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CASE NO. 52
CHAMBER ONE
AWARD NO. 215-52-1

BLOUNT BROTHERS CORPORATION,
Claimant,
and
THE GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN, IRAN HOUSING
COMPANY,
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاری ایران - ایالات متحدہ
ثبت شد - FILED	
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AWARD

Appearances:

For the Claimant : Mr. A. H. Gaede,
Mr. L. Davis,
Attorneys;
Mr. J. T. Honan,
Mr. H. Quade,
Representatives of Blount Brothers
Corporation.

For the Respondents : Mr. M. K. Eshragh,
Agent of the Government of the
Islamic Republic of Iran;
Dr. S. K. Khalilian,
Legal Adviser to the Agent;
Mr. S. Niazi,
Adviser to the Agent;

Mr. M. Azadeh,
Assistant to the Agent;
Dr. Y. Abolfotuh,
Attorney of Iran Housing Company;
Mr. N. Tahbaz,
Technical adviser to Iran Housing
Company;
Mr. F. Hamadani,
Financial adviser to Iran Housing
Company;

Also present : Mr. J. R. Crook,
Agent of the Government of the United
States of America.

I. INTRODUCTION

A. The proceedings

On 16 November 1981 the Claimant, Blount Brothers Corporation ("BBC") filed with the Tribunal a claim against the Respondents, The Government of the Islamic Republic of Iran and Iran Housing Company ("IHC"), seeking payment of moneys allegedly due under a contract entered into between the Claimant's Iranian subsidiary, BCJ Development Co., ("BCJ") and IHC on 16 February 1975 for the construction of houses for workers in Bushehr, Iran. The amount claimed in the most recent written pleadings is \$5,487,676¹,

¹The claim has been calculated by the Claimant in U.S. Dollars using a rate of exchange of 70.35 Rials to the Dollar. However, as the Contract was priced, billed and conducted throughout in Rials, the Tribunal will use the Rial amounts in its discussion.

It should also be mentioned that this figure is subject to a reduction of 698,000 Rials agreed during the hearing. This relates to the claim for extra work and is dealt with below, at p. 22.

being the equivalent of 386,058,044 Rials. Interest and legal costs are also claimed. BBC also claims the release of two guarantees given in the form of checks.

The claim was expressed in its original form as an indirect claim whereby BBC was claiming moneys due to its subsidiary pursuant to Article VII, paragraph 2, of the Claims Settlement Declaration. It was also pleaded in the alternative as a claim for compensation for the alleged expropriation of BBC's 90% interest in BCJ, the principal asset of which was its claim under the Contract with IHC. At the hearing, BBC conceded that there was insufficient evidence on which to proceed with the claim based on expropriation, and confirmed that it intended to pursue the contract claim only.

Statements of Defence were filed by IHC on 20 April 1982 and by the Government of Iran on 2 June 1983. A pre-hearing conference was held on 12 November 1982. In its Statement of Defence, IHC denied liability, and sought to raise, by way of set-off, various alleged liabilities of BCJ, including amounts in respect of repair costs, workers' social insurance premiums, training fund liabilities and income taxes. IHC filed a further memorial concerning its claim for social security premiums on 31 October 1984. BBC disputes the Tribunal's jurisdiction over the tax and social security claims. After further exchanges of pleadings and evidence between the Parties, an oral hearing was held on 18 and 19 September 1985.

Mr. Richard Mosk participated in the hearing and Award in this Case pursuant to Article 13, paragraph 2 (as amended) of the Tribunal Rules and pursuant to an agreement between the Governments of the Islamic Republic of Iran and the United States of America.

B. Facts and contentions of the Parties

On 16 February 1975, BCJ entered into a contract ("the Contract") with IHC for the construction of 330 houses for workers at Bushehr. BCJ had been incorporated in Iran in January 1975 for the specific purpose of undertaking this project. BCJ was owned at that time as to 45 shares by BBC; 45 shares by an Iranian partnership, Jahanbin and Associates; and 10 shares by Charter Iran Development Company. BBC claims to have purchased the 45 Jahanbin shares in 1977, thus giving it 90% of BCJ's stock, though the validity of this transfer is disputed by IHC. The United States nationality of BBC itself is also disputed, as is its right to claim 100% of whatever is owed to BCJ, or to make an indirect claim in any event on behalf of an Iranian subsidiary.

BBC alleges that IHC falls within the definition of "Iran" contained in Article VII, paragraph 3, of the Claims Settlement Declaration and that, as such, it is subject to the jurisdiction of the Tribunal. IHC denies that it is controlled by the Government of Iran or any political subdivision thereof.

IHC further alleges that Article 14, the arbitration clause in the Contract, excludes the Tribunal's jurisdiction by virtue of Article II, paragraph 1, of the Claims Settlement Declaration. BBC disputes this.

The Contract provided initially for the construction of 330 houses within a period of 20 months (later increased in writing on 16 August 1975 to 376 houses over 23 months) after the issue of a local construction permit and the handing over of the site to BCJ by IHC. IHC was obligated to procure and make available the land. It was responsible for the provision of roads, drainage, and other necessary infrastructure. BCJ was to construct the houses, whereupon IHC had an obligation either to sell the houses at a fixed price, and credit BCJ with the price less a 5% retention, or to pay BCJ for all the houses within 15 days of completion, less a 5% retention, whether or not the

houses were sold. The guaranteed price was subject to escalation according to a formula contained in the Contract.

BBC claims that all 376 houses were completed and accepted by IHC by the end of 1978, but that IHC paid only part of the price for the first 274 houses. Its claim of \$5,487,676 (i.e. 386,058,044 Rials) is made up as follows:

i) unpaid part of price for first 274 houses and unpaid price for remaining 102 houses	104,791,979 Rials
(120,076,395 Rials <u>less</u> credit for fence and yardwork of 15,284,416)	
ii) extra work performed	12,062,381 Rials
iii) price escalation	194,881,160 Rials
iv) costs of delay	74,322,524 Rials
	<hr/>
	<u>386,058,044 Rials</u>

BBC alleges that IHC was responsible for several instances of delay which resulted in an increase in the amount due under the Contract. It claims, in particular, that IHC delayed for several months in providing the necessary drawings and surveys to enable the construction work to proceed; that it became necessary to re-draw plans after part of the site was appropriated by the local power company in order to build a power station; that the national cement shortage in Iran severely restricted the supply of cement to between 10 and 20 per cent of what was needed to keep the project on schedule; and that there were recurring shortages of bitumen and water heaters. BBC maintains that all the houses were built and duly accepted by

IHC on completion, and that they were in good condition and free from constructional defects.

IHC denies these assertions. It contends, in particular, that it did not delay in providing plans and elevations, but that BCJ failed to obtain the necessary construction permit from the local authority, which permit would have authorised the commencement of work. The possible consequences of failure by BCJ to obtain such a permit, as outlined by IHC in the present proceedings, vary from, at worst, the exercise by the municipality of its entitlement to demolish the buildings, to the risk that the houses would be unsaleable by IHC without a permit. IHC denies that it was under any obligation to guarantee the provision of cement, and contends instead that delays occasioned by the national cement shortage should be governed by the Contract's force majeure provisions (Article 12). It contends that, out of a total of 20 months of delay, only 6 could be accepted as not attributable to the fault of BCJ itself. BCJ's computations of escalation costs are disputed; and liability for certain items of extra work is denied.

IHC alleges that BCJ utilised inadequate materials in the construction work, and that serious defects appeared in the buildings after they had been taken over by IHC. Previously notified defects, notably leaking roofs, had not, it claims, been corrected on request. It points to the fact that no certificate of completion was issued, as required by Article 7 of the Contract. It contends that the houses remained unsold because of defects attributable to BCJ; that such breaches on BCJ's part invalidated the agency whereby IHC was to sell the houses on BCJ's behalf; and that IHC should not be obliged to pay for the houses in such circumstances.

IHC raises a claim by way of set-off for a total of 1,612,794 Rials in social insurance premiums, and 22,667,615 Rials in taxes allegedly owed by BCJ.

II. REASONS FOR AWARD

A. Jurisdiction

The United States nationality of BBC itself has been established to the satisfaction of the Tribunal. Proxy statements and affidavits of the corporate secretary show that BBC has at all material times been wholly owned by Blount International, Ltd., which in turn has been wholly owned by Blount, Inc., and that 98.95 percent of the shareholders of Blount, Inc. have addresses in the United States.²

Evidence of BBC's control of BCJ was submitted in the form of an affidavit of Mr. Yerby Land, formerly chief of BBC's overseas operations in Iran. BCJ was incorporated in Iran in January 1975 and duly registered. Until 1977, BBC owned 45 of its shares, Charter Iran Development Company owned 10, and the remaining 45 were held by Jahanbin and Associates Construction Company ("Jahanbin"). At a shareholders' meeting held on 31 July 1977, a copy of the minutes of which are before the Tribunal, Jahanbin purported to transfer all its 45 shares of BCJ stock to BBC, thus apparently increasing BBC's stake in BCJ to 90%. An attorney was appointed for the purpose of registering the minutes at the corporate Registration Office and "signing, on behalf of the shareholders, all the necessary documents". The notice which subsequently appeared in the Official Gazette refers only to actual resolutions adopted by the meeting, and not to the transfer itself. IHC has questioned the formal validity of such a transfer if it was not in fact properly registered.

² See, also, Award No. 74-62-3 of 2 September 1983 in Blount Brothers Corporation and Ministry of Housing et al., reprinted in 3 Iran-U.S. C.T.R. at p. 225, in which BBC's United States nationality was established.

In this regard, the Tribunal considers that the minutes themselves constitute, in the absence of any evidence to the contrary, sufficient evidence of an actual transfer having taken place to establish, at least, possession by BBC from that time of 90% of the shares in BCJ. Control of the shares changed hands, even if formal title did not pass. It thus appears that BBC fulfils the requirement of Article VII, paragraph 2, of the Claims Settlement Declaration that "the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement."

The question of what constitutes a proper indirect claim under Article VII, paragraph 2, of the Claims Settlement Declaration is before the Full Tribunal as Case A-22. A request was made by the Government of the Islamic Republic of Iran for the decision on this issue in the present case to be deferred until the outcome of Case A-22 is known.

Cases before the Tribunal involving indirect claims are numerous. As has previously been observed in Award No. 187-325-3 of 19 August 1985 in Futura Trading Incorporated and Khuzestan Water and Power Authority in connection with a similar request concerning determination of corporate nationality, "suspension of jurisdictional determinations would for an indeterminate time bring the work of the Tribunal to a halt"³, given the frequency with which such issues occur. For these reasons, the three Chambers have consistently ruled upon the admissibility of indirect claims, and the request for postponement in this case is therefore denied.

³At page 7.

The express wording of Article VII, paragraph 2, imposes two relevant conditions on what constitutes an indirect claim for the purposes of the Tribunal's jurisdiction. There must be "ownership interests" which were sufficient "to control the corporation or other entity" at the time the claim arose; and the entity in question must not itself be entitled to bring a claim. There is no requirement that the entity in question be a United States national; nor, indeed, is any distinction drawn for this purpose between Iranian entities and those of other nationalities. Whatever may be the position under general international law in this respect, the Tribunal is bound by the express terms of its governing instrument, the Claims Settlement Declaration. This is the interpretation which has been applied consistently by the Tribunal in its practice to date. Numerous examples could be cited of indirect claims admitted involving a non - United States corporation. Further, it is clear from Award No. 138-82-2 of 29 June 1984 in Bikoff and Eisenpresser and the Islamic Republic of Iran that the Tribunal was prepared to assume jurisdiction over a claim belonging to an Iranian corporation, but did not do so only because the required level of control was not established. The Tribunal therefore finds that it has jurisdiction over the present claim.

Another jurisdictional issue presented by this case is the question whether IHC falls within the definition of "Iran" as any "agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof". This has been the subject of argument and evidence submitted by both Parties during the course of the written proceedings. The matter is disposed of, however, by the Tribunal's own decision in Award No. 61-188-2 of 27 July 1983 in Gruen Associates, Inc. and Iran Housing Company, et al., reprinted in 3 U.S.-Iran C.T.R., at p. 97. Addressing the same issue with respect to the same Respondent, the Tribunal found that any doubts about IHC's status had been removed by evidence presented in that case, and concluded that "a claim against the Iran Housing Company is a claim against 'Iran' pursuant to the Declaration."

Another question is whether claims arising under the present Contract are excluded from the Tribunal's jurisdiction by virtue of Article II, paragraph 1, of the Claims Settlement Declaration, which provides that claims are excluded if they arise "under a binding contract between the parties specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position".

Article 14 of the Contract provides that, if the parties should fail to reach agreement on disputes concerning certain aspects of the Contract, "the differences in question will be settled through arbitration and in accordance with the provisions of the Civil Code". Similar arbitration clauses have been the subject of previous determinations by the Tribunal; they have been found not to constitute a specific reference to the courts of Iran.⁴ In the present case, therefore, the Tribunal finds that the claim is not excluded from its jurisdiction.

There is a further question, which, though not strictly a jurisdictional one, arises out of the particular jurisdictional requirements of the Claims Settlement Declaration. It concerns whether BBC is entitled to an award of the entire amount the Tribunal might find to be owing to BCJ, or only the 90% representing the extent of its holding in that corporation.

BBC has satisfied the Tribunal of its entitlement to bring an indirect claim within the meaning of Article VII, paragraph 2 of the Claims Settlement Declaration. At the time the claim arose it had "ownership interests" as to 90% of the shares of the ineligible corporation, BCJ, which were sufficient to control it (see p. 7 above).

⁴ See, e.g. Award No. ITL 1-6-FT of 5 November 1982 in Gibbs and Hill, Inc. and TAVANIR et al. (Part III).

The question, in essence, is whether the claim must be treated as the claim of the ineligible non-United States corporation, in this case BCJ, or the claim of the United States national, in this case BBC, for its proportionate share of that corporation's claim.

In previous Tribunal Awards where damages have been granted for indirect claims, the ineligible corporation was wholly-owned by the United States Claimant or Claimants. In the case of Dames and Moore and The Islamic Republic of Iran et al. (Award No. 97-54-3 of 20 December 1983), the Claimants were owners of record of ninety per cent of the subsidiary in question, and apparently, beneficial owners of the remaining ten per cent of shares which were formally held by nominees. The Claimants in that case were given one hundred per cent of the amount of the award.

In the case of BCJ, however, ten per cent of its shares were owned by Charter Iran Development Company. There is no conclusive evidence as to the nationality of this corporation. It was evidently not connected with BBC. It may or may not have been a United States corporation.

The Tribunal considers that the better view, consistently with the spirit of the Algiers Declarations, is that, while a test of control suffices to establish formal jurisdiction, and permit United States nationals to come before the Tribunal with a claim owned through an entity in which they have a controlling interest, it does not necessarily follow that those United States nationals should be permitted to recover the entire amount of the claim, including such portion of it - which could be as much as 49% - as might be owned by non-United States nationals, and even, in an extreme case, by Iranian nationals. Here there is no showing that the United States nationals will be obliged to account to the controlled entity or to the non-United States national shareholders in the controlled entity. Therefore the Tribunal does not have to deal with the question whether in such

a case additional considerations would have to be taken into account. The Tribunal renders its Award in such a Case in favour of the United States nationals themselves, and not in favour of the ineligible corporation, which is not itself a party to the proceedings.

The potential inequities inherent in any other conclusion are obvious: once the Tribunal had rendered an Award on an indirect claim, including the portion owned by the minority shareholders, those minority shareholders would be left without independent recourse, except insofar as the applicable corporate law might permit them to recover against the majority. The Tribunal has no means of compelling a successful shareholder Claimant to distribute the proceeds of its claim, were it to receive 100%.

Furthermore, to grant 100% in such an indirect claim would still not fully exclude the admitted risk that the corporation itself might at some point bring an action based on the same set of facts against the same Respondent in another forum.

For these reasons the Tribunal determines that, based on the facts of this Case, BBC is entitled to recover only its 90% proportion of the amount awarded against the Respondents in this Case.

Finally, as discussed below, the Tribunal lacks jurisdiction over the Respondents' claims for social security premiums.

B The merits

1) BCJ's performance of the Contract

The essential elements of the amount BBC is seeking to recover comprise, broadly, the remainder of the Contract price, subject to certain deductions, together with additional amounts in respect of Contract price escalation, and extended overheads due to delay.

Two of the arguments raised by IHC go directly to the issue of BBC's entitlement to recover the Contract price. They relate to the alleged defects in BCJ's workmanship and to the allegation that BCJ commenced construction without a valid construction permit from the local municipality.

It is not disputed by IHC that 376 houses were completed by the end of 1978. Indeed, by that date IHC had paid some 244,549,597 Rials for work performed. The terms of the Contract included the following provisions:

"ARTICLE 7 - JOB COMPLETION CERTIFICATE

Upon the termination of all construction and installations, in conformity with the terms and specifications of the Contract and after the houses become available for sale and occupancy, the Company will introduce its representative and at the same time inform Khaniran [IHC] and the representative of the Supervisory Board in writing and request that an Inspection Commission be formed and a Job Completion Certificate be issued

Upon the termination of the above-mentioned procedures, the Supervisory Board will issue a Job Completion Certificate.

ARTICLE 8 - DURATION OF GUARANTEE OF SATISFACTORY COMPLETION OF THE JOB

The Company guarantees the houses and the installations covered by the Contract for a duration of one year from the date of issuance of the Job Completion Certificate; specifically, the Company undertakes to remove and correct any defects or faults which may appear or be discovered within the one-year period

As a guarantee, Khaniran will deduct the equivalent of five per cent from the price of the superstructures at the time of payment to the Company

ARTICLE 9 - TERMINATION OF OBLIGATIONS CERTIFICATE

At the end of the one-year period, the Inspection Commission ... will inspect the houses ... Should there be any defects or faults, the Commission will act in accordance with Article 7. The Supervisory Board will issue a Termination of Obligations Certificate ... Khaniran will then credit the Company with the total sum of the Guarantee or a portion thereof (in case a certain amount of money is spent to repair the defective parts as prescribed in Article 8),

within fifteen days after the date of issuance of the Termination of Obligations Certificate."

BBC admits that no formal Job Completion Certificate within the meaning of Article 7 of the Contract was ever issued. However, it is clear from the contractual correspondence in the record that the first 274 housing units were accepted by Daz Bushehr, IHC's Consulting Engineers, which confirmed to IHC in writing that previously notified defects had been corrected. It appears that the first 82 units were accepted on 26 September 1977; a further 76 units on 25 May 1978, 85 units on 4 June 1978; and 31 on 11 September 1978, making a total of 274. Four invoices were submitted in respect of these batches of units, totalling 220,745,676 Rials⁵. Of this, 182,549,597 was paid by IHC, after it took account of deductions it considered justified. This figure takes no account of escalation payments now claimed in respect of the first 274 units completed.

Documents accompanying these invoices indicate that Daz Bushehr certified acceptance after the correction by BCJ of certain defects which had previously been notified.

It also appears from the evidence before the Tribunal that the remaining 102 units were completed by October 1978, and accepted, again by Daz Bushehr, which confirmed acceptance in letters to IHC dated 20 November and 23 December 1978. Invoices were delivered by BCJ for these units totalling 81,879,616 Rials, none of which has been paid. However, none of the invoices has been the subject of any objection by IHC.

Thus the completion and acceptance of all 376 units establishes, prima facie, BCJ's right to the Contract price. This entitlement is still, however, subject to the one-year guarantee obligation contained in Article 8 of the Contract, pursuant to

⁵ This is a gross figure, taking no account of fence credits or the 5% contractual deduction.

which BCJ was bound to remove and correct any defects which might appear and be notified to it by IHC within one year of acceptance. IHC was, of course, entitled to deduct 5% from the price paid upon initial acceptance, with the promise that this was to be reimbursed upon satisfactory inspection at the end of the one-year period, less any part applied to the cost of repairing any defects discovered.

The payments were referred to as an "investment guarantee"; but IHC was obligated by the Contract to pay for the units upon acceptance. This being so, IHC's insistence on characterising the Contract as an "Investment Contract" does not lead to any other result in view of the substantive obligations of the parties.

The correspondence shows that the first 82 houses, initially accepted on 26 September 1977, were certified for final turnover by Daz Bushehr on 20 November 1978. The one-year period in respect of the remaining units did not expire until after the departure of BCJ's personnel from Iran. This notwithstanding, there is no indication that any of the defects now complained of were recorded by IHC during that period, or that any attempt was made to put BCJ on notice that repairs were required pursuant to the Contract. Nor was any objection raised based on delay in delivery of the units. Indeed, there is evidence that IHC notified BCJ of certain defects, and that those defects were corrected.

In its Statement of Defence in these proceedings, IHC has now alleged that serious latent defects came to light after the buildings had been taken over. It attributes the failure to sell the houses to the appearance of such defects, which it ascribes to BCJ. In support of this contention, IHC relied on various photographs, of unspecified date, as evidence of the state of the properties. No contemporaneous correspondence was produced.

Mr. Terry Honan, who as Project Manager for BBC supervised the Bushehr construction from mid- 1977 to late October 1978, gave evidence to the Tribunal both by Affidavit and in person at the hearing, and addressed the question of the alleged defects. He confirmed that Daz Bushehr supervised and approved the materials and workmanship of BCJ at each stage. The particular problem of roof leaks was, he explained, due to a faulty design, which IHC insisted upon using despite suggestions from BCJ as to improvements which could have been made. The provision of major utilities to the site, such as wiring, water pipes and drainage, was not BCJ's responsibility under the Contract. It was the subject of a separate contract awarded to another contractor by IHC in late 1978, though the work was evidently not carried out. The weight of the evidence indicates that any inability on the part of IHC to sell the houses was due to its failure to provide for adequate infrastructure and utilities rather than to any defects, alleged now but never notified at the time, which may have been caused by the workmanship or materials of BCJ.

The conclusion of the Tribunal is that the entire contract price, as invoiced, i.e. 302,625,992 Rials, should have been paid to BCJ.⁶ Since no moneys were apparently applied to the rectification of defects as none was notified during the post-completion one-year period, there is no reason to deduct 5% from this gross figure.

It was further contended by IHC that the construction of all 376 housing units appeared to have proceeded in the absence of the necessary construction permit from the local municipality. The Contract provided that the starting date for the project was to

⁶ As to the Tribunal's practice with regard to uncontested invoices, see, e.g. Award No. 176-255-3 of 26 April 1985 in DIC of Delaware, Inc. and anor. and Tehran Redevelopment Corporation and anonr. at pp. 27-28; Award No. 143-127-3 of 13 July 1984 in Morrison-Knudsen Pacific Limited and The Ministry of Roads and Transportation and anor. at pp. 34-35.

be the date of delivery of the land or of the issuance of the permit, whichever was the later. Note 1 to Article 2 provides:

"Note 1: Obtaining the Construction Permit, as well as the plans attached thereto, from the Municipality is the Company's responsibility, and Khaniran will take the necessary measures at the local municipality in order to expedite the issuance of the Permit."

Although BBC was unable to produce the permit itself in evidence, Mr. Honan stated at the hearing that, while he had never personally seen the permit, his colleagues at BCJ had confirmed to him that it had been obtained, as required by law, before construction began. Mr. Honan said that such a document was likely to have been kept in the local site office at Bushehr with other important contract papers, and was thus among the documents to which BCJ no longer had access after it left Iran. It should also be noted that IHC had the contractual obligation to "take the necessary measures at the local municipality in order to expedite the issuance of the permit".

The essential nature of the permit, and the fact that the commencement of building depended on its issuance, both under the Contract itself and as a matter of local law, make it improbable in the extreme that construction could have proceeded on the site in the absence of such authorisation. Either the municipality or IHC would certainly have objected, but there is no record of either having done so. Further, in the unlikely event that no permit was obtained, IHC, by allowing the work to proceed and accepting the completed houses, must be taken to have waived any objection it might have been entitled to raise based on the terms of the Contract. The Tribunal concludes that IHC's objection in this respect is without substance.

2) Adjustments to the Contract price

As the Tribunal is thus proceeding from the starting-point that BCJ was, initially, entitled to the invoiced contract price of 302,625,992 Rials, it becomes necessary to examine various additions and deductions which the Parties contend should be applied in the light of the terms of the Contract and the circumstances under which it was performed.

A. Amounts to be deducted

i) Amounts paid by IHC

It is admitted by BBC that the payments made by IHC in respect of the first 274 units totalled 182,549,597 Rials. This figure is accepted by IHC as the amount paid in respect of Invoices No. 20, 26, 30 and 40. Payment orders in respect of the first three such payments have been included in the documentary evidence filed by IHC.

IHC also paid an additional sum of 62,000,000 Rials to BCJ, a fact which BBC admits. The Parties disagree, however, about the purpose and application of this payment. BBC contends that it was a payment intended to be applied in respect of extra site fill work undertaken by BCJ; IHC maintains that it was an advance payment applicable to the contract price itself.

References to the sum of 62,000,000 Rials appear both in BCJ's balance sheet for the year ending on 20 March 1978, where it is listed under "Pre-receipts", and again in the Statement of Income for the year ending on 21 March 1979, where it is described as "Site Work Advance."

It seems clear, however, that extra work was done by BCJ in filling the site at various stages during the early part of the project, and that this was in addition to work contemplated by the Contract and invoiced pursuant to it. In particular, Daz Bushehr authorised BCJ "to fill and compact the project site" by a letter dated 29 August 1975, adding that "a formal change

order to cover this extra work" would follow as soon as a price was fixed. The minutes of a meeting held on 2 September 1975 confirm this. Further, a letter of 16 May 1976 from Mr. Land of BCJ to IHC referred to a statement having been submitted to IHC on 10 May 1976 that site fill work completed as of 1 April 1976 amounted to 103,959,164 Rials. The same letter refers to an earlier agreement that site fill work would be paid for in instalments; and that a payment on account of 50,600,000 Rials was to be made in May 1976.

The payment in question does indeed appear to have been made in May 1976. The fact that it was supported by two checks given by BCJ as security, one for 36,000,000 Rials and one for 26,000,000, tends to support the argument that it was an advance payment. But in the view of the Tribunal, one document in particular serves to establish a link between the payment and the extra site fill. This is a letter of 28 April 1978 from IHC to BCJ, in which it is stated that "some amounts were paid to that Company on account in respect of earth filling of the construction site of Bushehr Project." The letter goes on to request BCJ to expedite submission of a progress report giving details of the work actually performed, and warns that if such a report were not forthcoming within 45 days "Khaneh Sazi [IHC] would deduct from that Company's claims on housing units the amounts paid on account".

On this basis the Tribunal accepts that the amount of 62,000,000 Rials was not intended to be applied to the Contract price, and it should not therefore be deducted from the amount now claimed.

As the work was completed and paid for, the two guarantee checks given by BCJ, one for 26,000,000 Rials and the other for 36,000,000 Rials, should be deemed cancelled.⁷

⁷See Award No. 143-127-3 of 13 July 1984 in

ii) Credit for work performed by IHC

BCJ acknowledged that credit was due to IHC, and was taken into account in its invoices in respect of fencing and yard work performed on the site by IHC employees. The amount, which is not disputed by IHC, is stated to be 15,284,416 Rials.

B. Amounts to be added

(i) Extra work performed by BCJ

BCJ claims that it performed various items of extra work under the contract totalling 12,062,381 Rials. IHC disputes the existence of written authorisations for certain of these items, though it does not deny that the work was done.

BCJ supports its claim by an invoice rendered on 27 December 1978 for this amount, broken down into five types of extra work. These will be dealt with seriatim:

a) Additional site fill, excavation, backfill, concrete block and re-steel - 4,282,302 Rials

This work was done pursuant to a decision taken at a meeting between IHC, Daz Bushehr and BCJ on 13 March 1978, the minutes of which record that,

"Concerning the sewage site plan and taking note of the subterranean high water the requirement to make the proper slope to install sewage in section E, F, G, those houses need foundations and extra earthfill, therefore decided that Daz Bushehr engineering consultant give BCJ the work order..."

(Footnote Continued)

Morrison-Knudsen Pacific Limited and The Ministry of Roads and Transportation and the Islamic Republic of Iran, at pp. 41-46.

There exists, in addition, correspondence dating from January and February 1978 in which BCJ sought authorisation to undertake this work in order to commence construction of the last series of houses. The invoice was supported by a detailed list showing the volume of earth fill used on each of the units. The Tribunal therefore accepts that the work was authorised, was performed and should be paid for by IHC.

b) Use of Type 5 cement instead of Type 1 cement - 783,416 Rials

The invoice refers to a direction given by Daz Bushehr on 14 October 1975 that Type 5 cement was to be used for the construction; and it is supported by a breakdown showing the quantities involved. Although IHC initially disputed liability on the grounds that the authorisation order "appear[s] not to have been signed", there are numerous references throughout the correspondence to the need to obtain cement of this type. In addition, IHC refers to the amount now claimed in its own summary of additional works, and must thus be taken to accept it.

c) Partial work done on four units subsequently deleted - 45,108 Rials

Four units, numbered B-1, B-2, B-34 and B-35, were deleted from the project, the foundations for two of which had been excavated and filled. The deletion of the units is confirmed by a letter from Daz Bushehr received by BCJ on 9 January 1978. Daz Bushehr indicated its acceptance of BCJ's calculations as to the quantities involved by signing a copy of a letter from BCJ dated 15 October 1978. There is no indication in the written or oral pleadings that IHC now disputes the figure claimed; the Tribunal therefore accepts it.

d) Addition of telephone jacks with wiring - 39,165 Rials

BCJ refers in its invoice to an instruction for this item given by Daz Bushehr and IHC on 19 April 1978. The amount claimed is supported by some papers of calculations extracted from BCJ's internal files, and there is a letter of 4 October 1978 signed by Daz Bushehr confirming the installations. The amount claimed has not been disputed by IHC in its written or oral pleadings and must therefore be accepted.

e) Additional re-steel and concrete required because of design change - 6,912,390 Rials

BCJ claims that Daz Bushehr issued revised drawings numbered 4238 and 4240 which required additional reinforcement work on the corners of the housing units. The Tribunal has not seen these drawings, which are apparently no longer in BBC's possession, but only various manuscript calculations from BCJ's internal files. There is a letter dated 5 July 1975 from Mr. Minbashian, the Managing Director of IHC, which appears to have accompanied five drawings, including two numbered 4238 and 4240, sent to BCJ.

Indeed, BCJ notes, in a letter of 14 July 1975, that a new foundation design had been received on 7 July 1975, and this is most probably a reference to the drawings transmitted on 5 July 1975. Further references in the same month to "the latest site plans" tend to confirm that changes were made in design, and Mr. Honan spoke at the hearing of the need for reinforcement of the corners of the units.

IHC, on the other hand, has disputed this aspect of the claim only on the ground of insufficient documentary evidence - it does not deny that the work was authorised or that it was done. The Tribunal concludes, therefore, that BCJ is entitled to be paid the amount claimed in respect of this item.

In summary, the Tribunal finds that BCJ is entitled to recover an additional 12,062,381 Rials representing the cost of extra work performed.

From this total should be deducted the sum of 698,000 Rials, representing the cost of installation of an improved type of pipe, borne by IHC during the course of the extra works, and agreed to as a credit by BBC during the hearing.

3. The effect of delay on the rights of the Parties under the Contract

The effects of the delays that occurred in the completion of the project manifest themselves in two ways in BBC's claim - as contract escalation payments and extended overhead costs. The upholding of these claims must depend on the Tribunal's being satisfied that the delays were, contractually, the responsibility of IHC. The two main causes of delay will accordingly be analysed from this perspective.

A. Delay in commencement of the construction

Under Article 2 of the Contract, the houses were to be made available within twenty months (later extended to twenty-three) from the date of obtaining the construction permit and taking delivery of the land. The Contract was signed on 15 February 1975, and the land handed over on 27 February 1975. Mobilization work began in March 1975, but BBC contends that, in the absence of plans, surveys and elevations which were to be supplied by IHC, work on the project could not begin on time. A letter written by Mr. Land, Managing Director of BCJ, to IHC on 29 June 1975 provides a detailed chronology of problems encountered in the initial months. It shows that the partial site plan and elevations were received by BCJ only on 1 June 1975, by which time BCJ had already expended some 29,000,000 Rials in preparatory work. There followed a further two week delay while Daz Bushehr and IHC decided what type of cement was to be used.

On 23 June that year, BCJ, Daz Bushehr and IHC met and decided that type 5 cement would be used, and that a new site plan and drawings would be provided. By 29 June 1975 some 35,750,000 Rials had been expended. In that same letter, BCJ notified IHC of its intention to claim compensation for "charges due to the delays" of nearly four months.

On 14 July 1975, BCJ's Construction Manager, Mr. Bourgeois, submitted a further report to IHC in which he stated that no formal notice had been received of the type of cement to be used, so as to enable it to be ordered. He noted that details of a new foundation design had been received by BCJ on 7 July 1975, and work on layout had been commenced accordingly. However, it was only on 22 November, 1975, that IHC provided final site elevations enabling the actual building work to begin. Construction began at once.

This ten month period of initial pre-construction delays appears to the Tribunal to be attributable almost entirely to the failure of IHC to provide the surveys, plans and elevations without which the work could not go forward. IHC has produced no evidence to suggest that BCJ was itself materially responsible for these delays.

Thereafter, the chief cause of delay during the period of actual construction was the shortage of cement. As the Tribunal considers that different legal considerations apply to this particular problem, it will be dealt with separately below.

The combination of factors which prolonged the period of construction to October 1978 were the subject of a meeting held on 19 April 1978 between BCJ, Daz Bushehr and IHC, at which a revised time schedule was agreed which extended the term of the project and envisaged completion of the last houses in September - October 1978. This is confirmed by a letter from IHC of 22 May 1978. The Tribunal interprets this as an agreement to extend the period of the Contract on the same terms.

B. Delay occasioned by shortages of cement - the question of force majeure

Even before the Bushehr project was under way, severe shortages of cement were being experienced in Iran as a result of the dramatic increase in the country's building construction programme. This crisis had led the Government to assume control of the supply of cement, by making allocations to the Ministries concerned. Each Ministry then distributed its allocation among projects for which it was responsible. In the case of the Bushehr project, IHC had to make specific requests to the Ministry of Commerce for a monthly allocation.

Correspondence shows that from January 1976 there was no cement available in Bushehr, and work on the project was temporarily halted. With IHC's help, supplies had to be obtained in Shiraz at a higher price. In November 1976 IHC obtained from the Ministry of Commerce an allocation of 84 tons per month for the Bushehr project. BCJ notified IHC at the time that a steady level of construction sufficient to keep the project on target would require 1,250 tons per month, and warned IHC in successive letters of the additional cost of the delays and closures that would ensue if the shortage persisted. On 16 June 1977 Mr. Bourgeois of BCJ notified Daz Bushehr that work was proceeding at only 20% of capacity because of this problem; five days later, work came to a standstill. Progress continued to be slow until the situation eased in November 1977, whereupon the rate of construction accelerated. Account was taken of these delays in the revised schedule agreed upon in April 1978 and referred to above.

In its written pleadings, BBC sought to hold IHC liable for costs incurred as a result of these delays, on the ground that the Government of Iran was in control of cement allocation and IHC, as a state enterprise, could therefore have ensured an adequate supply. IHC, however, argued that the situation was

one of force majeure, determined by circumstances beyond its control.

The Tribunal notes that the Contract contains no reference to any obligation on the part of IHC to supply cement, or even to assist in its procurement, though it is clear that IHC intervened on numerous occasions on BCJ's behalf. The risk was one which was assumed by BCJ, which was responsible for the procurement of its own cement in the absence of any provision to the contrary.

The Tribunal agrees that the shortage of cement in Iran at that time presents all the classic features of a case of force majeure. As such, it would certainly have served as a defence for BCJ against an action for breach. There is a clause, Article 12 of the Terms of the Contract, which acknowledges the possibility of force majeure; however, there are no provisions governing either termination of the Contract as a result, or the effect of force majeure on the continued obligations of the parties. Neither BCJ nor IHC chose to invoke this clause; they chose instead to continue with the project, notwithstanding the delays, as the extension agreement of April 1978 confirms.

The position of a state enterprise in circumstances of force majeure has been widely discussed. The starting point is acknowledged to be the principle that the separation between a state enterprise and the state itself should be respected, with the result that acts of public authority by the state may operate as force majeure and excuse the state enterprise from liability. In examining the facts in any given case to determine whether they do, the state enterprise generally must be neither privileged nor discriminated against in comparison with the private enterprise.

Certain general presumptions may be taken to apply in such cases, perhaps the strongest of which is that a state is unlikely to act in the exercise of its executive powers to the

detriment of its own trading organs. Here, however, it is not disputed that the measures taken by the Government of Iran were intended as a response to a widespread problem of general application, and that IHC was only one of a number of enterprises affected by them. The Tribunal therefore accepts the cement shortage as a circumstance of force majeure and one for which IHC should not be held responsible.

C. The contract price escalation claim

The Parties' respective contentions with regard to price escalation payments have to be viewed against the background of delay discussed above. Under the Contract, IHC was to pay a Contract price escalation calculated according to the indices published by the Plan and Budget Organisation of Iran. This is a usual provision, designed to operate as a safeguard against inflation during the course of construction. BBC claims 194,881,160 Rials in escalation, whereas IHC asserts that only 61,558,842 Rials are payable. While both Parties use the same index and the same formula, the variables used in their respective calculations reflect considerable differences in approach. The BBC figures are based on the actual period of construction, which commenced on 22 November 1975, and ended 36 months later; they incorporate variations in the rate of construction. IHC's figures are based on the hypothesis that construction should have begun on 27 April 1975, and should have ended on 27 March 1977. None of the delays that actually occurred during the construction is allowed for.

The Tribunal considers that the approach of BBC is more consistent with the achievement of the underlying purpose of such a price escalation provision - to cushion the contractor against increases in the prices of labour and materials over the actual period of construction. The delays which pushed the start-up date into November 1975 were, as the Tribunal has already noted, substantially attributable to IHC and not BCJ.

The later cement shortages, which delayed progress in the construction between January 1976 and November 1977 were not, as has been seen, the fault or the contractual responsibility of either.

The respective liabilities of the Parties must be governed by application of the terms of the agreement then in force between them. The Tribunal has already noted that the period of the final Contract was extended by the agreement reached at the meeting on 19 April 1978 between BCJ, IHC and Daz Bushehr. The meeting was held in response to a letter from BCJ of 18 April 1978 detailing the various delays and the reasons for them, and requesting, specifically, an extension of time. At that meeting, the revised time schedule proposed by BCJ was accepted.

A letter from IHC followed, on 22 May 1978, which requested BCJ to endeavour to complete the houses by September - October of that year "so that we can take action regarding your request, at the time of completion of the project" - meaning, presumably, that the financial implications would then be reviewed. There is no suggestion in the Minutes of the meeting, however, that any changes were proposed or adopted to any of the other terms of the Contract, which must therefore be taken to have continued to apply in their entirety. It follows as an automatic consequence of this that the price escalation clause continued to operate as before. The only exception to this would occur if those extended periods were found to be attributable to the fault of BCJ itself, for it could not be allowed to profit from its own default.

It was pointed out by IHC that BCJ had already expended an amount equivalent to 12% of the contract price by the time construction began; it was argued that for this reason the escalation formula should only be applied in respect of the remaining 88%. However, escalation is a technical formula applicable to the contract price of the houses in relation to their date of construction, and not to mobilisation or other

expenditures by the builder. An examination of BBC's calculations in this respect shows that the Plan and Budget Organisation Index is applied only from the date of construction of the first houses, i.e. the six units completed during the third quarter of the Iranian year 1354, which corresponds roughly with October-December 1975. In the light of the Tribunal's conclusions as to liability for delay, BBC is entitled to recover the full amount of 194,881,160 Rials in this regard.

D. The extended overhead claim

BBC makes a further claim for extended site overhead costs. This claim is based on a sentence in Article 5 of the Contract whereby IHC agreed to provide the building land and

"Should any problem arise, Khaniran [IHC] agrees to solve it promptly. It further agrees to compensate the company for any loss so incurred."

BBC claims that, because of the delays already described, BCJ was required to keep its management personnel and equipment on the site for very much longer than envisaged when the price for the job was agreed. It claims a total of 74,322,524 Rials on this basis. This claim is denied by IHC.

The Tribunal considers that this claim is different in nature from the escalation claim, though both arise out of the same cause - delay. As has been stated earlier, price escalation was written into the Contract, and applies as an automatic consequence of the Parties' having chosen in April 1978 to extend the contract period. The same is not, however, true for extended overhead. No interpretation of Article 5, however liberal, will suffice in the view of the Tribunal to constitute an agreement on the part of IHC to assume responsibility for extended overhead costs. Nor is there any other contractual basis for such a claim. Furthermore, in proposing and agreeing to the extension of the term of the Contract, BCJ must be taken to have agreed to absorb the additional overhead occasioned by - and

prior to - the extension. The claim for extended overhead must thus be denied.

The claim for set-off

For the reasons set out above, with regard to evidence of performance, the claims of IHC in respect of allegedly defective work are dismissed.

As to the claim by IHC that a deduction of 5.5% in respect of contractor's taxes should be applied to any amount found to be owing to BBC, the Tribunal observes that, consistently with its previous decisions, such a deduction is only admissible if it would normally have been made during the course of the contract. In other words, BBC should not be entitled to recover more in these proceedings than BCJ would have received had normal contractual relations between the parties continued. There is evidence in this Case that it was understood that payments to BCJ were routinely subject to a withholding of 5.5% tax, although there is no specific provision in the Contract authorising such deductions. Given the settled contractual practice of the parties, the Tribunal decides that the same 5.5% deduction should be applied to the amounts awarded for the unpaid price of housing units; the extra work; and the price escalation element.

However, different considerations apply to the claim for social security premiums. With regard to these, no such settled practice existed between the Parties. As the Tribunal has noted in previous Awards, social security premiums become payable by operation of Iranian law and do not arise out of the Contract itself. The claim in respect of social security premiums must

thus be dismissed as it falls outside the Tribunal's jurisdiction.⁸

The date of currency conversion

The claim has been expressed throughout in U.S. Dollars, using a rate of exchange of 70.35 Rials to the Dollar, the rate prevailing at the date the claim is said to have arisen, i.e. on or about 1 January 1979, the date of BBC's departure from Iran. The Contract was priced and conducted throughout in Rials, and the invoices rendered in Rials. The question thus arises of the correct date for the conversion into U.S. Dollars of the Rial amount found to be payable.

The test applied by the Tribunal in its previous Awards has been to select the date on which the obligation became due, and to apply the rate of exchange applicable on that date in making the conversion, provided it is satisfied that the Claimant would, in the normal course of events, have repatriated the funds if they had been received on the due date.⁹ In the present Case, the evidence shows that the work was substantially completed by the end of 1978 and there is nothing to suggest that contractual payments would have been retained in Iran. Indeed, in evidence given to the Tribunal during the hearing of the related Case No. 53, a claim relating to the attempts to repatriate bank accounts, officers of BBC stated that, in the normal course of the Contract, all funds were regularly repatriated save whatever was

⁸ See, e.g. Award No. 180-64-1 of 27 June 1985 in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, at p. 40.

⁹ See, e.g. Award No. 74-62-3 in Blount Brothers Corporation and Ministry of Housing et al., reprinted in 3 Iran-U.S. C.T.R. p. 255, at p. 233 (in respect of another project undertaken by the same Claimant); Award No. 196-302-3 of 28 October 1985 in International Technical Products Corporation and anor. and The Government of the Islamic Republic of Iran and others, at p. 31.

necessary for the immediate costs of operating the project in Bushehr. In view of the evidence before the Tribunal in relation to this particular Case, there is no need to address more general arguments as to what might be the requirements of general international law in different circumstances.

Accordingly, the Tribunal finds that the proper rate to apply is the market rate applicable at the relevant date.¹⁰ According to the publication International Financial Statistics, Supplement on Exchange Rates (IMF, 1981), the official rate at 1 July 1979 was 70.475 Rials to the Dollar.

The amount payable to BBC can thus be calculated as follows:

Total Contract price billed		302,625,992 Rials
<u>Less</u> credit for fence work	15,284,416	
		<hr/>
		287,341,576
<u>Add</u>	a) extra work	
	i) site fill	4,282,302
	ii) type 5 cement	783,416
	iii) deleted units	45,108
	iv) telephone wiring	39,165
	v) re-steel	6,912,390
		<hr/>
		12,062,381
	<u>less</u> credit for pipework	698,000
		<hr/>
		11,364,381
		11,364,381

¹⁰The dates on which different payments fell due are varied and uncertain. For the purpose of computing the rate of exchange and the rate of interest the Tribunal chooses 1 July 1979 as a global date applicable to the entire amount.

b) escalation payments	194,881,160	194,881,160
		<u>493,587,117</u>
<u>Less</u> 5.5% contractors' tax	27,147,291	27,147,291
		<u>466,439,826</u>
<u>Less</u> amount paid by IHC	182,549,597	<u>182,549,597</u>
		283,890,229
90% of 283,890,229 Rials =		<u>255,501,206</u>

at 70.475 Rials to the Dollar = U.S. \$3,625,416.19

Interest

In its Award in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran (Award No. 180-64-1 of 27 June 1985), this Chamber expressed its intention to develop and apply a consistent approach to the awarding of interest in cases before it. In the absence of a contractually stipulated rate of interest, it is the Tribunal's policy to derive a rate of interest based approximately on the amount that the successful Claimant would have been in a position to have earned if it had had the funds available to invest in a form of commercial investment in common use in its own country. Six-month certificates of deposit are such a form of investment for which average interest rates are available from an authoritative official source.

In the Sylvania case itself, the Tribunal applied a rate of interest approximating to the average rate of interest on six-month certificates of deposit for the relevant period in that case, which was about 1979 through 1984. In the present case, the relevant period began on 1 July 1979 but ends later because this Award comes several months later than the Sylvania Award and must therefore reflect the change in interest rates

that has occurred since then. The average rate of interest paid on six-month certificates of deposit from July 1979 through the date of this Award is approximately 11.5%, and it is that rate the Tribunal applies in this Case, using the last published rate available to it and rounding the rate awarded to the nearest quarter of a percentage point.

Costs

In the present case, BBC has claimed legal costs of \$148,500 and expenses of \$60,460. In the Award in the Sylvania case, likewise, this Chamber outlined the general considerations, as well as the factors relating to each individual Case, to be taken into account in determining to what extent an award of costs for legal representation and assistance is "reasonable". Applying these considerations and factors in the present Case, the Tribunal considers that a global sum of \$30,000 is reasonable.

III. AWARD

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

The Respondent IRAN HOUSING COMPANY is obligated to pay the Claimant BLOUNT BROTHERS CORPORATION the amount of Three Million Six Hundred and Twenty Five Thousand Four Hundred and Sixteen United States Dollars and Nineteen Cents (U.S. \$3,625,416.19) plus interest at the rate of 11.5 percent per annum (365-day basis) from 1 July 1979 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account; plus costs of arbitration in the amount of US\$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

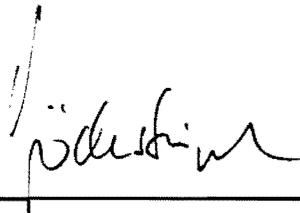
Democratic and Popular Republic of Algeria dated 19 January 1981.

The two checks, Nos. T0428637 and T0428658 drawn by B.C.J. DEVELOPMENT COMPANY on Banque Etebarate Iran for 26,000,000 Rials and 36,000,000 Rials respectively are deemed cancelled.

The remaining claims of BLOUNT BROTHERS CORPORATION and the claims for set-off of IRAN HOUSING COMPANY are dismissed.

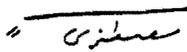
This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague
28 February 1986

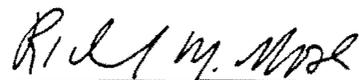


Karl Heinz Böckstiegel
Chairman
Chamber One

In the name of God



Mohsen Mostafavi
Dissenting in part,
Concurring in part,
See Separate Opinion



Richard M. Mosk
Concurring Opinion