56,148 |
| - line item 10 (field service representatives) | 198,702 |
| - line item 9 (factory repair) | 2,165,773 |
| - line item 7 (spares) | 2,437,536 |
| Hoffman must also be credited for test equipment left in Iran | 250,000 |
| Hoffman must be debited for three front panel assemblies and one console | (18,600) |
| Total | $16,496,605 |

The Tribunal, therefore, holds that the Claimant has performed services under the contract worth a total of U.S. $16,496,605. Since the Claimant has already received payment from the Ministry of U.S. $19,476,818, the Claimant is obligated to return to the Respondent U.S. $2,980,213.

2. The Counterclaim

Despite the Interlocutory Award rendered in the instant case, the Ministry reiterates its counterclaim for the alleged damages it has suffered as a result of Hoffman's cessation of performance of the contract. Such counterclaim may not, however, be maintained, as the Interlocutory Award disposed of any and all claims or counterclaims based on alleged breach of contract.

C. Interest

In order to compensate the Respondent for the damages it has suffered due to the delay in repayment of the balance due, the Tribunal considers it fair to award Respondent interest from 1 September 1979 to the date of this Award. Although the contractual provision limiting interest on late payments under the contract to 10 percent (Article IV) is not applicable per se to interest on refund of money due to frustration of the contract, the Tribunal believes it fair to give the Claimant the benefit of the same limitation agreed to by the parties for the benefit of the Respondent. Thus, interest shall be at the rate of 10 percent per year.

D. Costs

Each party shall be left to bear its own costs of arbitration.

III. Claim Number 50

A. The Claim

The Claimant, a Nevada corporation, is claiming as successor to Hoffman Export Corporation ("Hoffman"), a former California corporation, for damages for breach of contract by the Respondent. The Respondent denies that it was in breach and counterclaims for damages for Hoffman's breach of contract and for payment of certain guarantees related to the contract.

The contract in question, dated 16 April 1978, was entitled "Purchase Agreement Covering Integrated Fixed Station Communication System for VCS-801 and VHF/UHF Radio and Installation Services." In essence, the contract required Hoffman to perform certain site surveys in Iran, to fabricate, test and deliver seven fixed station installation systems, including related test equipment, and to provide certain training and installation services. Some of the equipment, including 26 VCS radios, two test sets and seven teleprinters, was to be furnished by the Respondent. The total contract price was U.S. $4,385,937, with 20 percent payable as an advance payment against a bank guarantee and the remainder to be paid by irrevocable letter of credit to be established within eight months of the execution of the contract. In addition to the advance payment bank guarantee, Hoffman was required to provide a good performance bond for 10 percent of the contract price. The contract called

for delivery of the fabricated or modified equipment between 10 and 12 months after the date of the contract. The contract (Art. II, Item 4.1) stated, however, that

> The Delivery schedule effectivity is based upon receipt of the advance payment and when issued the irrevocable Letter of Credit.

The advance payment was made in the required amount of U.S. $877,187, and two irrevocable standby letters of credit were opened by the Bank of America on 25 April 1978 for the benefit of the Respondent, one for U.S. $877,187 to secure the advance payment (No.SBLA-83401) and the other for U.S. $438,594 as a good performance bond (No. SBLA-83400). The Respondent sent Hoffman the 26 VCS radios and one teleprinter in late April 1978. Hoffman proceeded with the site surveys in Iran, with a training program in the United States, with its engineering, design and fabrication work, and entered into sub-contracts with a number of companies. In November 1978 Hoffman reminded the Respondent that the letter of credit for the balance of the contract price was required under the contract to be established no later than 16 December 1978. No response was received from the Ministry, and the letter of credit was never established. On 23 January 1979, Hoffman informed the Respondent that it had stopped work and would have to mitigate damages unless the letter of credit was opened by 14 February. When the Ministry did not respond, Hoffman cancelled sub-contracts and returned as much material as possible to its suppliers.

The Claimant seeks recovery of its costs, to the extent they exceeded the advance payment, a profit on these costs and damages arising from devaluation of the dollar. The Respondent counterclaims for recovery of the advance payment and for payment of the amount of the good performance guarantee. Both parties request interest and costs. Claims for payment of the two standby letters of credit securing the advance payment and the good performance bond have been brought against the Bank of America in this Tribunal (Claims numbered 686 and 825).

A hearing was held on 28 October 1983 at which both parties were represented.

B. Jurisdiction

The only jurisdictional issue presented in this case relates to the identity and proof of nationality of the Claimant. As noted above, the seller under the contract was the Hoffman Export Corporation, which was a California corporation wholly-owned by Gould, Inc., a publicly traded Delaware corporation. The Claimant has submitted evidence sufficient to satisfy the Tribunal that Gould, Inc. was at all relevant times, that is from 16 December 1978 until 19 January 1981, a national of the United States within the meaning of Article VII, paragraph 1(b), of the Claims Settlement Declaration, and that Hoffman and its successor, Gould Marketing, Inc., as wholly-owned subsidiaries of Gould, Inc., are also nationals of the United States within

the meaning of Article VII, paragraph 1(b). That the Respondent is included within the definition of "Iran" in Article VII, paragraph 3, cannot be disputed.

C. The Merits

Although the Claimant has been somewhat inconsistent in his legal arguments, sometimes arguing breach of contract and other times excusable delay and eventual frustration, the Respondent has been quite consistent in maintaining that the only breach of contract was Hoffman's failure to deliver, that its failure to establish the letter of credit did not excuse Hoffman's further performance, that the contract remains in force and that, if Hoffman will deliver, it will pay the contract price. The Respondent maintains that disruptions in the banking system in December 1978 as a result of the Iranian revolution prevented the opening of the letter of credit at that time and alleges that Hoffman's December 1978 withdrawal from Iran of its field service representatives under another contract (the subject of Claim 49) led it to doubt that Hoffman would be willing to perform the Fixed Station contract and justified the subsequent non-opening of the letter of credit after the banking problems eased.

After review of the contract and the evidence presented in this case, the Tribunal concludes that the failure of the Respondent either to open the letter of credit or to give notice of termination of the contract in accordance with

Article VI thereof was inconsistent with its contractual obligations. Since the Claimant has not requested compensation for its lost profits on the unperformed portion of the work and in view of the provisions of Article 6, paragraphs B and D, which would permit the Claimant to recover as termination costs its actual costs, including profit thereon, it is unnecessary for the Tribunal to decide whether the contract was breached or terminated, as the termination costs and damages requested would be essentially identical. While strikes in the banks may well have prevented establishment of the letter of credit on 16 December 1978 (although the Respondent submitted no evidence to support this allegation), the letter of credit certainly could have been opened earlier and presumably could have been opened later if the Respondent and Bank Markazi had been willing to do so. Taken as a whole, the relevant contractual provisions required the Respondent to open the letter of credit by 16 December 1978 or within a reasonable time thereafter. Certainly, Hoffman could not have been expected to proceed further than it did in the absence of a letter of credit. This conclusion also obviously requires dismissal of the counterclaims.

The evidence submitted by the Claimant concerning its work and the sub-contracts into which it had entered establishes that, had the letter of credit been opened on or before the contractual deadline, 16 December 1978, Hoffman would have been able to complete and ship the equipment in accordance with the contract schedule. The failure of the

Respondent either to open the letter of credit or to serve a written notice of termination upon the seller within a reasonable time after 16 December 1978 created a situation in which Hoffman was compelled to cancel sub-contracts and mitigate damages.

The determination of damages or termination costs in this case is relatively simple. The Claimant has presented evidence to support its claim that it has incurred costs for labor, material and overhead and charges for cancellations of sub-contracts, amounting to U.S. $943,039, and general and administrative expenses of U.S. $228,215, for a total of U.S. $1,171,254. While not seeking lost profits on the unperformed part of the contract, the Claimant asks for a profit of 35 percent on that total of costs, which is a profit of U.S. $409,939, and also seeks recovery of severance pay of U.S. $18,858 and storage costs of U.S. $13,818. The Claimant recognizes that the amount of the advance payment, U.S. $877,187, and the value of six of the Respondent's radios which the Claimant sold to another customer must be deducted from its claims. The contract price of these six radios was U.S. $258,696, which is the best available evidence of their value. The other 20 VCS radios, plus one teleprinter, all of which belong to the Respondent, as well as the miscellaneous equipment acquired under the contract which could not be returned for credit or economically disposed of, remain at the Claimant's facilities in California.

The Tribunal holds that the Claimant is entitled to damages or termination costs in the net amount of U.S. $477,986.

Since according to the present Award, the Claimant is not in default of its obligations towards the Respondent under the contract in question and the contract is no longer in force, it follows that no claim for payment or extension can be made lawfully by the Respondent or by Bank Markazi under the two standby letters of credit securing the advance payment and the good performance bond.

With respect to the radios and other equipment referred to above that remain in California, the Tribunal holds that they are the property of the Respondent, and it orders the Claimant to make them available to the Respondent.

D. Interest

In order to compensate the Claimant for the damages it has suffered due to the delay in payment, the Tribunal, in the absence of any contractually agreed rate of interest, considers it fair to award the Claimant interest at the rate of 12 percent on the net amount of damages or termination costs, calculated as from 30 April 1979, which was perhaps as long after the date specified in the contract for the opening of the letter of credit as could have been considered reasonable under the circumstances of this case. In this connection the Tribunal rejects as unjustified Claimant's related claim for the decline in value of the dollar since 1979.

E. Costs

Each party shall be left to bear its own costs of arbitration.

IV. Calculation of Net Award

As discussed above, the Tribunal has decided that the Claimant owes the Respondent in Case 49 U.S. $2,980,213, plus interest at 10 percent per year from 1 September 1979 and that the Respondent owes the Claimant in Case 50 U.S. $477,986, plus interest at the rate of 12 percent per year from 30 April 1979. After interest has been calculated to the date of this award, these amounts are $4,413,593.06 in Case 49 and $773,345.93 in Case 50. Thus, the net amount payable to the Respondent is U.S. $3,640,247.13.

AWARD

THE TRIBUNAL AWARDS AS FOLLOWS:

The Claimant, Gould Marketing, Inc., is obligated to pay the Respondent, Ministry of Defense of the Islamic Republic of Iran, U.S. $3,640,247.13.

The counterclaims are dismissed on the merits.

The standby letters of credit of the Bank of America (Numbered SBLA-83400 and SBLA-83401, dated 25 April 1978) have no further purpose, and the parties shall not make any further effort to call or collect on either of them.

The Claimant, Gould Marketing, Inc., is obligated to make available to the Respondent, Ministry of Defence of the Islamic Republic of Iran, the 21 VCS radios, the two ARC radios, the teleprinter, the one front panel assembly and the miscellaneous equipment and materials acquired under the contract involved in case number 50 which were not returned for credit or economically disposed of and therefore belong to the Respondent.

Each of the parties shall bear its own costs of arbitrating these claims.

Dated, The Hague
22 June 1984

Willem Riphagen
Chairman
Chamber Two

In the name of God,

Shafie Shafeiei
Concurring in part
Dissenting in part

George H. Aldrich