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AIMS TRIBUNAL

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دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 180
CHAMBER THREE
AWARD NO. 175-180-3

HARNISCHFEGER CORPORATION,
Claimant,

and

MINISTRY OF ROADS AND TRANSPORTATIONS, INDUSTRIAL DEVELOPMENT AND RENOVATION ORGANIZATION OF IRAN, MACHINE SAZI ARAK and MACHINE SAZI PARS,
Respondents.

FINAL 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:
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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:
Ms. Jamison M. Selby
Deputy Agent of the United States of America
Mr. John B. Reynolds
Legal Adviser to the Agent

I. THE PROCEEDINGS

On 18 December 1981, the Claimant, HARNISCHFEGER CORPORATION ("Harnco" or "the Claimant"), filed a Statement of Claim containing seven separate claims against the MINISTRY OF ROADS AND TRANSPORTATION ("MORT" or "MRT"), the INDUSTRIAL DEVELOPMENT AND RENOVATION ORGANIZATION OF IRAN ("IDRO") and MACHINE SAZI ARAK ("MSA"). On 18 January 1982 Harnco filed a First Amendment to Statement of Claim adding an additional claim against MACHINE SAZI PARS ("MSP"). The Claimant thus put forward eight separate claims relating to purchase and delivery of crane machinery, as well as to alleged breaches of a Technical Service Agreement. The amount claimed, as ultimately reduced, was $4,970,811.10. Respondent MSA raised counterclaims for a minimum amount of U.S. $7,685,00.

In a partial award, Award No. 144-180-3 filed (in English) on 13 July 1984, the Tribunal, while dismissing MSA's counterclaims as untimely filed and for lack of proof, awarded the Claimant U.S. $2,452,403.39 for its Claims One through Five and Eight.

An Award on Claims Six and Seven was deferred to be decided in a subsequent Final Award in order to make it possible for the Tribunal to deliberate further on the acceptability of the Claimant's sought amendment, to be described below, of these Claims, as well as on certain other issues.

In the Statement of Claim of 18 December 1981 the said Claims Six and Seven were directed against MORT which, allegedly "acting through MSA as its agent", had in both cases failed to open a letter of credit pursuant to the terms of alleged contracts for the purchase of cranes.

On 11 June 1982, MORT filed its Statement of Defence denying that it ever concluded with Harnco the alleged contracts concerning Claims Six and Seven. On the same day

MSA filed its Statement of Defence and Counterclaim addressing the claims (One through Three and Five) directed against it in the Statement of Claim. It was noted by MSA that Claims Six and Seven "are not relevant" to that Respondent; however, referring to the fact that MSA had been called "representative" of MORT in connection with these two claims, MSA made, in a footnote, certain explanations in which the merits of the Claims in question were denied. MSA had been specified in other claims within the overall claim as a respondent.

On 21 September 1982, Harnco filed Response to Defenses and Statement of Defense to Counterclaims. The Claimant maintained its claim for MORT's alleged breaches of the purchase agreements in the conclusion of which MSA had allegedly acted as MORT's agent.

On 15 April 1983, a Prehearing Conference was held during which Harnco informed that it would file an amendment to its claim. After that, on 5 May 1983, the Tribunal issued an Order providing, inter alia, that "[b]y 10 May 1983 the Claimant shall file:
a) any amendment it seeks to make with regard to Claims 6 and 7" and that "[o]n or before 14 July 1983, Respondents shall submit ... documents relating to the transactions with regard to the cranes involved in Claims 6 an [sic] 7."

Before that order was issued, the Claimant already on 2 May 1983 filed a document entitled Second Amendment to the Statement of Claims by Harnischfeger Corporation. With respect to Claims Six and Seven Harnco, referring to documents provided by MORT and to the discussions at the Prehearing Conference, sought to amend its claim so as "to seek recovery from both MRT, which led Harnco to believe it was responsible for payment as principal, and MSA, which

MRT asserts was acting as principal in issuing purchase orders to Harnco for these cranes."

On 21 September 1983 MORT filed a submission in which it once more denied that it had ever entered, whether directly or using MSA as an agent, into the agreements at issue in Claims Six and Seven.

On 3 October 1983, both Harnco and MSA filed Memorials. Harnco specifically argued MSA's alleged liability for Claims Six and Seven, whereas MSA's Memorial did not contain any direct defences against these claims. MSA's Memorial was supplemented by exhibits filed on 14 October 1983, which are not specifically related to Claims Six and Seven.

The Hearing in this case took place on 28 and 29 November 1983. In the Hearing the Claimant stated that, although MORT is still technically a Respondent in Claims Six and Seven, these claims are principally directed against MSA. The amendment of the claim to this effect was objected to by MSA on the ground that no new claims could be raised after 19 January 1982. MSA also argued on the merits of these Claims denying the merits.

On 15 December 1983 both MORT and MSA filed additional material in which MORT denied its liability under Claims Six and Seven while MSA did not specifically address these claims. The Claimant filed a response on 30 January 1984 stating, with respect to the amendment, inter alia, that "Harnco modified its position to treat MSA as the real principal in interest, and the evidence supports that position."

The Tribunal, in its above-mentioned Partial Award No. 144-180-3 stated as to Claims Six and Seven that:

> 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.

By its Order filed 1 March 1985 the Tribunal invited the Parties to file by 1 April 1985 any materials they wished on the following points concerning Claims 6 and 7:

> 1. Who was the actual purchaser from Claimant (or its subsidiaries) of the materials which are the subject of those claims and what is the basis of any contractual relationship?
>
> 2. Who, if anyone, was actually obligated to pay to Claimant (or its subsidiaries) for the materials which are the subject of those claims?
>
> 3. What was the legal and factual relationship between Claimant (or its subsidiaries), MSA and MORT with respect to the alleged agreement to sell the materials which are the subject of those claims?
>
> 4. During the relevant period, what percentage of the stock of Harnischfeger was owned by Claimant?
>
> 5. Was the Second Amendment to Statement of Claim by Harnischfeger Corporation appropriate? Compare In Re Raymond International (U.K.) Ltd. (Refusal Case No. 21) (8 Dec. 1982); In Re AMF Overseas Corporations (Refusal Case No. 20) (8 Dec. 1982); American International Group v. Islamic Republic of Iran, Award No. 93-2-3 (19 Dec. 1983) and Kimberly-Clark Corp. v. Bank Markazi Iran, Award No. 46-57-2 (25 May 1983).

Harnco filed its Response to the Tribunal's March 1, 1985 Order on 1 April 1985. The Claimant contended, inter alia, that the actual purchaser of the cranes was MORT "with MSA acting as a mere conduit to satisfy Iranian legal requirements." Harnco, however, repeated that it was seeking recovery from both MORT and MSA, "from MRT because Harnco had been led to believe during the negotiations that MRT would be responsible for payment as principal, and from MSA because MRT had asserted that MSA had exceeded its authority and become the principal in the purchase of cranes from Harnco." According to the Claimant the amendment adding MSA as a Respondent in Claims Six and Seven was in the nature of a clarification which is permissible under the applicable rules and precedents.

By Order filed on 4 April 1985, the Respondents were granted an extension until 16 April 1985 to file their responses to the 1 March 1985 Order. MORT and MSA filed their submissions on 24 April 1985. MORT repeated its earlier contentions and stated also that the sought amendment had not been submitted in time. MSA repeated and elaborated its earlier viewpoint that the amendment was inadmissible; MSA also repeated that it had acted neither as MORT's representative nor as a principal in the alleged contracts.

On 10 April 1985 the Claimant filed Harnischfeger Corporation's Objection to Iranian Parties' Request for Extension of Time in which it, inter alia, requested a possibility to file a reply to the Respondents' response to the above-mentioned Order of 1 March 1985 in case the Respondents should be granted an extension to file their submission envisaged in that Order. Noting that the Respondents' filings of 24 April 1985 do not contain any new argumentation, the Tribunal denies the request.

On 17 August 1984, the Claimant had filed a request for correction of Partial Award No. 144-180-3 alleging that, due to the misreading of certain documents on the part of the Tribunal, the Tribunal had failed to award the Claimant U.S.$6,025.75 to which it was entitled under its Claim Two. In its above-mentioned Order of 1 March 1985 the Tribunal also invited the Parties to address certain questions concerning the sought correction (see infra Part III B).

The Tribunal has decided to join this request for correction to be dealt with in this Final Award together with the deferred Claims Six and Seven.

As decided in the Partial Award, also the Parties' entitlement to costs in the proceedings concerning Case No. 180 is determined in this Final Award.

II. CONTENTIONS OF THE PARTIES

A. Amendment

The issue common for Claims Six and Seven has been described in the previous section: whether the amendment seeking to add MSA as a Respondent is proper. As an explanation for originally naming MORT as the Respondent (with MSA as an alleged agent) Harnco contends that, due to the existence of a seller-buyer relationship between MORT and Harnco in connection with certain other affairs, the Claimant was led to believe that a similar relationship existed also regarding the transactions at issue in Claims Six and Seven. The Claimant says that MSA was originally named not only as agent in Claims Six and Seven but as a Respondent to four other claims in Case No. 180 and thus no new party is being added, the question being rather that of a permissible clarification of the claim. Harnco also emphasizes that it submitted the amendment at an early stage of the

proceedings, thus giving both MORT and MSA ample time to defend, and contends that the filing of the Amendment by the Co-Registrars "apparently" means an acceptance of it on the part of the Tribunal. In its 1 April 1985 submission Harnco concludes that its "Second Amendment was 'appropriate' under Article 20 of the Tribunal's Rules and the Tribunal's prior acceptance and filing of the Amendment should not be disturbed at this late date."

MSA's position is that the amendment naming it as a respondent as to certain claims could not be made, since no new claim could be instituted after 19 January 1982. According to MSA the change sought in the instant case is not covered by Article 20 of the Tribunal Rules dealing with amendments, but rather means "the introduction of a new Respondent which throws out the claim from the Tribunal's jurisdiction." Also according to MORT the amendment was inadmissible.

B. Jurisdiction

As regards Claim Seven there is a remaining jurisdictional question which is connected with the fact that this claim is an indirect claim on behalf of Harnco's West German subsidiary, Harnischfeger GmbH ("GmbH"). In its Award No. 144-180-3 of 13 July 1984 the Tribunal accepted Harnco's contention concerning its alleged control, in the sense of Article VII, paragraph 2 of the Claims Settlement Declaration, over GmbH. The Tribunal stated, inter alia, that "Harnco has submitted affidavits establishing ... that from 1978 to the present it has owned between 51 per cent and 75 per cent of the voting stock of its West German subsidiary, GmbH", and that "[t]here is no evidence contradicting these facts." The Respondents, however, assert that as Harnco in

any case did not own more that 75 per cent of GmbH's stock, it is at the most entitled to 75 per cent of any monies to which GmbH may be entitled. According to the Claimant nothing in the relevant rules suggests that an indirect claim of a United States national is defined on the basis of its proportionate ownership of a foreign subsidiary.

B. THE CLAIMS

Claim Six

Harnco originally sought U.S.$630,533 plus interest from MORT, but now seeks U.S. $504,441, plus interest, from either "MSA/MRT" 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.

The claim against MORT was originally based on the theory that MORT bought the machinery in question using MSA as its agent. In the latest submission by Harnco (1 April 1985), the alleged role of MSA was reduced to that of "a formal, or nominal, party to the transaction because it had the exclusive right under Iranian law to obtain import licences for the 650ATC and W300 cranes", MORT itself having been directly involved in all the essential phases, including the conclusion, of the agreements. According to the Claimant the fact that the "technical title" was intended to be transferred to MORT through MSA does not affect the economic and legal nature of the transaction as one between Harnco and MORT.

As evidence for MORT's alleged role as purchaser the Claimant especially relies on a letter from Howard, Needles, Tammen & Bergendoff (HNTB), MORT's design engineers/ construction consultants, to Harnco and MSA requesting written information relating to the cranes in question, Harnco's pro forma invoices concerning the cranes addressed thereafter to MSA and the latter's corresponding purchase orders and purchase order numbers, as well as to affidavits by John C. Schweers, the Claimant's representative in Tehran at the relevant time. Harnco contends that it can neither confirm nor deny MORT's allegation that MSA lacked authorization to act on MORT's behalf; if this allegation is found to be true Claimant seeks recovery from MSA which in that case has acted as principal. As explained above, Harnco has sought to amend its claim correspondingly.

MORT contends that it has not entered into the alleged contracts either directly or using MSA as an agent. MSA, in addition to its objections concerning the amendment, also argues that it had no contract to purchase the cranes. MSA further denies that it had any contractual and legal relationship with MORT as regards the subject matters of Claims Six and Seven; any negotiations were carried out directly between MORT and Harnco.

Claim Seven

According to Harnco, MSA (in the Claimant's original theory MORT using MSA as its agent) contracted with GmbH to purchase 34 cranes but breached the contract by failing to open a letter of credit. 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.

According to Harnco, either MORT through MSA or MSA acting as a principal contracted with GmbH to purchase 34 cranes but breached the contract by failing to open a letter of credit. Harnco's alternative claims against MORT and MSA are based on arguments similar to those put forward in connection with Claim Six.

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

III. REQUEST FOR CORRECTION OF AWARD

A. Claim Two and the Tribunal's Award Regarding It

Harnco's Second Claim concerned allegedly unpaid 10 per cent balance of the purchase price in connection with several contracts concluded between the Claimant and MSA in 1976 and 1977. The amount originally sought, U.S. $153,850.81, represented the principal due on 16 date drafts accepted but not honoured by MSA. In connection with 12 of the unpaid drafts, Harnco, however, subsequently received insurance proceeds from Export-Import Bank of the United States ("EX IM Bank") which in turn has settled its own claims raised before the Tribunal in a Settlement Agreement concluded between EX IM Bank and Bank Markazi outside the framework of the Tribunal. According to Harnco it received insurance reimbursement from EX IM Bank covering 95 per cent of the face value of the 12 drafts, leaving outside an amount of U.S. $6,025.75. Accordingly, Harnco reduced its claim so as to encompass this amount, as well as U.S. $33,335.64 representing the remaining four drafts. The

total principal amount sought by Harnco was thus U.S. 39,361.39. The Tribunal awarded the Claimant U.S. $33,335.64 dismissing the claim for U.S. $6,025,75. In this regard the Tribunal stated in its Partial Award No. 144-180-3 (p.24) as follows:

> 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.

B. The Claimant's Request

In its request for Correction of Award filed on 17 August 1984 Harnco contends that the non-awarding of the amount of U.S. $6,025.75 is an error which should be corrected pursuant to Article 36 of the Tribunal Rules. The Claimant states that, in interpreting the Settlement Agreement between EX IM Bank and Bank Markazi to cover the whole amount of the 12 drafts, "the Tribunal apparently overlooked a footnote to the Settlement Agreement explicitly carving out from the Settlement the uninsured (and thus unreimbursed) portion of Harnco's drafts in Claim 2. This footnote explained that the Settlement as it applied to the insured drafts in Claim 2 did not encompass the uninsured 5% amount of $6,025.75".

Harnco further contends that both it and MSA had agreed during the proceedings that the above sum was not part of the Settlement Agreement, and that this interpretation has been confirmed by EX IM Bank itself. Harnco requests the Tribunal to correct the Award and award the Claimant U.S.$6,025.75, plus 10 per cent interest calculated from the maturity date of each draft.

In its Order of 1 March 1985 the Tribunal, among other things (cf. supra, Part I), asked the Parties to comment on as to whether "the Request for Correction [was] timely filed and the correction authorized by the Tribunal Rules?"

Harnco addressed these questions in its 1 April 1985 submission and in an affidavit by its counsel attached thereto. According to Harnco the Partial Award was received by the counsel on 18 July 1984, and the request filed on 17 August 1984. Emphasizing that the United States Agent who transmitted the award is not an agent of Harnco, the Claimant contends that the request was filed "[w]ithin thirty days after receipt of the award", as required by Article 36 of the Tribunal Rules. According to the Claimant "Harnco's Request is also authorized by the Article 36 mechanism for the correction of ministerial-type errors in an award."

MORT and MSA did not comment on the request for correction in their 24 April 1985 submissions.

IV. REASONS FOR AWARD

A. Preliminary Issues

In its Partial Award No. 144-180-3, the Tribunal determined 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. The Tribunal also held that it had jurisdiction over all the Respondents in accordance with the Claims Settlement Declaration.

In the particular circumstances of this case there appears to be sufficient reasons to allow the Claimant's Second Amendment to its Statement of Claim. In view of the Tribunal's findings on the merits, however, a decision on the amendment issue has no effect on the outcome of the case before the Tribunal. For the same reasons, the Tribunal does not have to reach the particular jurisdictional issue regarding Claim Seven.

B. The Merits

(i) The Factual Background

Claim Six

Following discussions in April and May 1978 involving especially representatives of Harnco and MORT but also those of MSA regarding equipment possibly needed by MORT for a road-building project, Harnco submitted three proposals in the form of pro forma invoices dated 27 May 1978 to MSA for Model 650ATC cranes. The first proposal was for five cranes to be shipped in June-July 1978. The second proposal was

for additional nine cranes to be shipped in August-October 1978. The third proposal covered six cranes, with shipment between September 1978 and January 1979. All three proposals provided that 10% of the payment was to be made with the order by means of a letter of credit or its equivalent. Under the second and third proposals, MSA had the right to cancel its order without penalty provided that it did so at the latest by specified dates between 1 August and 1 December 1979.

On 18 June 1978, MSA sent Harnco a signed purchase order which incorporated by reference the terms of Harnco's May proposal for five cranes. In August, Harnco was informed of the two purchase order numbers which covered the other two Harnco proposals.

Harnco manufactured the cranes and shipped 15 of them to port, informing MSA that they would be held there pending receipt of the letter of credit. Following the receipt of a 13 December 1978 telex from MSA which informed Harnco that "no further deal regarding this [road] project is possible," Harnco began to resell the cranes to third parties.

Claim Seven

In relation to the same MORT road-building project discussed in Claim Six, Harnco, on behalf of GmbH, submitted three proposals on 27 May 1978 to MSA for Model W300 cranes. The three proposals were identical except as to the number of cranes they covered and the scheduled dates of shipment, the latest of which was December 1978. Under the payment terms of the proposals, MSA was obligated to pay 10% of the purchase price by letter of credit or its equivalent with its order.

In August, Harnco and GmbH were informed of its three purchase order numbers covering the three GmbH proposals, totalling 34 W300 cranes. On 6 and 7 September 1978, GmbH returned its signed acknowledgements of the three purchase orders to MSA.

GmbH manufactured the cranes and shipped 17 of them. Following Harnco's receipt of MSA's 13 December 1978 telex stating that "no further deal regarding this [road] project is possible," GmbH proceeded to resell the cranes.

(ii) The Tribunal's Findings

Because of the similarity of the facts and legal issues as between Claims Six and Seven, the following reasoning applies to both claims.

MORT denies that valid contracts existed between it and Harnco. The Tribunal must agree. Although the discussions between the two reached a rather advanced stage, there is not enough evidence that they led to an agreement. According to Mr. Schweers' affidavit filed on 15 July 1983 MORT had, in May 1978, the intention of issuing a letter of intent for the purchase of the 20 Model 650ATC cranes which are at issue in Claim Six and the 34 Model W300 cranes at issue in Claim Seven. In an internal Harnco letter dated 1 June 1978 Mr. C.P. Cousland informed Mr. W.P. Hoban that he had heard from Harnco's local distributor, Sherkate Machinalate Omrani (SMO) , "that the Ministry of Roads had written a letter of intent copy of which [SMO] had already seen and which indicated that they would be ordering 20 Model 650ATCs and 34 Model W-300s for the MK Cofraran job." However, there is no evidence that such a letter of intent was ever finally issued by MORT to Harnco; neither has a

copy of it been included in the evidence nor does Harnco's main representative in Tehran at the relevant time, Mr. Schweers, contend that he saw it. If the letter of intent was not issued, the less reason is there to conclude, in the absence of confirming contrary evidence, that the negotiations between MORT and Harnco led to a final agreement. There is not either evidence that MSA concluded such an agreement in the capacity of MORT's agent, as originally contended by the Claimant. Indeed, in its supplementary submission filed 1 April 1985 Harnco describes MSA's role as a "mutually recognized conduit", a "formal" or "nominal" party to the transaction, who was to make the purchase orders, not as an agent or upon the instructions of any one of the two parties, MORT and Harnco, but on the basis of an agreement between the two. This role of MSA will be discussed below. At this point the Tribunal concludes that the claim against MORT has to be dismissed for lack of proof.

It remains to be decided whether MSA can be held liable as a principal, as alternatively argued by Harnco. It appears that MSA in fact sent Harnco purchase orders and purchase order numbers which covered Harnco's relevant proposals. Such an exchange of documents can normally be held to mean the formation of binding agreements (cf. Claim Five in the Partial Award, p. 41). As it cannot be proven that the alleged agreements existed between MORT and Harnco, the alternative is that they have been concluded between MSA and Harnco. However, in regard to the transactions in question, there are certain features in the position of MSA as a conduit between MORT and Harnco which makes it questionable whether it can be held liable on its own.

The evidence before the Tribunal, especially that provided by the Claimant in its filing of 1 April 1985, shows that MSA was acting in the transactions neither as an agent for MORT nor as an independent principal. MSA's role in the possible agreements was contemplated to be that of a

"nominal" purchaser through which the title would pass to the actual purchaser MORT in accordance with an agreement to be concluded between MORT and MSA. MSA was not to include the cranes in its inventory or to make them available to anyone but MORT. According to the Claimant MSA had to be involved because it had exclusive right to obtain import licences for the cranes in question. In its 1 April 1985 submission Harnco explained as follows:

> Because of its specially privileged status under Iranian law, MSA had a unique factual and legal relationship to Harnco/GmbH and MRT. MSA was required to take formal title to the 650ATC and W300 cranes in order to secure import licenses and was similarly required to implement shipping instructions and perform minimal, unskilled tasks at the assembly point ... The principal parties recognized that their purchase-seller relationship could not be implemented unless MSA facilitated the transaction, and MSA was prepared and compensated to undertake responsibilities to both sides (emphasis added) in order for the transaction to proceed. (Footnote omitted)

Thus MSA was contemplated as a necessary formal link in the finalization of the transaction between MORT and Harnco without any independent role of its own. MSA clearly was not to conclude agreements as an independent principal; it was to enter the picture on the condition that the agreement is concluded between MORT and Harnco - not to send purchase orders or purchase numbers on the initiative of only one of them. As was concluded above, there is not enough evidence to show that MORT ever made any agreement with Harnco so as to enable MSA to proceed. On the other hand, there is indication that Harnco was active in trying to put the transaction into motion through MSA. Thus the letter of 1 May 1978 from MSA to HNTB providing the latter with background information concerning the equipment was, according to Mr. Schweers' 15 July 1983 affidavit, prepared

in co-operation between MSA and Harnco. An internal Harnco letter dated 1 June 1978 from Mr. Cousland to Mr. Hoban, referred to earlier, also shows that it was after discussions with Harnco that MSA agreed to send the relevant orders. The letter shows that after having been told about MORT's alleged letter of intent MSA, although it "was extremely nervous about ordering these quantities of equipment, ... finally agreed to order 5 Model 650ATCs and 17 Model W-300s on a firm basis and also place a conditional order for 15 Model 650ATCs and 17 W-300s ..." Dated 18 June 1978 MSA then sent its purchase order for 5 Model 650ATC cranes. The rest of the cranes were included in purchase order numbers submitted to Harnco by its Tehran representative, Mr. Schweers, in August 1978.

Thus the submission of the purchase orders and purchase order numbers by MSA was rather a result of information given to MSA by Harnco, than a consequence of an agreement between the latter and MORT which MSA's role as "a mutually-recognized conduit" in the contemplated transaction presupposed. In the light of the evidence MSA, however, did not intentionally go beyond the role that had been reserved to it. It was unwilling to order the cranes unless MORT and Harnco reached an agreement, [1] and it did submit - with hesitation - its unconditional purchase order for five 650 ATC cranes only after it had been informed by Harnco that such an agreement had been made, or at least was about to be finalized. As to the rest of the cranes, an internal Harnco telex dated 8 August 1978, when the cancellation time had already expired for some of the cranes, shows that on or about that date Mr Schweers had given the respective

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[1] In its Second Amendment to Statement of Claims by Harnsichfeger Corporation filed on 2 May 1983, the Claimant stated (p.4) that "MSA was reluctant to issue its own purchase orders for the cranes in Claims VI and VII until it received authority from MRT in the form of MRT's own commitment to purchase the cranes."

purchase order numbers on telephone. The manufacture of the rest of the cranes was apparently commenced thereafter. However, only subsequent to that, in another Harnco telex dated 23 August 1978 it is stated that Harnco had been informed on telephone by MORT that the latter had "approved and signed" the purchase of the cranes, and that MSA will be contacted in order for it to submit the orders for the machines. This indicates that by the time MSA submitted its purchase orders or the purchase order numbers were given MORT had not given its consent to the contemplated MORT/Harnco agreement. Indeed, as has been stated above, there is not enough evidence showing that MORT ever entered into such agreement. This again means that an essential condition for the MSA/Harnco agreement contemplated to "implement" the MORT/Harnco agreement was lacking. It is a generally accepted principle in various legal systems that an essential error regarding the conditions upon which a party has entered into a contract may relieve that party from liability, at least where the other party knew or should have known about the error. See K. Zweigert & H. Kötz, An Introduction to Comparative Law: The Institutions of Private Law: 82-93 (1977). Even though in the present case the reasons indicated above would not necessarily render the agreement null from the beginning, the Tribunal holds that it would be contrary to good faith (cf. § 242 on "Treu und Glauben" in the German Civil Code) to allow Harnco to rely on that agreement against MSA afterwards when it is known that the essential conditions on which the conclusion of that agreement was based never materialized. Accordingly, Claims Six and Seven are dismissed also against MSA.

C. Request for Correction

The Claimant in its request relies on Article 36 of the Tribunal Rules. Its paragraph 1 reads as follows:

> Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

The request for correction thus has to be made "[w]ithin thirty days after the receipt of the award."

In this case the English version of the partial award in question was filed on 13 July 1984, and served upon the Agent of the United States of America on 16 July 1984. The Farsi version of the Award was filed on 6 December 1984. The Claimant's Request for Correction of Award was received and filed by the Tribunal Registry on 17 August 1984.

According to Article 2, paragraph 3 of the Tribunal Rules a document "shall be deemed to have been received by [the] arbitrating parties when it is received by the Agent of their Government." See also Hood Corporation v. Iran, Decision No. 34-100-3 (1 March 1985). Considering that the serving of the English version of the partial award on the United States Agent is decisive in the counting as to when the American Claimant shall be deemed to have received the award, the Tribunal concludes that the Partial Award No. 144-180-3 was so received by the Claimant on 16 July 1984. The request for correction filed on 17 August 1984 was thus not made within "thirty days after the receipt of the

award", as required by Article 36. Therefore, and as the Claimant has not presented sufficient explanations in justification for the delay, the Tribunal dismisses the request for having been filed too late.

In view of the above, the Tribunal does not have to reach the question as to whether the alleged error is of such a nature as can be corrected pursuant to Article 36 of the Tribunal Rules.

D. COSTS

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

E. AWARD

For the foregoing reasons,
THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

The Claims Six and Seven, as well as the request for correction concerning Claim Two are dismissed.

Each Party shall bear its own costs of this arbitration.

Dated, The Hague,
26 April 1985

Nils Mangård
Chairman
Chamber Three

In the name of God

Richard M. Mosk
Dissenting Opinion

Parviz Ansari Moin