IRAN-UNITED STATES CLAIMS TRIBUNAL

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** DISSENTING OPINION of ______

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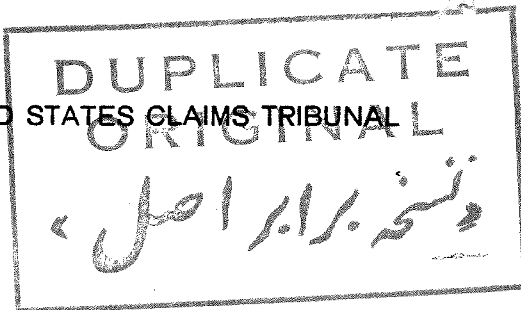
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 180
CHAMBER THREE
AWARD NO. 144-180-3

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
تاریخ ۱۳۶۳ / ۴ / ۲۲
13 JUL 1984
شماره 180

HARNISCHFEGER CORPORATION,

Claimant,

and

MINISTRY OF ROADS AND TRANSPORTATION, INDUSTRIAL DEVELOPMENT AND RENOVATION ORGANIZATION OF IRAN, MACHINE SAZI ARAK and MACHINE SAZI PARS,

Respondents.

PARTIAL AWARD

Appearances:

For the Claimant:
- Mr. Bert Rein
- Mr. Philip Davis
  Attorneys for Claimant
- Mr. C.P. Cousland
  Senior Vice President, Harnischfeger Corporation
- Mr. George Knight
  General Counsel, Harnischfeger Corporation

For the Respondents:
- Mr. Mohammad Ali Shamlou
  Attorney for Machine Sazi Arak
- Mr. Changiz Ahmaripour
  Representative of Machine Sazi Arak
- Mr. Saif Ali Vafa Mehr
  Managing Director, Machine Sazi Arak and Pars
- Mr. Mohammad Ali Lotfalian
  Attorney for Ministry of Roads and Transportation

Also Present:
- Mr. Mohammad K. Eshragh
  Agent of the Islamic Republic of Iran
- Mr. Khosrow Tabasi
  Legal Advisor to the Agent
- Ms. Jamison M. Selby
  Deputy Agent of the United States of America
- Mr. John B. Reynolds
  Legal Advisor to the Agent

I. THE PROCEEDINGS

On 18 December 1981, the Claimant, HARNISCHFEGER CORPORATION ("Harnco" or "Claimant"), filed a Statement of Claim against the MINISTRY OF ROADS AND TRANSPORTATION ("MORT"), the INDUSTRIAL DEVELOPMENT AND RENOVATION ORGANIZATION OF IRAN ("IDRO") and MACHINE SAZI ARAK ("MSA"). The claim against MORT was for damages arising from alleged breaches of executory contracts for the purchase of machinery. The claim against MSA was for amounts allegedly due on date drafts for machinery delivered to and accepted by MSA, for licence fees and consultant and training charges allegedly owed pursuant to a Technical Service Agreement, and for damages for alleged breach of an executory contract for the purchase of machinery. IDRO was named as a Respondent on the basis of its alleged control over MSA. Harnco also sought interest and costs of arbitration.

On 18 January 1982, Harnco filed a First Amendment to Statement of Claim adding an additional claim against MACHINE SAZI PARS ("MSP") for recovery of amounts allegedly due on two promissory notes for machinery previously delivered and accepted.

On 11 June 1982, a Statement of Defence and Counterclaim was filed by MSA on behalf of itself and IDRO. The Counterclaim sought damages for alleged defects in the machinery purchased, for alleged delays in shipment, lost profits, social security premiums and taxes. On the same date, MORT filed its Statement of Defence. MSP filed its Statement of Defence on 30 August 1982.

On 21 September 1982, Harnco filed Responses to the Defences and Statement of Defence to the Counterclaims, and additional evidence.

Although not a Respondent, the Iranian Ministry of Commerce, which the Claimant had alleged controlled IDRO, filed a Statement of Defence and Counterclaim for costs on 7 December 1982. Harnco responded to that Statement of Defence on 5 January 1983, noting that the Ministry of Commerce had never been named as a Respondent. That Ministry has not filed anything further nor appeared in any proceeding in this case.

On 24 March 1983, Harnco filed additional evidence regarding its nationality.

Following a pre-hearing conference held on 15 April 1983 and as a result of a Tribunal order, Harnco filed a document entitled Second Amendment to Statement of Claim on 2 May 1983. On 15 July 1983, Harnco filed additional evidentiary submissions.

Additional evidence was filed by MORT on 4 August and 21 September 1983.

On 3 October 1983, Harnco filed a Hearing Memorial and additional exhibits and MSA filed a Memorial. Additional evidence was filed by MSA on 14 October 1983.

The Hearing was originally scheduled for 21 October 1983 but was postponed until 28 November 1983. The Hearing took place on 28 and 29 November 1983. In the course of the Hearing, on 28 November 1983, Harnco filed a corrected affidavit rectifying non-substantive typographical errors in a previously submitted affidavit. The Tribunal accepted that filing, together with a new version of the affidavit showing revised damage calculations.

Pursuant to the Tribunal Order of 5 December 1983, MSA and MORT filed additional material on 15 December 1983. Claimant filed a response on 30 January 1984.

Pursuant to Article 13, paragraph 5, of the Tribunal Rules, a member who had resigned after the Hearing on the merits of this claim participated in this Award.

II. CONTENTIONS OF THE PARTIES

A. Jurisdiction

Harnco, a manufacturer of cranes and related equipment, contends that it is a United States corporation, a majority of whose shares are owned by United States citizens, and that it controls the two non-United States subsidiaries, Harnischfeger GmbH ("GmbH") and Harnischfeger International Corporation, S.A. ("HIC"), claims of which subsidiaries Harnco has filed as its indirect claims. Harnco further contends that MORT and IDRO are both agencies, instrumentalities or entities controlled by the Government of Iran and that MSA and MSP are both either subsidiaries of, or otherwise controlled by, IDRO. The Claimant therefore

contends that the Tribunal has jurisdiction over these claims.

MORT and MSA, contending that Harnco has proven neither its United States nationality nor its ownership of its two alleged subsidiaries, assert that the Tribunal lacks jurisdiction over these claims. The Respondents also claim that certain alleged obligations arose after 19 January 1981 and thus, under the Claims Settlement Declaration, are outside the jurisdiction of this Tribunal. MSA contends that the Claimant's Second Amendment to Statement of Claim naming MSA as a Respondent in the Sixth and Seventh Claims is improper. The Respondents assert, furthermore, that even if it were established that GmbH was a foreign corporation controlled by Harnco, Harnco in any case did not own more than 75% of GmbH's stock and that therefore, under the Claims Settlement Declaration, Harnco is only entitled to 75% of any monies to which GmbH is entitled.

B. Claims

There are eight claims.

1. First Claim

Harnco alleges that pursuant to a purchase agreement with MSA, Harnco delivered FOB its factory in Iowa the components of ten Model T300A cranes to MSA. Under the purchase agreement, payment for the equipment was to be made by means of 180-day date drafts. Harnco alleges that

although MSA accepted the date drafts for payment of the equipment, no date drafts have been paid. The full amount of those date drafts is $1,251,757.65. The Claimant alleges that it is entitled to payment on those drafts regardless of any defense based on the underlying transaction. Harnco also asserts that it delivered the equipment in good order and in a timely fashion. The Claimant seeks interest on the unpaid amounts.

MSA, in defense, argues that the equipment which it received was defective, and it is therefore not obligated to pay the date drafts. Part of MSA's Counterclaim relates to the condition of these cranes upon receipt by MSA.

2. Second Claim

Harnco alleges that pursuant to agreements with MSA for the sale of crane equipment in 1976 and 1977, MSA accepted sight and date drafts totalling U.S. $153,850.81, which amount MSA has not paid. Harnco alleges that MSA has already paid the sight drafts representing 90% of the purchase price of most of the equipment. In connection with certain of these unpaid drafts, Harnco has already received insurance proceeds from Export-Import Bank of the United States (EX IM Bank), which has settled its own claims before this Tribunal, including those concerning the insurance paid on the drafts with Bank Markazi. The Claimant now has a claim for the uninsured amount of U.S. $39,361.39. Claimant alleges it is entitled to this amount, plus interest, regardless of defences related to the underlying transaction.

MSA argues that the equipment for which the drafts were accepted was delivered late and was defective. MSA also argues that Harnco violated a 1973 Technical Service Agreement (the "1973 Agreement") between the parties with regard to the goods. The Respondents further suggest that the EX IM Bank settlement completely settled this claim.

3. Third Claim

The Claimant contends that MSA violated the 1973 Agreement which was entered into with Harnco's foreign subsidiary, HIC, by not paying U.S. $331,521.38, representing personnel charges for the years 1975 to 1978 and the minimum annual licence fees for the years 1976 up to and including 1981. Alleging that the agreement was anticipatorily breached by MSA, the Claimant asserts that its claim for the 1981 license fee was outstanding on 19 January 1981. The Claimant maintains that MSA's allegations of defective performance under the 1973 Agreement were resolved in a 1976 agreement. Finally, the Claimant alleges that MSA has acknowledged this debt. The Claimant seeks interest on the unpaid amount.

MSA argues that HIC breached the 1973 agreement by, *inter alia*, not training personnel and not transferring technology, with the result that MSA never became fully capable of independent manufacture of cranes. MSA also alleges that as services could not be provided during the period from 1979 up to and including 1981, no annual licence

fees should be due for that period. Finally, MSA asserts that the 1981 licence fee was not payable until June 1981, and thus the claim for this fee is outside the jurisdiction of the Tribunal.

4. Fourth Claim

In its original Statement of Claim, Harnco sought U.S. $807,367, plus interest, from MORT for MORT's alleged breach of contract in failing to provide an irrevocable letter of credit pursuant to the terms of a purchase agreement with Harnco for 11 truck cranes. In an amendment to its Statement of Claim, the Claimant asserted that the purchase order covered only nine cranes and reduced its claim to U.S. $588,577.34, plus interest. Following MORT's failure to open the letter of credit, Harnco resold the cranes and now seeks the losses incurred upon resale, carrying costs and interest.

MORT alleges that Harnco failed to return the signed acceptance copy of the purchase agreement, and, therefore, no contract was concluded between the parties. MORT also contends that its opening of the letter of credit was a condition to the formation of the contract and that as it did not open the letter of credit it was not obligated to purchase the cranes. MORT finally asserts that the Iranian Revolution constituted force majeure, excusing its performance under any existing contract.

5. Fifth Claim

The Claimant contends that MSA breached a contract with Harnco to purchase five truck cranes by failing to open a letter of credit. The Claimant originally sought damages in the amount of U.S. $54,278, plus interest. The Claimant now seeks U.S. $40,044, representing its carrying costs until the cranes were resold, and interest.

MSA argues that Harnco's offer to sell the cranes expired before MSA responded and that MSA's failure to provide a letter of credit precluded formation of any contract.

6. Sixth Claim

Harnco originally sought U.S. $630,533, plus interest, from MORT, but now seeks U.S. $504,441, plus interest, from either "MSA/MORT" in connection with the failure to open a letter of credit pursuant to the terms of an alleged contract with Harnco for the purchase of 20 cranes. The damage amount sought by Harnco includes carrying costs and other alleged expenses.

MORT says that it is not involved, and the Claimant admits that it cannot establish its original contention that MSA was acting as an agent for MORT. MSA, at the Hearing, said that the amendment naming it could not be made on the basis that no new claim could be instituted after 19 January 1982. MSA also argues that it had no contract to purchase the cranes.

7. Seventh Claim

According to Harnco, MSA contracted with GmbH to purchase 34 cranes but breached the contract by failing to open a letter of credit. Originally the claim was directed against MORT on the theory that MSA had acted as MORT's agent, but, as with the Sixth Claim, it was amended to add MSA as a Respondent. Again the Claimant has admitted that it could not establish that MSA had acted as the agent of MORT. The Claimant originally sought damages of U.S. $2,236,301, plus interest, but reduced the amount sought to U.S. $2,067,275, representing losses on resale and carrying costs, plus interest.

The Respondents MORT and MSA make the same arguments in response to this claim as they did with respect to the Sixth Claim.

8. Eighth Claim

Harnco alleges that two promissory notes issued by MSP and guaranteed by IDRO, in payment of cranes purchased from HIC, have not been paid. The face amount of each note is U.S. $73,916.67, and each provides for 9% interest per annum. One of the notes was due on 15 April 1979, and the other on 15 October 1981.

There is no dispute as to the validity or enforceability of the notes. MSP contends that the Tribunal has no jurisdiction over the second note because the claim was not outstanding on the date of the Claims Settlement Declaration. The Claimant contends that the claim was outstanding

either because there had been an anticipatory breach of the obligation or because it could sue on the underlying transaction as the note was not paid. The Claimant seeks the principal amount of each note, plus interest from 15 October 1978.

The Claimant seeks costs.

C. Counterclaims

MSA claims that Harnco breached the Technical Service Agreement by failing to ship products promptly to MSA and by shipping defective equipment, thus seriously impairing MSA's potential capacity to manufacture. MSA counterclaims for a minimum of U.S. $7,685,000, representing, inter alia, alleged damages arising from delays in shipment of equipment and shipment of defective equipment, lost profits and amounts owed to the Social Security Organization and Ministry of Economic Affairs and Finance for social security contributions and taxes. MSA also seeks interest and costs.

The Claimant asserts that most of the counterclaims are based on matters that were resolved by virtue of the 1976 Agreement or involve contracts which are not the subject of the Claim and thus are outside the jurisdiction of the Tribunal. The Claimant also denies that it breached any agreements or is liable in any manner. It further states that the counterclaims are too general and are insufficiently particularized to comply with Tribunal pleading requirements.

III. REASONS FOR AWARD

A. Jurisdiction over the Claim

The Claimant has submitted a certificate of good standing from the Secretary of State of Delaware establishing that it is a United States corporation. It has also submitted material from proxy statements and a sworn affidavit indicating that over 50 percent of its shareholders are and, at the relevant times have been, United States citizens. With regard to the two non-United States subsidiaries, claims of which have been filed as indirect claims by Harnco, Harnco has submitted affidavits establishing that at all relevant times it owned all but one share of the voting stock of its Panamanian subsidiary HIC, that the one share of HIC stock not owned by the Claimant was owned by an American citizen - the Chairman of the Board of Harnco - for the benefit of the Claimant and finally that from 1978 to the present it has owned between 51 percent and 75 percent of the voting stock of its West German subsidiary, GmbH. There is no evidence contradicting these facts. Accordingly, the Tribunal is satisfied that the Claimant is a United States national within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration and that it is pursuing the "claims of nationals" within the meaning of Article VII, paragraph 2 of such Declaration.

Neither MORT nor IDRO has denied that it is an "agency, instrumentality, or entity controlled by the Government of Iran". Nor has MSA or MSP denied that it falls within the

definition of "Iran". The Tribunal therefore holds that it has jurisdiction over all the Respondents in accordance with the Claims Settlement Declaration.

With regard to the acceptance of the Claimant's Second Amendment to Statement of Claim filed on 2 May 1983 and naming MSA as a Respondent in the Sixth and Seventh Claims, the Tribunal, having reviewed the parties' evidence and argument on this issue, has determined that further deliberation is required on that issue as well as on other jurisdictional and substantive issues relating to those claims. Pending such deliberation, the Tribunal will issue a Partial Award on Claims One to Five and Claim Eight. An Award on Claims Six and Seven shall be rendered subsequently.

Finally, the Respondents contend that the claim for the 1981 licence fee and the claim on the promissory note due 15 October 1981 were not outstanding on 19 January 1981 and thus the Tribunal lacks jurisdiction over both these claims. As discussed below, the Tribunal concludes that the claim for the portion of the 1981 licence fee due and payable after 19 January 1981 and the claim on the promissory note due on 15 October 1981 were not outstanding on 19 January 1981 and thus are not within the Tribunal's jurisdiction (See under B.3 and 6 below).

The Tribunal, therefore, holds that with regard to Claims One through Five and Claim Eight, with the exception of the claim for the portion of the 1981 license fee due and payable after 19 January 1981 and the claim on the promissory note due on 15 October 1981, it has jurisdiction over the Claimant's claim.

B. <u>The Merits of the Claim</u>

1. <u>First Claim</u>

On 11 November 1977, MSA and Harnco entered into an agreement pursuant to which MSA agreed to purchase component parts for ten Model T300A truck cranes. Under the agreement, delivery of the equipment was FOB Harnco's plant in Iowa. MSA was therefore obligated to arrange insurance for the shipment, designate the freight forwarder and ocean carrier and arrange any other transportation to its facility. Payment of the total purchase price of U.S. $1,251,757.65 was originally to be by letter of credit, but the parties subsequently agreed that payment would be effected by 180-day date drafts.

The component parts were manufactured by Harnco and delivered FOB its factory. Included in the documents forwarded to the shipper was a Certificate of Good Quality dated 19 January 1978 covering the purchased equipment and certifying that it was of "first-class material and workmanship."

In accordance with instructions from MSA, Harnco forwarded the component parts to Jan C. Uiterwick Corp., agent to Iran Express Lines, for transportation to the Port of Khorramshahr, Iran. The Export Forwarding Instructions issued by Harnco and covering the purchased equipment stated "on-deck loading not permitted without special authority."

The component parts were shipped from the Port of Baltimore on 15 February 1978. Despite Harnco's specific instructions to the contrary and without authorization, the cranes were loaded and transported on-deck from at least Baltimore to New Orleans. The cargo ship carrying the equipment arrived at Khorramshahr by May 1978. For several months the ship sat in port without being unloaded. After the equipment was unloaded, it remained at dockside for several additional months.

Originally four 180-day date drafts due on 15 September 1978 were issued and sent to MSA; however, because of typographical errors, three new 180-day date drafts due on 15 April 1979 were prepared and transmitted to MSA in September 1978. MSA accepted four drafts totalling U.S. $1,251,757.65; however, despite requests for payment by Harnco, the date drafts have not been honoured.

The agreement between MSA and Harnco makes no reference to governing law; however, under general choice of law principles, the law of the United States, the jurisdiction

with the most significant connection with the transaction and the parties, must be taken to govern in this specific case.[1] Not only was the agreement accepted in the United States by Harnco, a Delaware Corporation, but the component parts were manufactured in the United States, and Harnco completed its performance by delivering the equipment FOB its Iowa plant. See Economy Forms Corporation and The Government of the Islamic Republic of Iran, et al., Award No. 55-165-1 (14 June 1983).

The United States law applicable to this commercial transaction is the Uniform Commercial Code ("UCC") which, with minor variations, has been adopted by 49 of the 50 states, including each of the United States jurisdictions with contacts with this transaction.

Harnco has argued that under UCC §3-302 it is a "holder in due course" of the accepted drafts[2] and as such is entitled to payment of them, irrespective of any defence based on the underlying transaction which gave rise to the drafts. While under the UCC a payee, such as Harnco, may be a holder in due course, under UCC §3-305(2) such a holder

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[1] Restatement (Second) of Conflict of Laws §188 (1971); see also Dicey and Morris, The Conflict of Laws p. 219 (1980 2d ed.)

[2] UCC §3-302(2) provides as follows:
A payee may be a holder in due course.

does not take the drafts free from the defences of a party to the instrument with whom the holder has dealt.[3]

MSA has alleged that it is under no obligation to honour the drafts because the crane parts which it received were rusted. Under the agreement with MSA, Harnco was required to deliver the component parts FOB its Iowa plant. Harnco has produced evidence, in the form of a Certificate of Good Quality covering the equipment, shipping documents and affidavits, that immediately prior to the time the component parts were loaded on the rail carrier they were inspected, coated with protective oil, placed in export packing and certified to be in good condition. Special precautions to protect against rust and corrosion were taken. MSA has produced no evidence to rebut this.

Under the UCC, the contractual delivery term of FOB Harnco's plant obligated Harnco to make reasonable arrangements for the shipment of the goods at MSA's expense and to bear the risk and expense of putting them into possession of

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[3] UCC §3-305(2) provides as follows:

> To the extent that a holder is a holder in due course he takes the instrument free from
> ...
> (2) all defenses of any party to the instrument with whom the holder has not dealt ....

the rail carrier.[4] Once Harnco had placed the components in the rail carrier's possession at its Iowa plant in good condition, it had completely performed its obligations under the agreement and under UCC §2-509 the risk of damage or delay passed to MSA.[5]

Harnco has also produced evidence showing that any damage to the crane parts occurred after the equipment had left Harnco's plant. Letters from the agent of Iran Express Line, the carrier chosen by MSA, contain admissions of

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[4] UCC §2-319(1)(a) provides as follows:

> (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which
>
> (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier;....

UCC §2-504 provides, in part, as follows:

> Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must
>
> (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case;....

[5] UCC §2-509(1)(a) provides as follows:

> (1) Where the contract requires or authorizes the seller to ship the goods by carrier
>
> (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505);....

misloading the equipment and above-deck transportation of the goods at least from Baltimore to New Orleans. Several affidavits submitted by Harnco attest to the lengthy delays in unloading the equipment from the ship and in the lengthy portside warehouse storage following unloading. Despite the above-deck shipment and the delay in unloading, the cranes were still in substantially good condition when unloaded in Iran. According to a June 1978 report of the Ports and Navigation Organization of Khorramshahr submitted by MSA, only parts of the cranes were rusted. There was no indication that the rust rendered the cranes unusable or that the rust condition could not be remedied.

However, even after the crane parts were unloaded at Khorramshahr, MSA allowed the equipment to remain at dock-side for several months, and then to remain in its portside warehouses for approximately a year. It was only after this time, as evidenced by two MSA internal memoranda of June 1979, that MSA noted any substantial rust. A further report was prepared by two members of MSA's quality control staff, but not until 27 September 1983.

Finally, as MSA provided Harnco's main office and local Iranian representatives with no notice of any complaint regarding the cranes and never disputed its liability for payment until it filed its response in this proceeding before the Tribunal -- nearly four years after the delivery of the equipment in Iran -- MSA is precluded from asserting

the defence that the cranes were rendered unusable by rust. Under the UCC, MSA was obligated to notify Harnco within a reasonable time after discovering the alleged breach or else it was barred from asserting defects in the equipment as a defence.[6]

The Tribunal, therefore, finds that Harnco is entitled to receive the face value of the accepted drafts in an amount totalling U.S. $1,251,757.65 and interest for the period of non-payment of the drafts. The Tribunal finds that Claimant should be awarded interest at the rate of 10% from the date of maturity of each date draft to the date on which the Escrow Agent instructs the Depositary Bank to pay the Award.

2. Second Claim

Pursuant to several agreements entered into in late 1976 and 1977, Harnco sold MSA various items of crane equipment and parts. In payment for this equipment, MSA accepted sight and date drafts. MSA has already honoured the sight drafts representing 90 percent of the purchase price under each agreement. MSA, however, has accepted but not honoured the date drafts representing the 10% balance of the purchase price.

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[6] UCC §2-602(1) provides as follows:

> (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

Harnco's Second Claim originally sought U.S. $153,850.81, which amount represents the principal due on 16 drafts accepted but not honoured by MSA. Since the Statement of Claim was filed, however, 12 of these drafts have been the subject of the EX IM Bank Settlement Agreement referred to above. On these 12 drafts, Harnco now alleges that it has already received insurance reimbursement from EX IM Bank covering 95% of the face value of the notes. Harnco now seeks recovery of U.S. $6,025.75, representing the uninsured 5% of the face value of these 12 drafts which were due on various dates between 16 January 1979 and 15 March 1979. Harnco also seeks recovery of the full amount due on the four other drafts accepted by MSA -- $11,164.15 due on 3 February 1978; $853.38 due on 25 March 1978; $20,519.50 due on 29 May 1978; and $798.61 due on 5 June 1978. The total principal amount now sought is thus U.S. $39,361.39. Representatives of Harnco contacted MSA on several occasions regarding the non-payment of all of the drafts. MSA's financial director responded by telex on 22 May 1979 that the non-payment was the result of "MSA's financial difficulties" and promised that the drafts were included in a "schedule of payments to be made in near future."

For the same reasons as stated above in the discussion of Harnco's First Claim, the law of United States jurisdictions, as codified in the UCC, is the law applicable to this series of agreements. Under the UCC, although Harnco is a holder in due course of the drafts, it does not hold the drafts free of any defences to the underlying agreements

which MSA can assert. In this respect, MSA has alleged that certain unspecified equipment and parts which it received from Harnco were either defective or delivered late and that such defective and late deliveries breached the agreements under which the equipment was purchased and violated the 1973 Agreement pursuant to which Harnco was obligated to sell to MSA the components for certain crane models.

In support of its contentions, MSA has submitted a series of telexes and letters, many of which are dated prior to the dates of the agreements underlying the drafts and thus bear no relation to the contracts in question. Only two of the documents submitted by MSA relate to any of the date drafts or purchase agreements which are the subject of this claim. Neither document includes claims that Harnco breached any agreement or demands a reduction in purchase price. One document merely requests replacement parts. While the second document indicates that Harnco was responsible for a delay in completion of equipment beyond the scheduled delivery date, it is far from conclusive evidence as to Harnco's responsiblity, as Harnco submitted several telexes establishing that MSA, by its failure to provide shipping instructions to Harnco, was responsible for shipping delays. MSA has thus not presented sufficient evidence that through the fault of Harnco the equipment and parts it received under these agreements was either shipped late or in a defective condition. Thus MSA has not proven that Harnco breached the purchase agreements.

Harnco, however, has submitted sufficient evidence to establish that the goods which it shipped were delivered to the buyer free of defect. All deliveries were FOB Harnco's plant, which, under the UCC, meant that all risk of damage and delay passed to MSA upon Harnco's delivery of the goods in good condition to the rail carrier at its plant. Harnco has established that with regard to each shipment, it performed its customary pre-loading inspection to assure good condition and export-packed the equipment.

Moreover, MSA has presented no evidence that its acceptance of the date drafts was subject to any reservation or that it at any time contacted Harnco to complain about defects or delays. Having failed to notify Harnco of any defects or delays with regard to the equipment covered by these agreements until this claim was filed at the Tribunal, some five to six years after the equipment was received by MSA, MSA is precluded from asserting this defence. In this respect it should be noted that MSA has made partial payment for the equipment and parts. Such partial payment indicates that MSA was satisfied with the condition of the equipment.

MSA has also asserted that delayed and defective shipments by Harnco violated the terms of the 1973 Agreement. On 1 February 1976, HIC and MSA entered into an Agreement (the "1976 Agreement") which addressed the problems which had arisen under the 1973 Agreement. Both the terms of the 1976 Agreement and the subsequent behaviour of

the parties suggest that the 1976 Agreement effected a resolution of any problems or disputes between Harnco and MSA arising prior to 1 February 1976. Although under the 1976 Agreement Harnco was obligated to ship any equipment promptly or suffer a reduction in the purchase price payable, the Tribunal, as stated above, finds no evidence that the shipments pursuant to the purchase agreements in question were delayed. The Tribunal thus holds that with respect to the shipments at issue in the Second Claim, Harnco did not violate the 1973 or 1976 Agreements between the parties.

MSA has also asserted that the EX IM Bank Settlement Agreement settled all of the claims alleged by Harnco in its Second Claim. The Tribunal has independently reviewed the EX IM Bank Settlement Agreement. As a result of this review, the Tribunal has determined that with regard to the 12 notes upon which Harnco alleges it received insurance proceeds equal to only 95% of their face value from the EX IM Bank, the Bank, in its Settlement Agreement, received the full face amount of each of the 12 notes. The claim on those 12 notes must, therefore, be deemed to have been settled by the EX IM Bank Settlement Agreement. The four other drafts upon which Harnco is claiming, however, were specifically excluded from the Settlement Agreement.

The Tribunal, therefore, holds that Harnco is entitled to U.S. $33,335.64, representing the face amount of the four uninsured accepted drafts. Interest is awarded at the rate of 10 percent on U.S. $11,164.15 from 3 February 1978; on

U.S. $853.38 from 25 March 1978; on U.S. $20,519.50 from 29 May 1978; and on U.S. $798.61 from 5 June 1978. Such interest shall be payable until the Escrow Agent instructs the Depositary Bank to pay the Award.

3. Third Claim

On 26 April 1973, MSA and HIC entered into the 1973 Agreement pursuant to which HIC granted MSA the exclusive right to use certain confidential information to manufacture designated types of Harnco cranes in Iran under the Harnco trademark (Sections 2(a) and 7). HIC was obligated to deliver the then-existing confidential information within 30 days after the required Governmental approvals of the 1973 Agreement and to deliver any future confidential information "as soon as practicable" after such information had been adopted by Harnco in its own manufacture of the cranes (Sections 3(a) and 6). Subject to the reasonable requirements of HIC's and Harnco's business, HIC was also obligated to provide MSA with a technical consultant for the purpose of the "initial training" of MSA personnel and "assisting" MSA to commence manufacture of the cranes as soon as possible (Section 3(c)).

The 1973 Agreement, the initial term of which was five years, would be automatically renewed for successive additional periods of three years each unless, at least six months prior to the expiration of the initial period or any subsequent renewal period, either party provided written notice of termination (Section 11). That Agreement could also be terminated for cause so long as the non-breaching

party provided written notice to the defaulting party (Section 12(a)).

Under the 1973 Agreement, MSA was obligated to make two separate periodic payments to HIC. The first of these was an annual "Technical Service Fee" to be paid in consideration of HIC's furnishing confidential information, technical assistance and support, and the right to use the Harnco trademark (Section 9(a)). Minimum annual Technical Service Fees payable to HIC in United States dollars were established for each year after the second year of the Agreement (Section 9(c)). Secondly, in consideration of HIC's provision of technical consultants, MSA was obligated to pay a Technical Consultant Fee not exceeding U.S. $2,500 per month per consultant. (Section 3(c)).

Although obligated by the 1973 Agreement to make these payments, MSA failed to pay U.S. $134,021.38, representing the Technical Consultant Fees from July 1975 through October 1978, and U.S. $197,500, representing the minimum annual Technical Service Fees for the years 1975 through 1981. In defence of its non-payment, MSA has alleged that HIC breached the 1973 Agreement by failing to train MSA personnel, by failing to transfer technology to MSA and by shipping equipment late or shipping defective equipment. MSA also argues that as a result of the imposition of economic sanctions by the United States Government, HIC provided no services at all from 1979 to 1981 and is thus not entitled to any minimum Technical Service Fee for those years.

The evidence submitted, however, fails to establish that at least prior to October 1978 HIC breached its contractual obligations. Many of the documents provided by MSA are dated prior to 1976. As discussed above in relation to the Second Claim, problems which may have arisen under the 1973 Agreement prior to the date of the 1976 Agreement are irrelevant to the present Claim as that latter agreement resolved all disputes between HIC and MSA arising prior to 1 February 1976. None of the documents dated after the 1976 Agreement specifies any contractual obligation which HIC failed to perform. The only relevant evidence provided by MSA is a telex indicating that one of HIC's consultants was about two weeks late. The telex, however, does not request a reduction in the fees or allege that HIC had breached the 1973 Agreement. Although MSA has submitted some evidence of problems at the MSA factory, there is no indication that such problems were the result of HIC's failure to provide consultants or technical information.

Furthermore, MSA was entitled under the Agreement to terminate the contract in the event of a breach thereof; there is no evidence that it ever sought to do so. Nor is there evidence that it ever protested the invoices regularly sent by HIC, some of which it paid. Rather than protesting the invoices or terminating the Agreement for breach, MSA in May 1979 telexed Harnco and admitted that the reason for nonpayment of the minimum Technical Consultant Fees and Technical Service Fees invoiced as of that date was its own financial difficulties.

The evidence submitted by the Claimant establishes that during the relevant time until October 1978 HIC provided the confidential information and technical consultant services required by the Agreement. Although one document submitted by the Respondent indicates that in July 1974 certain engineering data had been received later than expected, there is no indication that HIC ever failed to provide MSA with the information or services required under the Agreement. The Tribunal, therefore, holds that the Claimant is entitled to the Technical Consultant Fees from July 1975 up to and including October 1978 and the minimum annual Technical Service Fees for the years 1975 up to and including 1978.[7]

After October 1978, however, HIC, as a result of MSA's failure to pay the previous invoices, refused to assign consultants or transmit additional technical information to MSA. Nonetheless, the Claimant seeks the minimum annual Technical Service Fees due in the years 1979, 1980 and 1981. The fees were due and payable quarterly but generally were not billed until June of each year.

Under Section 9(a) of the 1973 Agreement, payment of the minimum annual Technical Service Fees was contingent upon "the furnishing by HIC ... of the CONFIDENTIAL INFORMATION and technical assistance and support relating to the PRODUCTS and right to use the [Harnco] trademark...." Clearly, after October 1978, HIC provided MSA with neither

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[7] Respondent has not asserted as a defence any undue delay in the assertion of any portion of this claim.

new confidential information nor technical assistance; however, MSA still possessed the technical information previously provided by HIC and still had the right to use the Harnco trademark. The evidence submitted by MSA clearly indicates that after 1978 it still continued manufacturing and selling products bearing that trademark. Based upon this evidence, the Tribunal considers that, while HIC is not entitled to receive the full minimum annual Technical Service Fees due during the years ending June 1979 and June 1980 and due prior to 19 January 1981, it is entitled to receive a percentage of such fees, which percentage the Tribunal estimates to be 25% of the minimum annual Technical Service Fees for those periods.

That portion of the Technical Service Fee for the year ending June 1981 which was not due and payable until after 19 January 1981 presents a different problem. The jurisdiction of the Tribunal is limited by the terms of Article II, paragraph 1, of the Claims Settlement Declaration to those claims outstanding on 19 January 1981. The Claimant argues that prior to that date, MSA had taken actions constituting a repudiation of its obligations, thus entitling Harnco to an immediate right of action on these fees. The Claimant bases its argument on United States law. The 1973 Agreement, however, contained a choice of law provision providing that the contract was to be construed and interpreted in accordance with the laws of Iran. MSA has not argued the question of whether Iranian law recognizes the right of a non-defaulting party to sue on the

grounds of anticipatory breach. In the instant case, however, HIC's actions were inconsistent with the Claimant's argument that the 1973 Agreement was anticipatorily breached by MSA. Although HIC had the right under the Agreement to terminate the contract because of a material breach by MSA, it never exercised its right to terminate -- an indication that it considered the 1973 Agreement as continuing in force and not irrevocably breached. Moreover, there is insufficient evidence suggesting that HIC otherwise treated the Agreement as being anticipatorily breached. The Tribunal, therefore, concludes that the portion of the 1981 Technical Service Fee not due and payable until after 19 January 1981 was not outstanding within the meaning of the Claims Settlement Declaration and that, therefore, the Tribunal lacks jurisdiction over that portion of the claim for the 1981 Technical Service Fee. The Tribunal has jurisdiction over those payments which were due and payable prior 19 January 1981.

The Tribunal holds that Harnco is entitled to receive U.S. $134,021.38, representing the Technical Consultant Fees from 1975 to October 1978; U.S. $85,000, representing the minimum annual Technical Service Fees for the years ending June of 1976, 1977 and 1978; and U.S. $23,438, representing 25 percent of the minimum annual Technical Service Fees for the years ending June 1979 and 1980 and for the quarterly periods ending September and December 1980. Harnco is also entitled to receive interest at the rate of 10 percent

calculated from the date each amount was payable until the date the Escrow Agent instructs the Depositary Bank to pay the Award.

4. Fourth Claim

By Purchase Order No. 87-2111-1, dated 10 August 1978, Harnco entered into an agreement with Cofraran, S.A.R.L. and Morrison-Knudsen Pacific, Ltd. ("Morrison-Knudsen"), a consortium of engineers acting as agent for MORT, pursuant to which MORT agreed to purchase 11 truck cranes from Harnco F.O.B. Harnco's factory in Michigan. Under the agreement, payment was to be effected by means of an irrevocable letter of credit which MORT was obligated to open. In November 1978, pursuant to a change order, the number of truck cranes to be purchased was reduced to nine, for a total purchase price of U.S. $3,293,154. The other provisions of the contract remained the same.

Harnco commenced manufacturing the equipment and notified Morrison-Knudsen by telex on 1 November 1978 that the cranes were scheduled for shipment pending receipt of the letter of credit. MORT, however, neither opened the letter of credit nor sought to make payment by other means. On 14 December 1978, Harnco received a telex from Morrison-Knudsen stating "[t]he Ministry of Roads and Transportation has directed an investigation of the withdrawal or reduction of purchase orders issued...." Harnco replied by telex, informing Morrison-Knudsen that the nine cranes were ready

for shipment and stating that if the letter of credit was not opened and shipping instructions not provided, Harnco would have to take steps to mitigate its damages. Such a communication, under the circumstances, can be construed as giving notice that the goods would be resold and that MORT would be responsible for any loss. In late December, the letter of credit was still not opened, and Harnco, in an attempt to minimize its damages, began to resell the cranes. By March 1980, all nine cranes had been resold.

MORT first argues that no binding agreement existed with Harnco because Harnco had failed to send a written acceptance of the contract to Morrison-Knudsen. The Claimant provided a copy of the acknowledgement, which it had signed on 30 August 1978 and returned to Morrison-Knudsen. Under the terms of the Purchase Order, by signing and returning this document, Harnco accepted MORT's offer to purchase the cranes.

Even if Harnco had never sent a written acceptance to Morrison-Knudsen, its mere promise to ship the equipment consituted an acceptance of Morrison-Knudsen's order. The contract by its terms was governed by the law of Idaho, which includes the UCC. Under the UCC, when Harnco notified Morrison-Knudsen by telex in November 1978 that the cranes

were scheduled for shipment, this prompt promise to ship constituted an acceptance of the purchase order.[8]

MORT also maintains that its opening of the letter of credit was a condition precedent to a binding contract and that since it never opened the letter of credit, it was not obligated to purchase the nine cranes. In defence of its position, MORT submitted a letter dated 11 October 1978 from Morrison-Knudsen which stated that "...vendors absolutely refuse to commence manufacturing the particular item until a Letter of Credit is transferred in their favor." This letter, however, which is dated almost two months after the purchase order in question and which does not even mention the Claimant, merely indicates an alleged practice of some vendors, presumably in order to show that the acceptance of a purchase order by a seller prior to the issuance of the letter of credit was considered a risky business decision. The letter does not indicate that the opening of the letter of credit was a condition precedent to a binding contract once the seller had accepted the purchase order or that it was a condition precedent to an enforceable contract in the instant case.

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[8] UCC §2-206 provides, in part, as follows:

> (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by prompt promise to ship or by prompt or current shipment....

Moreover, the provisions of the purchase order agreement with Harnco do not support MORT's argument. The first page of the purchase order clearly identifies the letter of credit as a "term" of the agreement, and the agreement states that "Letters of Credit will be (have been) opened by the Ministry of Roads and Transportation...." Nowhere in the agreement is it stated -- or could it be reasonably inferred -- that the opening of the letter of credit was a condition precedent to a valid agreement. Finally, under Section 2-325(1) of the UCC, the law governing the contract, "[f]ailure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale."[9] The Tribunal, therefore, concludes that MORT's failure to open the letter of credit was a breach of the purchase agreement with Harnco.

MORT has finally argued that even if it did breach the purchase agreement, the breach is fully excused by *force majeure* of the Iranian Revolution. Even assuming that any of the doctrines of *force majeure*, impossibility or frustration of purpose could be applicable, MORT has not submitted facts which would establish any of these defences. Moreover, MORT never gave notice of any such excuses for

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[9] Under UCC §1-204(3), "[a]n action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time."

non-performance nor otherwise invoked such excuses at the time of non-performance. There is no evidence indicating that MORT could not notify Harnco of conditions which might justify non-performance. Indeed, the evidence establishes that in November 1978 MORT entered into an amendment to the contract reducing the number of cranes purchased.

Of course, that conditions may have made performance difficult for MORT does not legally excuse MORT from performance. Those conditions and the lack of communication from MORT, however, justified Harnco in considering the contract breached and taking steps to mitigate its damages. Had Harnco delayed further, the damages might have been greater.

The Tribunal, therefore, holds that in the circumstances MORT's failure to open the letter of credit was such a breach of the purchase agreement entitling the Claimant to damages.

Claimant seeks damages of U.S. $114,099, representing the difference between the MORT contract prices and the resale prices of the cranes, and U.S. $474,478.34, representing carrying costs calculated from the scheduled delivery dates until the dates of resale. The Claimant has submitted affidavits and work sheets detailing its method of calculating the amount of damages sought and its other claims.

Under the UCC, once MORT had breached the purchase agreement by failing to open the letter of credit, the Claimant, without receiving MORT's approval, was entitled to resell the cranes and recover the difference between the contract price and the resale price.[10] In regard to the loss suffered on resale, the Claimant's evidence shows that although most of the cranes were sold at prices lower than the MORT contract prices, two of the cranes were sold at higher prices. This fact and the fact that sales discussed *infra* in Claim Five were made at profits suggests that the sale was made in good faith and in a commercially reasonable manner and that the resale prices reflect the "market price"

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[10] UCC §2-703 provides, in part, as follows:

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may
>
> ...
>
> (d) resell and recover damages as hereafter provided (Section 2-706).

UCC §2-706(1) provides as follows:

> Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

which would establish the damages under UCC Section 2-708 even if UCC Section 2-706 were not applicable.[11]

The Claimant, relying on UCC Section 2-706(6),[12] has not taken the resale profit on these two cranes into account in calculating the damages to which it is entitled. Under UCC Section 2-706(1), however, the resale price and the contract price appear to refer to the price covering all the goods under the contract -- not the price of each particular item. The Tribunal, therefore, concludes that in arriving at the resale price both the losses and the gains sustained on the resale of each individual item covered by the contract must be taken into account. Under UCC Section 2-706, the Claimant is not accountable to MORT for any net profit made on the resale of all the goods under the contract. But in determining the loss, credit should be

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[11] UCC §2-708(1) provides, in part, as follows:

> Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the differece between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

[12] UCC §2-706(6) provides, in part, as follows:

> The seller is not accountable to the buyer for any profit made on any resale.

given for those items sold at a profit. The Claimant is thus entitled to damages of U.S. $110,862, representing the loss on the resale of the goods, plus interest at the rate of 10% from the date on which the resale payment was received until the date the Escrow Agent instructs the Depositary Bank to pay the Award. As to interest prior to such date see <u>infra</u>.

The Claimant also seeks carrying costs, composed of physical carrying costs (inventory warehousing, physical handling and storage) and interest. Under Sections 2-706(1) and 2-710 of the UCC, Harnco is entitled to certain incidental damages resulting from the breach, including the carrying costs sought by the Claimant.[13]

To calculate physical carrying costs, the Claimant applied its standard 4% annual warehouse charge[14] to the contract price for the period from the original scheduled shipment date until the actual shipment date following resale. To calculate interest, Harnco's weighted average short term borrowing rate was applied to the sum of the

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[13] UCC §2-710 provides as follows:

> Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

[14] The Claimant submitted evidence that the 4% warehouse factor was relied upon by Harnco in the regular course of its business in a number of commercial transactions.

warehouse charge and the MORT contract price for the period from the scheduled payment date until the actual payment date following resale.

While Harnco is entitled to compensation for its carrying costs, the Tribunal concludes that certain adjustments should be made in the Claimant's method of calculating the amount of such compensation. In regard to the physical carrying costs, the 4% annual warehouse factor should be applied not from the original scheduled shipment date but from 1 November 1978, the date the cranes were ready for shipment. Harnco is therefore entitled to U.S. $123,189 as compensation for its physical carrying costs. The Tribunal, however, does not consider such carrying costs to be the type of expenses, the nonpayment of which would entitle the Claimant to interest.

In regard to the interest sought by Harnco as compensation for the delayed receipt of the price of the cranes, the Claimant should be compensated for non-receipt of the contract price from MORT as of the date payment from MORT should have been received, December 1978, until the date Claimant received payment following resale. The Tribunal concludes that Harnco is entitled to receive U.S $280,527, representing interest on the contract price calculated at the rate of 10% from 1 December 1978 until the dates upon which payment for the resold cranes was received, which dates extended from 31 March 1979 to 31 March 1980.

5. Fifth Claim

On 2 July 1978, Harnco provided MSA with a written proposal to sell five Model 325TC cranes. By its terms the proposal expired on 31 July 1978. On 21 August 1978, MSA forwarded to Harnco its own purchase order, which incorporated the terms of Harnco's earlier proposal. In September, Harnco returned its acceptance copy of the MSA purchase order to MSA.

Pursuant to the terms of Harnco's proposal, as incorporated in the MSA purchase order, payment of 10% of the total purchase price of U.S. $584,647 was to be effected by a letter of credit with the balance payable by 180-day date drafts.

At the request of MSA, Harnco shipped the completed cranes to the port of Baltimore in August and September 1978 and notified MSA that they would be held there pending receipt of the letter of credit. Despite requests by Harnco, MSA failed to open the letter of credit. Following this failure of MSA to open the letter of credit and after MSA refused to open letters of credit in connection with other contracts with Harnco and GmbH, in December 1978 Harnco began to resell the cranes to third parties. The resales were completed in October 1979.

MSA has argued that as it did not accept the Harnco proposal until 21 August 1978, three weeks after the proposal's expiration date, no valid contract existed between the parties. For the reasons stated above in the discussion of the First Claim, the law applicable in the United States governs the question of the validity of this purchase agreement. Even though Harnco's proposal expired on 31 July 1978, MSA's purchase order incorporating the terms of the Harnco proposal - including the price - was a counter offer under applicable United States law. Once Harnco accepted MSA's order by returning the "acceptance copy" thereof, a valid contract existed between the parties.[15]

This legal conclusion is supported by the regular course of dealing between Harnco and MSA. Generally, whenever MSA desired equipment from Harnco, it would meet with a representative of Harnco. Harnco would then prepare and submit a proposal in the form of a pro forma invoice to MSA, which would accept the offer by either sending its own purchase order incorporating the Harnco proposal or notifying Harnco of its purchase order number. Harnco would then usually return the "Acceptance Copy" of the order to MSA as an acknowledgement. A series of communications between parties may together constitute a contract between them. See Economy Forms Corporation and The Government of the Islamic Republic of Iran, et al., Award No. 55-165-1 (14 June 1983).

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[15] See 1 Corbin on Contracts §89 at 379 (1963) ("If the party who made the prior offer properly expresses his assent to the terms of the counter offer, a contract is thereby made on those terms.")

MSA has also argued that its failure to open the letter of credit precluded the formation of a binding contract. As discussed above, under the UCC such a failure is a breach of the contract entitling Harnco to damages. A letter of credit was clearly identified in Harnco's proposal as a term of the agreement, not a condition precedent thereof. Moreover, under the 21 August 1978 purchase order, Harnco was obligated to ship the cranes in August. Delay in shipment would have subjected Harnco to penalties under the 1976 Agreement. Although MSA has submitted a number of documents which it claims establishes that both parties understood that the opening of the letter of credit was a condition to a binding contract, these documents do not in any way relate to this purchase of cranes from Harnco.

MSA's course of conduct following Harnco's acceptance of the purchase order also does not support its argument that no binding agreement existed between it and Harnco. MSA requested that the equipment be shipped to port as soon as possible. In response to Harnco's repeated requests regarding the letter of credit, MSA not only informed Harnco of its efforts to open the letter of credit, but opened a Bank Registration for the cranes, a precondition to the establishment of the letter of credit.

Harnco resold all of the cranes at a profit of U.S. $46,181 and now seeks only damages for the carrying costs it incurred for the period between the scheduled shipment date under the MSA contract and the date it received payment

following resale. In calculating these damages, Harnco utilized the same methods as detailed above in the Fourth Claim. In light of all the evidence and after having performed its own calculations, the Tribunal concludes that the Claimant's carrying costs were U.S. $48,284. U.S. $14,493 of this amount represents its physical carrying costs calculated at the rate of 4% of the MSA contract price from 1 September 1978 until the date of resale. U.S. $33,791 of the carrying costs represents interest on the unpaid contract price at the rate of 10% of the contract price from 1 September 1978 until the dates of payment on resale, which dates extended from 31 August 1979 to 31 March 1980.

Although under a literal interpretation of the UCC, Harnco is entitled to compensation for such costs,[16] there is authority for the proposition that when a seller, such as the Claimant, resells goods for a profit, this profit should be used to offset any incidental damages suffered.[17] The Tribunal concludes that such an offset is a better and more equitable view of the law and finds that the Claimant is entitled to damages of U.S. $2,103.

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16 Following a breach of contract, a non-defaulting seller is entitled to compensation for incidental damages, including carrying costs, under either UCC §2-706(1) or UCC §2-708(1).

17 See 1 R. Alderman, A Transactional Guide to the Uniform Commercial Code 388-390 (2d ed.).

6. Eighth Claim

In payment of the purchase price for one hydraulic crane purchased from HIC, MSP issued six promissory notes to Harnco. Each note provided for 9 percent annual interest payable from 15 October 1978, was to be paid on designated dates and was guaranteed by IDRO.

Harnco sold four of the notes and retains two of them, one of which was due on 15 April 1979, the other on 15 October 1981. The face amount of each note is U.S. $73,916.67. Both notes remain unpaid. MSP has conceded that the notes are valid and enforceable but maintains that the Tribunal does not have jurisdiction over the note due on 15 October 1981.

Harnco has argued that under the doctrine of anticipatory repudiation, it had a claim for the note due on 15 October 1981 as of 19 January 1981, on the basis that this note was the last of a series and the previous one had been dishonoured. Under applicable law, however, "[a] cause of action against a maker ... accrues in the case of a time instrument on the day after maturity."[18] There is authority for the proposition that a cause of action on a promissory note cannot be sustained before maturity even if

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[18] UCC §3-122. The law of the United States, the jurisdiction with the most substantial contacts with this transaction, is the law which governs. That the claim on an underlying transaction may revive after non-payment of the note (UCC § 3-802) does not mean the claim was retroactively "outstanding" as that word is used in the Claims Settlement Declaration.

the maker declares his intention not to pay. See Bertolet v. Burke, 295 F.Supp. 1176 (D. V.I. 1969); but see 4 Corbin on Contracts, Sec. 961 ff. (1951).

The Tribunal, therefore, concludes that the claim on the promissory note due on 15 October 1981 was not outstanding on 19 January 1981 and thus is not within the jurisdiction of the Tribunal. The Claimant is, therefore, entitled to receive U.S. $73,916.67 from MSP, which amount represents the face amount of the promissory note due on 15 April 1979, and interest at the contractual rate of 9% per annum on such amount from 15 October 1978 until the date the Escrow Agent instructs the Depositary Bank to pay the Award. As payment from the Security Account must be deemed to be payment by the principal debtor, MSP, the Tribunal makes no finding against IDRO as guarantor.

c. The Counterclaims

Although MSA has alleged that Harnco breached the 1973 Agreement by failing to ship equipment in a timely fashion and by shipping defective equipment, MSA has failed to provide any evidence of a breach by Harnco. As discussed above, MSA has submitted an extensive amount of documentation, most of which predates the 1976 Agreement which

resolved all disputes between the parties arising prior to 1 February 1976. The remaining evidence is mostly routine correspondence unrelated to the purchase orders upon which Harnco is suing. None of these documents identifies any obligation under either the 1973 Agreement or any purchase order which Harnco failed to fulfill. Furthermore, although MSA was entitled under the 1973 Agreement to terminate the contract for breach, it never did so. Although the Tribunal recognizes that it is not bound by local statutes of limitations, this Tribunal has the discretion to determine whether or not there has been an unreasonable delay in presenting a claim to a competent forum. See J. Simpson and H. Fox, International Arbitration 123-124 (1959). In the instant case there has been such an unreasonable delay. Thus, because of the age of the claims and the effect of the 1976 Agreement, the Tribunal determines that such claims are, in effect, barred.

MSA has also alleged that Harnco owes an unspecified amount to both the Social Security Organization and the Ministry of Economic Affairs and Finance for social security contributions and taxes. There is a question as to whether the Tribunal has jurisdiction over such counterclaims. In any event, MSA has failed to produce sufficient evidence regarding these counterclaims. Thus, they should be dismissed.

On 15 December 1983, MSA submitted three filings which contained additional counterclaims and which allegedly were filed in response to the Tribunal's Order of 6 December 1983. This Order, however, authorized MSA to make a post-hearing submission addressing solely Harnco's 3 October 1983 filing. It did not authorize the pleading of additional counterclaims. MSA has provided no justification for this delayed pleading of counterclaims, which justification is required by the Tribunal Rules.[19] Furthermore, the evidence provided by MSA in alleged substantiation of its counterclaims either does not relate to or does not substantiate these counterclaims.

The Tribunal, therefore, holds that MSA's counterclaims must be dismissed as untimely filed and for lack of proof.

D. Costs of Arbitration

The determination of the parties' entitlement to costs is deferred until the award on Claims Six and Seven.

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[19] Tribunal Rule 19(3) provides, in part, as follows:

> "In the Statement of Defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim...."

IV. PARTIAL AWARD

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

Respondent, MACHINE SAZI ARAK, is obligated to pay Claimant, HARNISCHFEGER CORPORATION, the following amounts: U.S. $1,849,140.91, which amount constitutes principal and interest up to and including 20 January 1981; and simple interest on the amount of U.S. $1,521,927.67 at the rate of ten per cent (10%) per annum (365 day year) from and including 21 January 1981 up to and including the date on which the Escrow Agent instructs the Depositary Bank to pay the Partial Award.

Such payment shall 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.

Respondent, MINISTRY OF ROADS AND TRANSPORTATION, is obligated to pay Claimant, HARNISCHFEGER CORPORATION, the following amounts: U.S. $529,345.81, which amount constitutes principal and interest up to and including 20 January 1981; and simple interest on the amount of U.S. $110,862 at the rate of ten per cent (10%) per annum (365 day year) from and including 21 January 1981 up to and including the date on which the Escrow Agent instructs the Depositary Bank to pay the Partial Award.

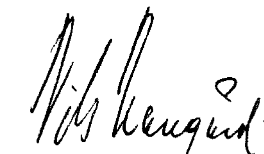
Such payment shall be made out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

Respondent, MACHINE SAZI PARS, is obligated to pay Claimant, HARNISCHFEGER CORPORATION, the following amount: U.S. $73,916.67, plus interest at the annual rate of 9% from 15 October 1978 to the date on which the Escrow Agent instructs the Depositary Bank to pay the Partial Award.

Such payment shall 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.

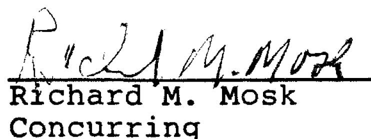
This Partial Award is hereby submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated, The Hague
13 July 1984

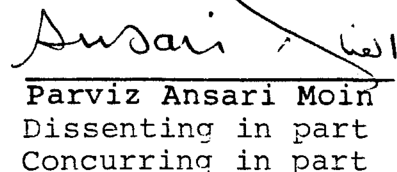


Nils Mangård
Chairman
Chamber Three

In the Name of God,



Richard M. Mosk
Concurring



Parviz Ansari Moin
Dissenting in part
Concurring in part