84-87

IRAN - UNITED STATES CLAIMS TRIBUNAL

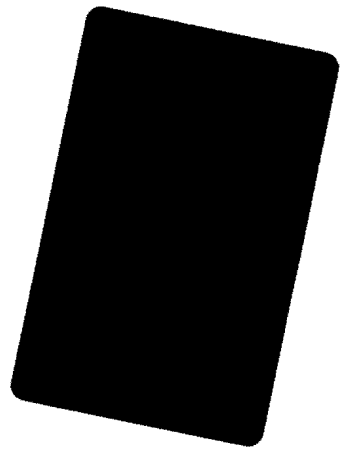
دادگاه داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 84 Date of filing 4 March 1983

Partial
✓ AWARD. Date of Award 4 March 1983

23 pages in English. 23 pages in Farsi.



_____ DECISION. Date of Decision _____

_____ pages in English. _____ pages in Farsi.

_____ ORDER. Date of Order _____

_____ pages in English. _____ pages in Farsi.

_____ CONCURRING 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.

IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

ULTRASYSTEMS INCORPORATED,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN;
INFORMATION SYSTEMS IRAN,
Respondents.

CASE NO. 84
CHAMBER THREE
PARTIAL AWARD NO. 27-84-3

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date ۱۳۶۱/۱۲/۱۴ تاریخ
4 MAART 1983
No. 84 ۸۴ شماره

PARTIAL AWARD

APPEARANCES:

For the Claimant:

Mr. Richard Chernick,
Attorney, Gibson, Dunn, & Crutcher

Mr. Phillip Stevens,
President, Ultrasystems Inc.

Mr. Phillip Simons,
Vice President, Ultrasystems Inc.

Mr. J.L.W. Sillevis Smith,
Attorney, de Brauw & Helbach

DUPLICATE ORIGINAL
«نسخه برابر اصل»

For the Respondents:

Mr. Mohammed K. Eshragh,
Deputy Agent of the Islamic Republic of Iran

Dr. A.A. Riazi,
Legal Adviser to the Agent

Dr. Varasteh,
Attorney for Isiran

Mr. N. Khoshayni,
Isiran

Mr. A. Zandi,
Isiran

Also Present:

Mr. Arthur Rovine,
Agent of the United States of America

I. THE PROCEEDINGS

On 17 November 1981 the Claimant, ULTRASYSTEMS INCORPORATED ("Ultrasystems") filed its claim against Respondents THE ISLAMIC REPUBLIC OF IRAN and INFORMATION SYSTEMS IRAN ("Isiran"), originally seeking an award in the amount of $607,945.37 in connection with alleged obligations arising out of a contract, plus interest on said amount, cancellation of a $100,000 letter of credit or compensation based on the calling thereof by Isiran, costs in connection with maintaining the letter of credit, and costs in connection with the arbitration.

Isiran filed a Statement of Defence on 24 February 1982, raising certain jurisdictional defences, denying liability, and requesting from Claimant $33,560.98 which represents the difference between $40,000 for alleged unaccounted for advances plus $21,346 for an alleged erroneous payment, and $27,785 admittedly owing Claimant. Isiran also claimed that Ultrasystems had not complied with certain social insurance laws but did not specify any amount. Finally, Isiran sought its arbitration costs.

The Islamic Republic of Iran did not file any Statement of Defence.

On 31 March 1982 a Pre-hearing Conference was held.

The Tribunal at first ordered a hearing on certain jurisdictional and other issues. Thereafter the Tribunal ordered a full hearing on all issues on 26 October 1982. The hearing was postponed until 12 and 13 November 1982 at the Respondents' request.

The parties filed evidence and memorials prior to and at the hearing, and presented oral argument at the hearing itself. Thereafter material was submitted on behalf of the Respondents which has not yet been accepted by the Tribunal under Article 29 of the Provisionally Adopted Rules.

On 5 November 1982, Isiran filed a counterclaim reiterating its claim for $33,560.98, and also seeking 26,258,767 rials allegedly owed by Ultrasystems to the Social Insurance Organization and 17,404,177 rials allegedly owed to the Ministry of Finance and Economic Affairs for taxes.

The Tribunal has, by virtue of Article 32, paragraph 1, of the Tribunal Rules, decided to issue a partial award covering Ultrasystems' claims with the exceptions indicated at III B 1 and 2 below, and also covering the Respondents' counterclaims.

II. FACTS AND CONTENTIONS

Ultrasystems is a corporation organized under the laws of the State of California of the United States of America.

On 15 May 1976, Ultrasystems and Isiran entered into a contract whereby Ultrasystems provided certain services - a contract which was fully performed by both parties. This contract terminated in August 1977.

On 1 September 1977, Ultrasystems and Isiran entered into a second contract (the "Contract"), which is the subject of the claim. Under the Contract, Ultrasystems was to act as a consultant in "the general area of computer sciences and other related fields". Under the Contract Ultrasystems would provide certain personnel. Isiran was to make payments based on a prescribed schedule. On 12 June 1978, the Contract was amended reducing the rates of some of the Ultrasystems personnel but providing that Isiran would make efforts to increase Ultrasystems staffing to a certain minimum level. Article 4.1 of the Contract provided as follows:

> The Consultant [Ultrasystems] shall submit an invoice, in the prescribed format, to ISIRAN on or about the first of each Iranian month for man-months delivered during the preceding Iranian month. Such invoices shall be payable by ISIRAN by the thirtieth day following receipt of the monthly invoice.

During the period 1 September 1977 to 31 January 1979 Ultrasystems' engineers and other personnel in Iran worked on Isiran projects. For a period monthly invoices were submitted to Isiran and were paid. Such payments ceased in September 1978 according to the Claimant.

Under the Contract Isiran made an advance payment to Ultrasystems of $100,000. On 27 September 1977 Ultrasystems issued through a bank in the United States a standby letter of credit supporting a bank guarantee issued in Isiran's favour by Bank Melli in Tehran in the amount of $100,000, guaranteeing repayment of the advance. Under the Contract and the amendment thereto the advance was repaid by deduction from the monthly amounts owed and paid by Isiran to Ultrasystems. On 6 January 1982 - after the claim was filed with this Tribunal - Isiran made a call on the guarantee. Bank Melli in turn sought payment of the United States standby letter of credit. Payment of the letter of credit, however, was not made to Bank Melli. Instead, a blocked account was established in Bank Melli's favour pursuant to the United States Treasury Regulations applicable at the time.

There is no dispute that on 14 January 1979 the Contract was mutually terminated as of 31 January 1979.

As disruptions in Iran preceding and during the revolution period increased, Claimant asserts, it continued providing services, despite the fact that many Isiran employees did not work and Claimant's invoices were not being processed. Nevertheless, the manpower to be supplied by Ultrasystems to Isiran did not increase and did not reach the anticipated minimum level of 10.

According to Claimant, in view of the aforesaid circumstances, it was entitled to terminate the Contract either

for force majeure, or breach or default by Isiran. Under Article 15.3 of the Contract, if the Contract was terminated for such reasons,

> ISIRAN shall pay the Consultant for:
> a. Satisfactory work performed by the Consultant to date of termination, and all fully supported actual costs incurred in connection with the termination and demobilization by the Consultant.
> b. Any amount to be mutually agreed upon by ISIRAN and the Consultant to compensate for other costs resulting directly from such termination. Failure of the parties to agree on the amount of such costs shall be a dispute which shall be settled by arbitration under Article XIX.

According to Claimant, it in effect gave notice by telex to Isiran of such grounds for termination in December 1978, and suggested such a termination would be effective on 31 January 1979 and would be based on the payment to Ultrasystems of its final billing statement which would include agreed-upon costs. In mid-January 1979, Isiran agreed to that proposal.

Claimant argues that its representative and the managing director of Isiran, Mr. B. Motazed, negotiated the "final close out billing", which was then agreed upon.

Claimant asserts that it presented its final billing to Mr. Motazed on 18 February 1979, which called for Isiran to pay Ultrasystems $654,717.49. According to Claimant, Mr. Motazed accepted and agreed to that amount in writing on 20 February 1979.

The final billing included unpaid invoices, performance guarantees withheld and not paid back, unamortized recruiting costs, unamortized mobilization and demobilization costs, special security and medical costs, and lost income due to early termination of the contract. Although Claimant asserted that by virtue of the agreement regarding

termination it was entitled to the full $654,717.49, it later discovered some errors in the original billing and thus adjusted the amount to $549,237.42 during the proceedings.

Claimant now seeks the amount of $549,237.42 plus $461,587.23 in consequential damages allegedly representing the actual interest it had to pay to borrow said amount.

Claimant also seeks $4,240 which is its cost of maintaining the letter of credit.

Finally, Claimant asserts that the entire amount of the $100,000 advance it received has been repaid, so that the letter of credit must be cancelled. Claimant requests that either the letter of credit be cancelled, or it should receive $100,000 to compensate it in the event that the letter of credit amount is released in favour of Isiran.

The Respondents contend that the Tribunal does not have jurisdiction over the claim on the grounds that: (a) Ultrasystems has not submitted proof of its United States nationality; (b) the proper party to the Contract was not the Claimant but Ultrasystems Inc., Iranian operations, an Iranian Corporation which would not be entitled to bring a claim before the Tribunal; (c) the contract provides for settlement of disputes through arbitration in Iran which, in effect, means that the Iranian courts have exclusive jurisdiction over such disputes. Isiran also initially asserted, (d) that it is a private entity independent of the Government of Iran though at the hearing Isiran expressly left it for the Tribunal to determine whether the company is controlled by the Government of Iran as required under the Claims Settlement Declaration.

Furthermore, Isiran defends by contending that two letters purportedly signed by Mr. Motazed - one agreeing to

the final billing and the other agreeing to the release of the letter of credit - were not authentic. In addition, Isiran contends that Mr. Motazed was not authorized to agree to such payments and release of the letter of credit.

Isiran also challenges the validity of the various items comprising the final billing.

Isiran asserts that it properly called the letter of credit since, according to Isiran, the advance had not been fully paid back.

Isiran contends that the contract was, in effect, terminated at the request of Ultrasystems so that Article 15.3 of the Contract was inapplicable. Isiran further argues that there was no agreement to pay Ultrasystems the amounts it requested or the final bill Ultrasystems presented.

Isiran contends that since it is liable for payment of 26,258,767 rials to the Social Insurance Organization for premiums that Ultrasystems owed, Ultrasystems should indemnify Isiran for such amount. Isiran asserts it also owes 17,404,177 rials to the Ministry of Finance and Economic Affairs for taxes owed by Ultrasystems and thus Ultrasystems should indemnify Isiran for this amount. Isiran claims that such taxes were figured into the rate of compensation to be paid Ultrasystems.

Isiran also claims that it is entitled to certain payments it made for termination of employment of staff, whose contracts were not in fact terminated, and for $40,000 of the advance payment allegedly not repaid.

Ultrasystems contends that the 5 November 1982 counterclaim was not timely filed; that most of the social insurance taxes relate to the 1976 contract and thus cannot be

the subject of a counterclaim or offset; that Isiran had no standing to assert a claim for taxes; that it was always understood that Ultrasystems would not be obligated to pay social security premiums and that if such premiums were legally owing, Respondents were estopped to assert such a claim; that those taxes that were owing were withheld and therefore paid; that Isiran supplied no evidence concerning Ultrasystems' liability for the alleged taxes owing; that the advance was fully repaid; and that it did not receive any termination overpayments.

III. REASONS FOR AWARD

A. JURISDICTION OVER ULTRASYSTEMS' CLAIM

Claimant has submitted evidence* which establishes that it is a United States corporation and that over fifty per cent of its shares are owned by United States citizens, and, thus, that it is a national of the United States as that term is defined in the Claims Settlement Declaration (Article VII, paragraph 1).

Moreover, it has been established that the Claimant is the party to the Contract in issue and that Ultrasystems Incorporated, Iranian Operations, is a division of Claimant, not a separate entity.

As to the question whether the Tribunal has jurisdiction over claims against Isiran, the Tribunal notes the following: In its submission filed on 10 September 1982 Isiran asserted that 100 per cent of its capital stock is "owned by the Government of Iran" and that "Isiran is affiliated to Iran Electronics Industries Corporation". At the hearing Isiran further explained that its stock is owned by Iran Electronics Industries Corporation, a corporation

---

* Affidavits and a certificate of the State of California concerning the status of the corporation.

whose stock is owned by the Government of Iran. Thus it is established that Isiran is controlled by the Government of Iran so as to be subject to the jurisdiction of the Tribunal (Article II, paragraph 1, and Article VII, paragraph 3, of the Claims Settlement Declaration).

The remaining jurisdictional issue raised by the Respondents is whether the dispute lies exclusively under the jurisdiction of Iranian courts.

The September 1977 contract provides as follows:

> All disputes between the parties arising out of, in relation to, or in connection with this Contract which are not settled by discussion and mutual accord shall be finally settled by arbitration in Iran, conducted in English in accordance with the rules contained in Civil Procedure Code of Iran, Article 632 through 676.

The Tribunal has held that such a clause is not one "specifically providing that any disputes [under the contract] shall be within the sole jurisdiction of the competent Iranian courts...", so as to divest the Tribunal of jurisdiction over the claim under Article II, paragraph 1 of the Claims Settlement Declaration. See Gibbs & Hill Inc. and TAVENIR, et al.. Case No. 6, Interlocutory Award No. ITL 1-6-FT.

In view of the foregoing the Tribunal determines that it has jurisdiction over Ultrasystems' claim.

B. THE MERITS OF THE CLAIM BASED ON THE FINAL BILLING

The Claimant bases its contract claim on the alleged 20 February 1979 agreement between Isiran and Ultrasystems whereby Isiran agreed to pay the amounts specified in the Claimant's final billing. In the event that the Tribunal holds that no such binding agreement was concluded, the

Claimant asserts the claim on the basis of the contract itself and services rendered under it, or on the basis of a promise in the 19 January 1979 termination agreement to pay the Claimant's final billing.

Isiran admits that the Contract was terminated as of 31 January 1979. It denies, however, that the final billing was ever approved, contending that the 20 February 1979 letter relied upon by Ultrasystems as evidence of that approval was not authentic and, in any event, that Mr. Motazed did not at that time have the authority to act for Isiran. Isiran therefore contends that the final billing does not constitute a binding agreement.

The first question to resolve is thus whether the letter represents a valid approval of the final billing, binding on Isiran. The Claimant has presented evidence in support of the authenticity of Mr. Motazed's signature on the letter. On the other hand a number of circumstances surrounding the signing of the letter cast serious doubt on whether the letter can be considered as an approval of the final billing binding on Isiran. There are, moreover, certain admitted inaccuracies in the final billing which render it in our view an unreliable basis for any decision as to the amount of Isiran's liability. Our conclusion is therefore that the final billing is not binding on Isiran.

The Claimant argues that the above-mentioned Article 15.3 of the Contract provides a basis for Isiran's liability to Ultrasystems in this case. This Article does stipulate to what extent such liability exists in case the Contract is terminated "for convenience of ISIRAN, or Force Majeure, or breach or default by ISIRAN". However, as far as the documentary evidence shows, the Contract was in fact terminated by mutual agreement, without either party invoking any of the specific grounds for termination mentioned in Article 15.3. In the Tribunal's view this contract provision may

nevertheless be considered as setting the appropriate standard for compensation also in a case of mutual termination; it would certainly not be reasonable to place a more extensive liability on Isiran in a situation where the parties have agreed on termination than in a case where Isiran is in breach of contract. It should be noted that under Article 15.3 Ultrasystems is entitled to compensation - except for work performed - only for "costs", either (a) for actual costs incurred in connection with the termination and demobilization, or (b) other costs resulting directly from the termination (in an amount mutually agreed upon or established through arbitration).

1. Unpaid Invoices

Ultrasystems claims on the basis of six invoices, numbers 5-10, for work performed under the contract. Ultrasystems also alleges the existence of a seventh invoice, no copy of which was in its possession. As to the six numbered invoices, Isiran admits the validity of only one, No. 6, and that only to the extent of $27,785.02 out of the $49,621 invoiced, on the basis of certain deductions which it states should have been made. Isiran asserts that invoice No. 5 ($38,262) was paid by a cheque, No. 854454, dated 21 November 1978 (30 Aban 1357). As to invoices No. 7 ($46,029), No. 8 ($39,262), No. 9 ($28,703.02) and No. 10 ($20,361.44), Isiran alleges either that the invoice lacked supporting documents or had other formal defects, or that the invoice had never been received.

Ultrasystems produced evidence that the work reflected in the invoices had in fact been performed; a witness for Isiran admitted at the hearing that he could not testify that the work had not been performed. Evidence also showed that the invoices were duly prepared and presented in the normal course of business.

As for Isiran's contention that the amount due under invoice No. 5 was paid in full, the Tribunal considers it appropriate to request further comments with respect to material filed on this issue after the hearing. Accordingly, this issue is excluded from this partial award and remains open for further consideration.

With regard to invoice No. 6 the Tribunal notes that the evidentiary material related to this invoice shows that from the invoiced amount there should be deducted the sum of $5,000 as an installment on advance payments made by Isiran (see below sub E3), and also the sum of $1,725 in taxes. Ultrasystems' claims on the other invoices represent net amounts after such deductions. The Claimant is therefore entitled only to $42,896 with regard to invoice No. 6.

As to invoice No. 7, we find from the evidence presented that, as with invoice No. 6, a deduction of $5,000 should be made from the invoiced amount as an installment on advance payment.

In conclusion, Ultrasystems is entitled to amounts under invoice Nos. 6-10 totaling $172,251.46.

As to the seventh invoice ($22,790), no convincing evidence was produced by Ultrasystems to satisfy its burden of proving either that the invoice existed, or that there was work performed justifying such an invoice. Ultrasystems' speculation that $22,790 was owing was based only on that amount being the difference between the sum of the items in the final billing which could be evidenced, and the amount alleged to have been confirmed independently by Price Waterhouse Iran in an audit of the final billing. Since Price Waterhouse Iran certified the validity of certain other items later found to have been erroneously included in the final billing, we see no reason to fill the "gap" between the audit total and the proved invoices with a hypothetical "lost invoice". The amount sought under that "invoice" is therefore denied.

2. Performance guarantees withheld but not paid

Pursuant to the Contract, Isiran withheld 10% from each payment to secure Ultrasystems' future performance, amounts which were to be paid in installments in accordance with certain contractual provisions, the last installment to be paid on full performance. Our decision with respect to Ultrasystems' full performance of the work invoiced entitling it to payment of the invoices applies as well to its entitlement to repayment of the previously withheld performance guarantee amounts. These amounts are due under Article XVI of the Contract.

Isiran asserts that it paid the greater part of the guarantee sum by a cheque, No. 184101, dated 24 September 1978 (2 Mehr 1357). As with cheque No. 854454 mentioned above we exclude this issue from this partial award to await comment on additionally supplied material.

With regard to the remaining portion of this claim the Tribunal notes the following. Although Ultrasystems in a submission claims it was paid $80,980 for Khordad 1357, it asserts, without explanation, that $24,060 was withheld, a sum which appears to be considerably more than the 10 per cent that should have been deducted under the Contract. Similarly, Ultrasystems claims that it was paid for Tir 1357 in a rial amount equivalent to $36,355,65. The amount of $18,018 it claims is also more than 10 per cent of the amount paid. Because of Ultrasystems' assertions with respect to the payments for Khordad and Tir, the Tribunal in this partial award allows the claims for those months in the amounts of $10,000 and $5,000 respectively, which are approximations. In order to give Claimant an opportunity to explain the discrepancies for Khordad and Tir we leave open the issue of whether Claimant is entitled to more than 10 per cent of the payments made for those months.

Thus the Tribunal allows the amount of $15,000, leaving open the questions of whether more should be given in light of further explanations.

3. Unamortized recruiting costs

Ultrasystems has sought $2,094 in unamortized recruiting costs incurred by it as part of its "initial investment". Isiran entered into the Contract for the chief purpose of securing Ultrasystems' "expertise and know-how" through the provision of foreign personnel by Ultrasystems for work in Iran. The recruitment costs would have been amortized in successive invoices over the life of the contract, as part of the billing rate for work performed.

In view of the fact that the Contract was terminated by mutual agreement, the Tribunal does not consider these to be costs for which Isiran can reasonably be held responsible. This item of the claim cannot therefore be granted.

4. Unamortized mobilization/demobilization costs

Ultrasystems has also sought $17,583 in certain unamortized costs incurred in connection with transportation of its personnel both to and from Iran. As in item 3 above, the Tribunal finds that Isiran should not be held responsible for costs of this nature.

5. Security costs to protect Ultrasystems personnel

Ultrasystems submitted evidence of actual costs in the amount of $25,386 incurred in hiring guards, building security fences, procuring emergency travel arrangements, and installing armour plate and bullet proof glass in a company vehicle, in order to assure the safety of its expatriate personnel in Iran from 8 September 1978 to 31 January 1979, the date the Contract was terminated. In justification of such costs, Ultrasystems presented testimony that during this period there was considerable civil unrest in Tehran leading, on 8 November 1978, to an attack on the Isiran offices where Ultrasystems personnel worked

and the destruction of certain property there. During the course of that attack, one of Ultrasystems' employees sustained personal injuries.

Isiran's response is that paragraph 11 of the Declaration of the Democratic and Popular Republic of Algeria dated 19 January 1981 (the "General Declaration") together with the related jurisdictional bar in Article II(1) of the Claims Settlement Declaration, relieves Iran of liability for "injur[ies] to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran". However, even if the Tribunal had jurisdiction over this part of the claim, Isiran contends that the security measures in question could not be charged to it because the Contract contains no provision obligating it to protect Ultrasystems' personnel.

With respect to Isiran's argument based on paragraph 11 of the General Declaration, we find it inapplicable to the claim for security costs. Such costs were incurred not as the result of any injuries caused by popular movements in the course of the Revolution, but in order to prevent such injuries. While it is evident that the existence of such movements prompted Ultrasystems to take the measures, the exclusionary provisions of paragraph 11 can hardly have been intended to cover more than claims arising directly out of actual injuries. The claim therefore lies within the Tribunal's jurisdiction since it allegedly "arise[s] out of" the termination provisions of the Contract. Article II(1), Claims Settlement Declaration.

With respect to Isiran's second objection, the Tribunal notes the following. The costs for security measures cannot reasonably be said to have been incurred in connection with the termination of the Contract. In view of this, there is no ground for allowing this portion of the claim.

6. Medical expenses for injuries to Ultrasystems' Manager

As noted in item 5 above, one of Ultrasystems' employees sustained personal injuries as the result of an attack on Isiran offices. Ultrasystems' claim on the point is $657. Isiran's objections are the same as with respect to item 5.

The Tribunal need not reach the jurisdictional questions since, in any event, the amount was not incurred in connection with the termination of the Contract.

7. Lost income due to early contract termination

Ultrasystems seeks $158,482.84 in lost income due to the premature termination of the contract, a sum calculated as 8½% of the gross billing rate for 15 persons working 360 man-months under the Contract, with deductions for man-months already invoiced. The 8½% represents what Ultrasystems viewed as a "fair net profit" for such work; the number of persons and man-months are based on the full projected term of the Contract.

In applying the standard of compensation laid down in Article 15.3 of the Contract it is clear that lost income is not part of "actual costs incurred in connection with the termination..." and therefore not compensable under point (a) of that Article. The issue then arises whether lost income comes under point (b) of Article 15.3 as part of Ultrasystems' "other costs resulting from ... termination"; if so, it would be within the Tribunal's discretion to determine whether and to what extent such costs are recoverable. In the Tribunal's view it is doubtful whether the

language of Article 15.3(b) can be interpreted so as to include lost income. In view of this and the fact that the Contract was terminated by mutual agreement and not on the basis of breach of contract on either side, the Tribunal holds that Ultrasystems is not entitled to compensation for profits it could have gained had the Contract not been terminated. This part of the claim shall therefore be denied.

8. Unpaid invoice for project update

Ultrasystems submitted an allegedly unpaid invoice for $4,645.46, setting forth in detail charges for consulting and other work related to the Contract. Evidence shows that the work was performed at Isiran's request. Isiran denies receiving the invoice; it does not deny that the work was performed, but states that it was performed outside the Contract and therefore is not payable thereunder. We think it is likely that the invoice was sent and received, but remained unpaid as part of the general break in contractual relations. Nevertheless, the request for work, and the performance provided pursuant to that request, rendered Isiran liable at least in quantum meruit, without regard to the Contract. The best measure of liability is the invoice itself. We therefore allow the invoiced amount to Ultrasystems.

9. Unpaid surface transportation costs to ensure safety of personnel

Ultrasystems seeks $1,878.50 in transportation costs incurred in connection with transporting its employees to and from work during the period 8 September 1978 to 31 January 1979. For reasons set forth under the related item 3 above, the Tribunal does not allow this part of the claim.

10. The total amount due related to invoices included in the final billing

The total amount thus due to Ultrasystems for its work performed and termination costs incurred is $191,896.92.

11. Interest on amounts due

Ultrasystems presented evidence that it had to borrow monies at rates of between 12 per cent and 21 per cent in order to compensate for its inability to obtain payment from Isiran.

The Tribunal holds that Ultrasystems is entitled to compensation for Isiran's failure to pay the monies owing and determines the damages in this respect to be $95,000. The Tribunal leaves open the question of damages on any amount found to be owing hereafter.

C. THE LETTER OF CREDIT

Claimant submitted evidence that Isiran has been credited with the full amount of the letter of credit (see below at paragraph E3). Accordingly, Isiran's call on the letter of credit was improper. Thus, Claimant is entitled to $4,240 for its costs in maintaining the letter of credit.

Moreover, Isiran must take steps to release the letter of credit. The Tribunal will issue a declaratory judgment to this effect, as part of the award in this case. See below at paragraph IV 2.

E. THE COUNTER-CLAIMS OF ISIRAN

1. Social insurance premiums

With respect to social insurance premiums, Isiran submitted as evidence a letter to Isiran from the Social Insurance Organization dated 26.10.1360 (16 January 1982). The letter shows an amount of 26,258,767 rials in insurance premiums due in connection with the 15 May 1976 contract; the computation of the premium amount however also appears to cover a later period of time when the 1 September 1977 contract was in effect.

The claim in this case is not related to the 15 May 1976 contract. Therefore, to the extent that the counter-claim arises out of that contract, it is doubtful whether the Tribunal has jurisdiction over the counterclaim. Article II, paragraph 1, of the Claims Settlement Declaration. The Tribunal, however, need not reach this jurisdictional issue for the following reasons. The letter from the Social Insurance Organization cannot eo ipso be regarded as sufficient evidence of Ultrasystems being liable for any social insurance premiums. In this regard it is noted that the letter, which is not accompanied by any supporting material, in no satisfactory way explains the basis for the calculation made.

Moreover, by a telex of 10 August 1977 during negotiations of the 1 September 1977 contract, Isiran stated that "if Iranian social insurance payments are subsequently required, they will be added to the billing rates". It has not been alleged that such changes were made with regard to the billing rates. It can thus be assumed that any liability for Ultrasystems to pay social insurance premiums in

regard to the 1977 contract was to be ultimately borne by Isiran.

For the foregoing reasons the Tribunal does not find sufficient grounds for allowing the counterclaim for social insurance premiums.

2. Termination costs

Isiran claims that it paid Ultrasystems $21,346 for termination of employment of staff, whose contracts were not terminated. Ultrasystems denies that it ever received such amount.

The evidence shows that an invoice for such amount was sent but not processed and that the expected terminations did not take place. Had the payment been made, the form in Isiran's file would have indicated approval for payment, including the cheque number. That the file did not include such material, supports the conclusion that Ultrasystems did not receive payment. Isiran provided no other evidence of such payment.

Consequently, Isiran's counterclaim for such over-payment must be rejected.

3. Advance payment

It is undisputed that Isiran paid $100,000 in advance payments to Ultrasystems, an amount secured through a bank guarantee. This amount was to be paid back in installments through deductions from the amounts invoiced by Ultra-systems. Isiran claims that there is a remaining balance of $40,000 which has not been repaid and seeks recovery of this amount. Invoices presented to the Tribunal however show that deductions equivalent to the full amount of $100,000

were made in the invoices; the last deduction of $30,000 was contained in invoice No. 10 mentioned above. This part of the counterclaim therefore cannot be granted.

4. Certain taxes

Isiran's counterclaim for 17,404,177 rials for certain taxes was not filed until 5 November 1982. Isiran gave no explanation as to why this counterclaim was not asserted earlier. Accordingly, under Article 19, paragraph 3 of the Tribunal Rules, the Tribunal must deny this counterclaim, since based on the record, the Tribunal cannot decide that the delay in filing the counterclaim "was justified under the circumstances."

F. COSTS OF ARBITRATION

Ultrasystems has claimed its arbitration costs in the amount of $111,800.

Although the amount lacks some specificity, it would appear that close to $30,000 were expended on non attorney fee costs (travel and translation costs) which are covered by Article 38 1(a) and (b) of the Tribunal Rules. In determining reasonable attorney's fees the Tribunal takes into account the fact that extra costs were incurred by the Claimant through Isiran's failure to provide information as to its status until a late stage of the proceedings.

Applying Articles 38 and 40 of the Tribunal Rules, the Tribunal determines that the costs of arbitration shall be apportioned in such a way that Isiran shall bear Ultrasystems costs in the amount of $70,000.

G. TOTAL AMOUNT FOR WHICH ISIRAN IS LIABLE

In accordance with the above holdings in this partial award, we find Isiran liable to Ultrasystems in the amount of $361,136.92.

H. THE QUESTION OF LIABILITY OF THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN

In this award we do not find the Respondent, the Islamic Republic of Iran liable for any portion of the claim. Thus the Government of Iran is not responsible except by virtue of the Declaration of the Democratic and Popular Republic of Algeria dated 19 January 1981.

IV. PARTIAL AWARD

THE TRIBUNAL AWARDS AS FOLLOWS:

1. Respondent, INFORMATION SYSTEMS IRAN shall pay to the Claimant, ULTRASYSTEMS INCORPORATED, the sum of Three Hundred Sixty-One Thousand, One Hundred Thirty-Six and 92/100 United States Dollars (U.S. $361,136.92).

Such payment shall upon notification by the President of this Tribunal be made 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.

2. The Tribunal declares any rights and obligations under the Bank Melli bank guarantee in the amount of $100,000 mentioned under II above, and the corresponding Bank of America standby letter of credit No.SBLA-77506 to be null and void.

3. The Tribunal retains jurisdiction over the claim in connection with the unresolved issues specified above under III B 1 and 2.

4. This Partial Award is hereby submitted to the President of this Tribunal for notification to the Escrow Agent with regard to item 1 of the Award.

Dated, The Hague,
4 March, 1983

Nils Mangård
Chairman

In the name of God,

Richard M. Mosk
(Concurring Opinion)

Jahangir Sani
(Dissenting Opinion)