

ORIGINAL DOCUMENTS IN SAFE

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Case No. 208

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\*\* CONCURRING OPINION of \_\_\_\_\_  
 - Date \_\_\_\_\_  
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CASE NO. 208

CHAMBER TWO

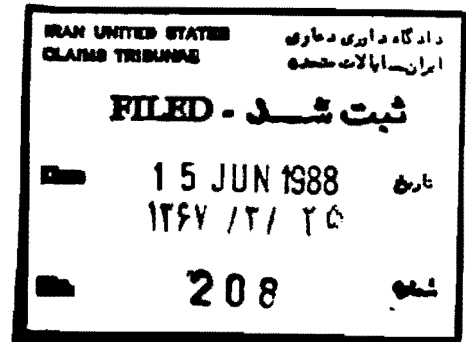
AWARD NO. 369-208-2

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THE BENDIX CORPORATION,  
BENDIX INTERNATIONAL  
SERVICE CORPORATION,  
Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN,  
IRAN HELICOPTER SUPPORT AND  
RENEWAL COMPANY,  
IRANIAN AIRCRAFT INDUSTRIES,  
IRANIAN AIR FORCE, and  
IRANIAN NAVY,  
Respondents.



AWARD

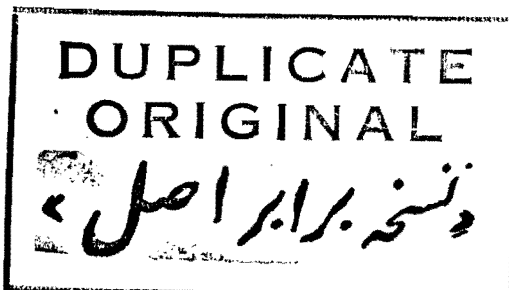
Appearances:

For Claimant:

Mr. Martin Paskoff,  
Attorney for Claimant;  
Mr. Alan Silberman,  
Director of International  
Finance for Claimant.

For Respondent:

Mr. Mohammad K. Eshragh,  
Agent of the Government  
of the Islamic Republic of  
Iran;  
Dr. Akbar Shirazi,  
Legal Adviser to the Agent;  
Mr. Hossein Piran,  
Legal Adviser to the Agent;  
Mr. Mohammad Taghi Moghisi,  
Representative, Defense  
Industry;  
Mr. Dabir Daryabeigi Balvardi,  
Representative, Defense  
Industry;  
Mr. M.B. Aziz Mohammad,  
Technical Expert of Defense  
Industry;



Mr. M. Emami,  
Representative of Ministry  
of Defense;  
Mr. Azade Imani,  
Technical Expert of Islamic  
Republic of Iran Air Force;  
Mr. Yahya Paviz,  
Attorney for Navy;  
Mr. Mohammad Saf Ara,  
Financial Adviser to Navy.

Also present:

Mr. Timothy Ramish,  
Agent of the United  
States of America.

I. INTRODUCTION

1. The Claimants, THE BENDIX CORPORATION ("Bendix") and its wholly-owned subsidiary, BENDIX INTERNATIONAL SERVICE CORPORATION ("BISCO"), both Delaware corporations, filed a Statement of Claim on 11 January 1982, seeking damages totalling U.S.\$1,129,491.06, plus interest, from the Respondents THE ISLAMIC REPUBLIC OF IRAN ("Iran"), IRAN AIR, IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY ("IHSRC"), IRAN AIRCRAFT INDUSTRIES ("IACI"), IRANIAN AIR FORCE ("IAF"), and IRANIAN NAVY ("Navy") based on ten claims.

2. The first claim brought by BISCO against IHSRC seeks U.S. \$121,951.05, plus interest, in compensation for the alleged nonpayment of 15 invoices issued for services provided by two BISCO field representatives in Iran in support of IHSRC helicopter weapon systems. IHSRC has acknowledged liability only for six of these invoices.

3. The second claim directed by Bendix against IHSRC is a claim for U.S.\$49,323, plus interest, arising out of an alleged repudiation of a sales contract pursuant to which IHSRC was to purchase aircraft components manufactured by Bendix. IHSRC denies that it repudiated the agreement, asserting that it was Bendix that breached the contract by failing to deliver the components. IHSRC filed on 15 April 1982 a counterclaim against Bendix for that alleged breach of contract, as well as for breaches of contract for failure to deliver under 37 other sales agreements. IHSRC seeks delivery of the goods at the contract price and various money damages. Bendix has contested the Tribunal's jurisdiction over the 37 additional sales contracts and asserts that it was IHSRC that repudiated all 38 agreements including the one under which Bendix is claiming here. In the event the Tribunal should find that it has jurisdiction over the counterclaim relating to the 37 other contracts, Bendix has in turn submitted a counterclaim to IHSRC's counterclaim

in the amount of U.S.\$72,600, plus interest, for lost profits on these additional agreements.

4. The third claim, a claim for breach of contract brought by Bendix against Iran Air for U.S.\$30,372, and the related counterclaim were settled by the Parties pursuant to a Settlement Agreement entered into on 28 June 1984 and were accordingly dismissed by the Tribunal by its Order of 19 July 1984 pursuant to the Parties' joint request.

5. The fourth claim, brought against IACI by Bendix, seeks compensation amounting to U.S.\$5,859.37 plus interest, for the alleged nonpayment of nine invoices issued by Bendix for various aircraft parts ordered by IACI which Bendix asserts it manufactured and delivered. In its pleadings, IACI denied that the items were ever delivered.

6. Bendix asserts the fifth, six, seventh, and eighth claims against the IAF. These four claims, for a total of U.S.\$190,738.78, arise out of (1) the alleged nonpayment by the IAF of five invoices issued pursuant to a sales contract for aircraft parts that Bendix asserts it manufactured and delivered (Claim Six), and (2) the alleged repudiation of a number of sales agreements, arising out of IAF purchase orders, pursuant to which the IAF was to purchase various items manufactured by Bendix (Claims Five, Seven, Eight). The IAF denies that any of the items covered by Claim Six were delivered and asserts that it terminated the purchase orders involved in Claims Five, Seven, and Eight after Bendix had itself breached the agreements. In addition, the IAF filed on 19 April 1982 a counterclaim for U.S.\$200,000, plus interest, as compensation for damages allegedly incurred as a result of nonshipment of the items.

7. The ninth claim of this Case was brought by Bendix against the Navy for the amount of U.S.\$721,469.91, arising out of contractual arrangements for the sale and purchase of

helicopter-borne sonar systems and parts. Bendix, in particular, seeks compensation for (1) the alleged nonpayment of an invoice for items purchased by the Navy which Bendix alleges it delivered, and (2) the alleged breach by the Navy of a contractual arrangement, which Bendix asserts caused it to be unable to deliver items ordered by the Navy. The Navy has denied that Bendix delivered or that the Navy breached any undertaking. In addition, the Navy filed on 19 April 1982 a counterclaim seeking compensation in the amount, as later amended, of U.S.\$7,460,090.75 for alleged damages caused by Bendix's failure to complete its performance.

8. The tenth claim,<sup>1</sup> for U.S.\$14,585.34,<sup>2</sup> plus interest, is brought by the Claimants against IHSRC and THE ISLAMIC REPUBLIC OF IRAN ("Iran") for the value of personal property left behind in Iran by the two BISCO employees whose services are the subject of Claim One, and who allegedly were forced to flee Iran in late 1978 as a result of wrongful acts or omissions of Iran and IHSRC. The Respondents deny having committed any wrongful acts or omissions.

9. Both Parties seek costs in connection with the arbitration.

10. A Hearing was held on 15 and 16 December 1987.

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<sup>1</sup>This Award follows the numbering of the claims used by the Parties. Given the similarity of the Parties and of the factual background in Claims One and Ten, these claims will be treated together.

<sup>2</sup>The original amount claimed was U.S.\$9,777, amended to the present figure in the Claimants' submission of 14 October 1982.

## II. GENERAL JURISDICTIONAL FINDINGS

11. The Claimant Bendix, a publicly held Delaware corporation, has provided evidence, including a good standing certificate and certified copies of pertinent pages of Bendix's proxy statements issued during the relevant period, establishing to the Tribunal's satisfaction that Bendix is a national of the United States as defined in Article VII, paragraph 1, of the Claims Settlement Declaration. Further evidence, including a good standing certificate and a certified audit by an independent accounting firm, establish that BISCO, a Delaware corporation and wholly-owned subsidiary of Bendix, is, similarly, a national of the United States.

12. There is no dispute that the Respondents are included within the definition of "Iran" contained in Article VII, paragraph 3, of the Claims Settlement Declaration.

13. The Tribunal also finds that the claims satisfy the jurisdictional requirements of Article II, paragraph 1, of the Claims Settlement Declaration as claims arising "out of debts, contracts . . . expropriations or other measures affecting property rights."

14. The Tribunal determines, therefore, that it has jurisdiction over all the claims except for part of Claim Nine, the particular jurisdictional issues of which will be discussed separately in Section VII, infra.

15. The Tribunal also finds that the IAF's counterclaim satisfies the jurisdictional requirements of Article II, paragraph 1, of the Claims Settlement Declaration as a counterclaim arising "out of the same contract, transaction or occurrence that constitutes the subject matter" of the claim.

16. The particular jurisdictional issues that concern the counterclaims of IHSRC in relation to Claim Two and the Navy in relation to Claim Nine will be discussed separately in, respectively, Sections IV and VII, infra.

### III. CLAIMS ONE AND TEN

#### A. The Facts

17. On 23 March 1978, BISCO and IHSRC entered into a contract, thereby reducing to writing an agreement already being performed, pursuant to which BISCO was to furnish the services of two technical Field Service Representatives to support IHSRC helicopter weapon systems. The contract provided for the services of a Field Service Representative in Esfahan at a rate of U.S.\$8,035 a month and one Field Service Representative in Tehran at a rate of U.S.\$8,210 a month, for the period 1 July 1977 through 30 June 1978, extended by amendment from 1 July 1978 through 31 December 1978. The contract also provided in Article 9(B) for reimbursement of certain expenses incurred by the Field Service Representatives. The payment provision in Article 9(C) specified that payment would be made "upon presentation of valid invoices, certified by Maintenance Management, IHSRC."

18. Two BISCO employees, Mr. Ethan Powell and Mr. George Chromiake, were sent to Iran to carry out the services required by the contract. BISCO asserts that the required services were performed until the employees left Iran in the last week of December 1978 when the rising tide of revolution allegedly made them fear for their personal safety and after one of the employees had been advised by the supervising Iranian General not to show up for work during the last week of performance.



19. From 28 July 1978 through 13 February 1979, BISCO issued seven invoices for U.S.\$8,035<sup>3</sup> per invoice and seven invoices for U.S.\$8,210 per invoice for the services rendered by its two employees from 1 June 1978 through December 1978. The first six of these invoices, for services in June, July, and August of 1978, were certified for payment by IHSRC in the Fall of 1978. Bendix also issued on 22 December 1978 an invoice in the amount of U.S.\$8,236.05 for expenses incurred from July 1977 through June 1978 by its two employees.

20. BISCO made a number of attempts to collect the total amount due on all the invoices, beginning on 21 March 1979 with the submission of a sight draft for that amount to Bank Melli in New York. There ensued a series of communications requesting payment, culminating in a telex from IHSRC on 8 October 1979 advising BISCO that IHSRC would "take immediate action to follow up your unpaid invoices upon receipt of your original invoices." On 12 October 1979 BISCO sent a letter to IHSRC apparently enclosing copies of all 15 invoices. There is no dispute between the Parties that the invoices, totalling U.S.\$121,549.30, remain unpaid.

21. After Mr. Powell and Mr. Chromiack departed Iran in December 1978, they were reimbursed a total of U.S.\$14,585.34 by BISCO and Bendix<sup>4</sup> in settlement of their claims for personal property they left behind in Iran. BISCO and Bendix have asserted Claim Ten against IHSRC and Iran to recover this amount.

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<sup>3</sup>One of these invoices was certified by IHSRC for payment only of U.S.\$7,633.25, a correction which BISCO accepted as proper.

<sup>4</sup>Bendix completed Mr. Powell's reimbursement after he was transferred from BISCO to Bendix in 1980 prior to full settlement of his claim. Bendix is apparently, therefore, asserting U.S.\$7,777 of this claim.

B. The Merits

22. In Claim One, IHSRC has acknowledged that it is liable for payment of U.S.\$48,333.25 for the six invoices covering services performed in the summer of 1978 which IHSRC certified for payment in the Fall of 1978. IHSRC maintains, however, that the eight invoices that followed had not been certified by it, and were therefore not payable as valid invoices under Article 9(C) of the contract, because BISCO had not performed the contract services for which the invoices were issued.

23. The Tribunal notes that there is no evidence that IHSRC, during the fall of 1978, complained of BISCO's alleged non-performance or objected to certification because of such lack of performance. The Tribunal, furthermore, has been presented with evidence, unrebutted by any evidence to the contrary, that BISCO's employees were in Iran performing or ready to perform the contract until the last week of the contract period. With respect to the 22 December 1978 invoice for U.S.\$8,236.05, the Tribunal notes that this invoice was for expenses incurred by BISCO's employees for the period July 1977 through June 1978. No allegations have been made or evidence presented by IHSRC that contract performance was deficient in that period, or that the expenses claimed were not allowable under the contract. IHSRC's assertion, made for the first time at the Hearing, that this invoice is questionable because issued almost six months after the relevant period is not persuasive. Nothing in the contract requires an invoice to be issued at any particular time nor was there any other evidence that the invoicing procedure was not appropriate.

24. The Tribunal concludes, therefore, that IHSRC is liable on Claim One for U.S.\$121,549.30, the total outstanding amount on the 15 invoices. The Tribunal notes that one of the invoices called for payment within 30 days of the date

of the invoice, while others requested payment within 30 days of receipt of the invoice. The contract and the IHSRC certification stamp on the six invoices, however, apparently contemplated payment by letter of credit. Under these circumstances, the Tribunal awards interest on the amount due at the fair rate of 10.5 percent to run from 21 March 1979, the date BISCO submitted its sight draft to Bank Melli.

25. With respect to Claim Ten concerning the personal property left in Iran by the two BISCO employees, the Claimants merely assert that IHSRC breached the contract by failing to adhere to a "universal concept of contract law requiring parties to a contract to provide a safe workplace for the life and property of those performing the contract." The Tribunal finds that the Claimants have proffered no evidence regarding the loss of the property and no evidence that acts or omissions of IHSRC resulted in the losses claimed.<sup>5</sup> The Tribunal need not, therefore, address the question of the existence or nature of the implied contractual obligation asserted by the Claimants. The Tribunal, consequently, dismisses this claim for lack of proof.

#### IV. CLAIM TWO

##### A. The Facts

26. The formation of the relevant sales contract between Bendix and IHSRC began with the issuance by IHSRC on 27

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<sup>5</sup>In early pleadings, BISCO apparently also directed this claim against Iran for its alleged wrongful acts resulting in the claimed damages. In later pleadings and at the Hearing, however, BISCO failed to maintain this aspect of its claim. At any rate, the Tribunal considers that it could not have been sustained on the merits, on the grounds of lack of proof of loss due to acts attributable to Iran.

March 1978 of Purchase Order No. A8BHMC6169 (the "Purchase Order") in the amount of U.S.\$78,622.97. The major purchase included therein was to be 120 voltage regulators at a total price of U.S.\$75,600. The Purchase Order specified that payment was to be made by Letter of Credit.

27. On 7 July 1978 Bendix accepted ("the Acceptance") the offer made by the Purchase Order, affirming that payment was to be by "Confirmed Irrevocable Letter of Credit." Both the Purchase Order and the Acceptance contemplated delivery of the voltage regulators to be completed by July 1979. On 9 July 1978, IHSRC opened an irrevocable Letter of Credit in the amount of U.S.\$78,622.97, valid until 28 February 1980. The Letter of Credit was issued by Bank Markazi with Bank Melli Iran acting as the correspondent bank in New York City.

28. Bendix alleges that it was manufacturing the ordered items when, in April 1979, it became concerned whether IHSRC would fulfill its contractual obligations on a wide variety of contracts and purchase orders, including the one here at issue. Consequently, on 1 May 1979, Bendix sent a letter to IHSRC in which Bendix explained that material ordered by IHSRC was becoming available for shipment but that the lack of valid IHSRC Letters of Credit and the failure of IHSRC to respond to numerous "telex requests for the opening and/or amending of covering Letters of Credit" raised serious questions about IHSRC's contract performance. Accordingly, Bendix requested adequate assurances before 30 May 1979 that IHSRC would comply with payment and other contractual obligations; otherwise Bendix might cancel the orders and hold IHSRC liable for damages. On 17 May 1979 Bendix sent a follow-up telex reiterating its warning. Incorporated in the body of the telex was a list of 57 purchase orders, including the one here at issue.

29. On 9 June 1979, a telex from IHSRC acknowledged the letter of 1 May 1979 and stated: "We are busy working on Bendix purchase orders. Please give us a few more days to work on these purchase orders . . . ." Not considering this adequate assurance and receiving no further response during the course of the summer, Bendix informed IHSRC on 6 September 1979 that all outstanding orders had been cancelled.

30. Bendix asserts that, while it was able to divert other materials included in the Purchase Order, it was unable to salvage or divert all the voltage regulator components. Bendix, therefore, alleges that it sustained damages amounting to U.S.\$49,323.

31. In its counterclaim, IHSRC asserts that Bendix was in breach of contract for its failure to deliver under 38 separate purchase orders for helicopter spare parts, including the Purchase Order which is the subject of Bendix's claim here. IHSRC asserts that, since 1975, it had arranged with Bendix, the most competitive supplier, for the purchase and repair of helicopter parts for various Iranian users. According to IHSRC, the purchase orders all constituted parts of a single system purchased from Bendix. IHSRC alleges that it scheduled manufacturing and servicing programs in Iran based on its agreements with Bendix. Nondelivery of the goods by Bendix resulted, therefore, in disruptions in IHSRC's programs. IHSRC seeks either delivery of the goods at the contract price and U.S.\$908,226.11 in damages, or, in the alternative, U.S.\$97,980, plus inflation and interest, representing the value of items allegedly sent to Bendix for repair and never returned, plus an unspecified amount of damages caused by inflation, arising from the necessity for IHSRC to purchase from other sources.

32. Bendix has raised a counterclaim to IHSRC's counterclaim in the amount of U.S.\$72,600 representing lost profits

on the 37 additional sales agreements included in IHSRC's counterclaim.

B. Jurisdiction

33. Bendix has contested the Tribunal's jurisdiction over IHSRC's counterclaim insofar as it relates to the 37 sales agreements additional to the one which is the sole subject of Bendix's claim. The Tribunal notes that the sales contracts are clearly separate and distinct and that IHSRC has failed to provide any evidence that they were all part of a single transaction so as to satisfy the jurisdictional requirements of Article II, paragraph 1, of the Claims Settlement Declaration that a counterclaim must arise "out of the same contract, transaction or occurrence that constitutes the subject matter" of the claim. (See, e.g., Westinghouse Electric Corporation and Islamic Republic of Iran, et al., Award No. ITL 67-389-2 (12 February 1987); American Bell International Inc. and Government of the Islamic Republic of Iran, et al., Award No. ITL 41-48-3 (11 June 1984)).

34. Accordingly, the Tribunal dismisses for lack of jurisdiction IHSRC's counterclaim relating to the 37 sales agreements which are not the subject of Bendix's claim. Consequently, Bendix's counterclaim is also dismissed for lack of jurisdiction. The Tribunal finds that it has jurisdiction over IHSRC's counterclaim to the extent that it relates to the contract which is the subject of Bendix's claim.

C. The Merits

35. Bendix states that Section 2-609 of the Uniform Commercial Code ("UCC"), part of New York law,<sup>6</sup> gives Bendix the right to request assurance of performance when "reasonable grounds for insecurity arise." The statute provides further that "failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract." Having made its request, and not having received adequate assurance, Bendix asserts that IHSRC accordingly repudiated the contract and is liable for damages.

36. The Tribunal notes that Bendix's claim is premised on it having had reasonable grounds for insecurity so as to give it the right to request IHSRC for adequate assurance of performance. The Tribunal notes further that the statute relied on by Bendix states, in Section 2-609(2), that as between merchants "the reasonableness of grounds for insecurity . . . shall be determined according to commercial standards."

37. While evidence exists that Bendix may well have had reasonable grounds for insecurity with respect to other transactions with IHSRC, the Tribunal finds that Bendix has failed to prove that it had reasonable grounds for insecurity with respect to IHSRC's performance of the contract here at issue. Both Parties evidently contemplated completion of delivery of all items specified in the Purchase Order by July 1979. No evidence was introduced to show that this assumption had changed by May 1979. For the deliveries so

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<sup>6</sup>Bendix argues that, for a number of reasons, New York law applies to the contract here at issue. As a result of the decision reached herein, the Tribunal finds that it need not reach the question of the applicability of New York law.

contemplated for July 1979, Bendix was covered by an irrevocable Letter of Credit valid until March of the following year.

38. At the Hearing, Bendix for the first time alleged that it had received a notice from Bank Melli citing a Bank Markazi request to suspend shipments destined for Iran. The Tribunal is not persuaded by this unsubstantiated allegation. No evidence was provided as to when Bendix might have received such a notice nor was any explanation given as to the relevance in May 1979 of such a notice from Bank Melli. In addition, Bendix asserted at the Hearing, also for the first time, that further grounds for insecurity rested on the fact that the Letter of Credit had not been confirmed by an American bank. The Tribunal notes, however, that no evidence was presented to the effect that Bank Melli or Bank Markazi had indicated in the spring of 1979 that they might not pay out on an irrevocable Letter of Credit. Furthermore, there is no evidence that Bendix had ever raised this concern in its communications to IHSRC in 1979.

39. Given all the above circumstances, the Tribunal dismisses this claim for lack of proof.

D. The Counterclaim

40. IHSRC asserts that Bendix breached the sales agreement at issue in Claim Two. The Tribunal observes that, in dismissing Claim Two for lack of proof, it did not decide whether Bendix was in breach of contract and that the burden of proof to show a breach of contract on the part of Bendix remains with IHSRC. However, the Tribunal finds that it need not decide this issue of a breach, because IHSRC has, in any event, provided no evidence as to the damages it allegedly sustained by purchasing the parts elsewhere. The Tribunal, therefore, dismisses IHSRC's counterclaim on this contract for lack of proof.



V. CLAIM FOUR

A. The Facts

41. This claim by Bendix against IACI arises out of eight orders issued by IACI in 1977 and 1978 for the purchase of various aircraft parts, all of which were accepted by Bendix. Bendix asserts that, according to IACI instructions, the items were manufactured and delivered, in nine shipments in 1978 and 1979, to IACI's freight forwarding agent in New Jersey, Behring International, Inc. ("Behring"). Bendix consequently issued nine invoices, each entitled "Invoice and Packing List", between June 1978 and May 1979 in the total amount of U.S.\$5,859.37, which Bendix asserts remain unpaid.

42. On 26 September 1979 Bendix sent a telex to IACI advising it that all IACI orders had been "cancelled and closed" because of IACI's lack of response "during political unrest in Iran." The telex added that new IACI orders could not be processed until payments had been received on nine outstanding purchase orders listed in the telex.

43. On or about 29 February 1980, Bendix sent IACI a statement showing a total due of U.S.\$5,617.24 reflecting both the past due outstanding amounts owing on the nine invoices, and also a credit due IACI of U.S.\$242.13. A similar statement was apparently sent to IACI on or about 31 March 1980, omitting the credit due IACI.

B. The Merits

44. In its pleadings, IACI asserted that Bendix had not performed the delivery and documentation requirements specified in IACI's Purchase Orders which would entitle Bendix to payment. In particular, IACI alleges that it did not receive the goods from Behring and asserts that there

was no evidence that the goods were ever delivered to Behring. Bendix, however, contends that it is entitled to payment by virtue of having shipped the required goods to Behring. At the Hearing, IACI admitted having received the appropriate documents from Behring but contended that two of these documents lacked the correct signatures. IACI also asserted at the Hearing that it had sent the amount due but had not received the equipment.

45. The Tribunal notes that typed on the face of IACI's Purchase Orders are terms stating: "F.O.B." at the various Bendix plant locations, and "Ship Freight Collect to: Iran Aircraft Industries c/o Behring Intl Inc." Similar terms appear on the Bendix Acceptances. The Tribunal also notes that IACI has asserted that it received the appropriate documents from its agent Behring, documents that were apparently sufficiently adequate at the time for IACI to allege that it had paid for the goods. Furthermore, the Tribunal finds that receipt by IACI of the shipping documents from Behring is prima facie proof, unrebutted by evidence to the contrary, that Bendix fulfilled the required terms of delivery, namely to ship the goods to Behring. The Tribunal also notes no significant difference between the documents apparently accepted by IACI and those that IACI asserts are problematic. Finally, the Tribunal notes that no evidence has been submitted either to show that IACI had paid or that IACI had ever objected to Bendix invoices or other documents in 1978, 1979, or 1980 when delivery, invoicing and billing occurred. The Tribunal, consequently, awards the Claimant the amount due on the nine invoices.

46. At the Hearing, Bendix alleged for the first time that the evidence of the credit due to IACI concerned other and unrelated invoices. The Tribunal is not persuaded by this belated assertion. The credit appeared on the same statement as the nine invoices here at issue, and Bendix proffered no independent evidence of the alleged unrelated

invoices to which the credit purportedly applied. The Tribunal determines, therefore, that the credit due IACI is to be taken into account in this Award. Consequently, the Tribunal finds IACI liable for U.S.\$5,617.24.

47. IACI Purchase Orders specify on their face that payment was to be "Net 30 Days." The terms in Bendix Acceptances are similar. The Tribunal notes that payment on the nine Bendix invoices were due, therefore, on various dates between July 1978 and June 1979, with the bulk falling due between December 1978 and April 1979. The Tribunal, consequently, finds it fair to award interest on the U.S.\$5,617.24 at the rate of 10.5 percent per year, to run from 1 February 1979, the approximate mid-point of the relevant period.

#### VI. CLAIMS FIVE, SIX, SEVEN, AND EIGHT

##### A. The Facts

48. The factual circumstances and legal issues involved in the various allegations of performance and breach in relation to these four claims by Bendix against the IAF are similar or interrelated. Therefore, the Tribunal will discuss them together. The claims are as follows:

- (1) Claim Five, for U.S.\$164,953, arising out of two IAF purchase orders of 15 and 16 February 1978 for three Boeing 747 "indicators" at a total price of U.S.\$180,693.01, accepted by Bendix on 15 March and 27 February 1978, respectively;
- (2) Claim Six, for U.S.\$19,690.57, arising out of five IAF purchase orders and Bendix acceptances issued between February and April 1978 for a variety of aircraft parts, reduced by two credits in favor of the IAF issued on 30 August and 27 December 1978;

- (3) Claim Seven for U.S.\$4,839.94 arising out of an IAF purchase order of 28 November 1977 for fourteen cable assemblies, accepted by Bendix on 20 December 1977;
- (4) Claim Eight, for U.S.\$1,255.27, arising out of a purchase order of 24 February 1978 for a particular type of shaft, accepted by Bendix on 20 March 1978.

49. Each IAF purchase order indicates on its face that the ordered goods were to be delivered within a certain number of days from the date of the order unless there were reasons beyond Bendix's control, in which event the new delivery date would have to be approved by the IAF. The purchase orders also specify shipment, F.O.B. Bendix premises, to IAF's freight forwarding agent in the United States, Behring. Article 1 of the "General Conditions," printed on the reverse of the purchase orders, reserves to the IAF the right to cancel orders "if deliveries have been delayed 30 days after the specified delivery date without a justifiable reason." The IAF "Conditions of Payment," also printed on the reverse of the purchase orders, provide for payment against invoices and shipping documents and further specify the number of copies of invoices and packing lists to be submitted. Bendix acceptances specify that payment was to be made within 30 days of the invoice date. The acceptances also specify, in their terms and conditions of sale, that Bendix terms and conditions supersede any that appear on purchase orders, and that Bendix terms and conditions are to be interpreted according to New York law.

50. According to Bendix, the items which are the subject of Claim Six were manufactured and shipped to Behring in the fall and winter of 1978, almost all of them more than 30 days after the specified delivery dates. The appropriate invoices, each entitled "Invoice and Packing List," and

shipping documents were issued in November and December 1978. There is no dispute between the Parties that the invoices remain unpaid. As for the items which are the subject of Claims Five, Seven, and Eight, the IAF purchase orders and the Bendix acceptances indicate that delivery of these items was to occur by February or March 1979 at the latest.

51. Bendix asserts that the absence of any IAF response to Bendix's attempts to contact it in early 1979, and the failure by the IAF to pay for the Claim Six shipments resulted in concern as to whether the IAF would fulfill its contractual obligations with respect to the as-yet-undelivered orders covered by Claims Five, Seven, and Eight. Consequently, on 1 May 1979, Bendix sent several communications to Colonel Khatami, the IAF representative in the United States, in which Bendix explained that material ordered by the IAF was available or was becoming available for shipment but that Bendix had received no response from IAF "to our numerous telex requests." Bendix indicated further that the lack of response by the IAF raised "serious questions concerning the performance of your contractual obligations." Accordingly, Bendix requested adequate assurances by 30 May 1979 that the IAF would comply with its payment obligations. Bendix indicated that, in the event of an inadequate reply, it might cancel the orders and hold the IAF responsible for cancellation charges and other damages.

52. In early May 1979, a Bendix credit administrator apparently had a telephone conversation with Colonel Khatami and, in response, on 14 May 1979, sent him a letter listing the past due Claim Six invoice amounts and enclosing copies of those invoices.

53. On 22 May 1979, Colonel Khatami sent a letter to Bendix "confirming" a telephone conversation with Bendix of 16 May 1979 "regarding cancellation without a cancellation charge

of the following listed [purchase orders], which you failed to provide within the specified time accordingly." Listed in the letter are 16 purchase orders, including those at issue in Claims Five, Seven, and Eight.

54. On 31 May 1979, Bendix sent a letter to Colonel Khatami, rejecting his interpretation of the 16 May telephone conversation. On the contrary, Bendix asserted that, under the circumstances, Article 8 of the "Terms and Conditions of Sale" printed on the reverse side of Bendix acceptances would apply, namely that a cancellation by the IAF would be subject to the assessment of reasonable cancellation charges by Bendix. Bendix indicated that it would soon send such charges to the IAF.

55. On 25 June 1979 Colonel Khatami insisted in a letter to Bendix that the IAF had cancelled the orders because Bendix had failed to deliver the goods within the specified time period, and that, therefore, no charges could be applied.

56. On 11 October 1979 Bendix sent the IAF cancellation charges of U.S.\$164,953 for the two orders which are the subject of Claim Five. Bendix asserted that these charges were the result of "material purchased and assembled solely for the Iranian Air Force, having no alternative market." The IAF responded on 22 October 1979 reiterating its position and stating that Bendix's Article 8 would apply only if the IAF's cancellation had occurred before the required delivery time had expired.

57. In addition to the purchase price of U.S.\$27,195.08 (less U.S.\$7,504.51 in applicable credits) for the allegedly delivered Claim Six goods, Bendix seeks recovery, in Claim Five, of U.S.\$164,953 representing those damages it was unable to mitigate after it ceased to manufacture the relevant Claim Five goods. Bendix asserts, on the other hand, that it had completed manufacture of the items which

are the subject of Claims Seven and Eight but was unable to divert them to other orders. Bendix, therefore, seeks recovery of, respectively, U.S.\$4,839.94 and U.S.\$1,255.27, the full purchase price of the orders covered by those claims.

58. The IAF's counterclaim for U.S.\$200,000 is for damages allegedly incurred as a result of Bendix's failure to ship the various items and the necessity for the IAF to acquire the items elsewhere.

B. The Merits

Claim Six

59. The IAF asserts that there is no proof of delivery of the items covered by Claim Six, either to the IAF or to Behring. In addition, the IAF questions the validity and sufficiency of the shipping documents introduced in evidence by Bendix.

60. The Tribunal notes that the specific terms of the contracts at issue here clearly provide for shipment to Behring and for payment against invoices, packing lists, and shipping documents. The Tribunal finds that the documents in evidence are prima facie evidence, unrebutted by persuasive evidence to the contrary, that such shipments were made. Furthermore, there is no reason to believe that Behring did not receive the items. The Tribunal observes, in addition, that there is no evidence of any IAF response, comment, or objection to Bendix's letter of 14 May 1979 which listed the past due Claim Six invoices. Nor indeed was there any indication in the communications in 1979 between the parties that the Claim Six materials had not been delivered. The Tribunal notes, in particular, that the 22 May 1979 letter from Colonel Khatami purporting to cancel

sixteen purchase orders for nondelivery did not attempt to cancel any of the Claim Six purchase orders.

61. The Tribunal, therefore, awards Bendix U.S.\$19,690.57, representing the agreed price for the delivered goods less the two credits applied by Bendix in favor of the IAF. As most of the amount due here became outstanding on 26 January 1979, the Tribunal finds it fair to award Bendix interest at a rate of 10.5 percent per year to run from that date.

Claims Five, Seven, and Eight

62. The IAF maintains that it cancelled the purchase orders in Claims Five, Seven, and Eight, acting within its rights under Article 1 of the IAF "General Conditions," because of Bendix's failure to deliver within 30 days after the time set for delivery. While the IAF rejects Bendix's assertion of the applicability of New York law and UCC 2-609 (described in paragraph 35 supra), it asserts that even if New York law applied, Bendix's request for assurances was invalid because it was made after Bendix had violated the contract. Bendix argues, however, that its request for assurances was proper, that only Bendix terms and conditions of sale apply, and that, even if IAF terms applied, it was the IAF that repudiated the agreement.

63. The Tribunal notes first that there is no dispute that Bendix had not delivered any of the material within the 30-day periods (ending on various dates in March 1979) specified in Article 1 of IAF's "General Conditions." The Tribunal also observes, however, that under the IAF terms, a delivery delayed beyond the 30-day period does not constitute a breach giving rise to damages or automatic termination of the agreement, but rather that, in those circumstances and under certain conditions, the IAF had a right to terminate the agreement. Nor does the Tribunal find any other evidence in these claims that the parties had



indicated or understood that time was of the essence, and it is understandable why it may not have been to the IAF during this period of revolutionary turmoil in Iran. Moreover, the Tribunal notes that the IAF's right to terminate for delay arises only in the absence of "justifiable reasons" for the delay. The Tribunal also observes that the IAF never objected to the late delivery of any of the items covered by Claim Six, nor did the IAF terminate those purchase orders for delay.

64. Under these circumstances, and in light both of the IAF's failure to pay Bendix for goods delivered five months earlier (See Claim Six, supra) and the difficulties Bendix encountered in communicating with the IAF and its consequent request for assurances on 1 May 1979, the Tribunal finds that there is ample evidence, unrebutted by the IAF, to believe that Bendix had "justifiable reasons," under the IAF's own terms, for the delay in delivery of items covered by Claims Five, Seven, and Eight.<sup>7</sup> Consequently, the Tribunal finds that IAF's peremptory cancellation of the purchase orders here at issue, two to three weeks after Bendix effectively notified the IAF of its reasons for delay, was a repudiation of the contract for which the IAF is liable to Bendix to the extent Bendix proves the damages it has suffered as a result. For the same reasons, the Tribunal also finds no merit in the IAF's counterclaim and dismisses it accordingly.

65. With respect to the question of damages in Claim Five, the Tribunal notes that Bendix's assertions, particularly concerning the unique nature of the "indicators" and its alleged inability to salvage or divert more than a few

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<sup>7</sup>Because of this determination, the Tribunal finds it need not decide either the question of the applicability of New York law or the issue regarding whether IAF or Bendix terms and conditions governed the contracts here at issue.

items, were supported only by the most cursory statement of Bendix's Director of International Finance, which under the circumstances of this Case, the Tribunal finds is insufficient to establish the damages claimed. The Tribunal concludes, as a result, that Bendix has not borne its burden of proof on the issue of damages.

66. Similarly, with respect to damages in Claims Seven and Eight, the Tribunal finds that Bendix has not presented proof that it sustained such damages. Bendix presented the Tribunal with no allegation or evidence as to its attempts to mitigate damages, nor was any persuasive explanation given as to its alleged inability to divert the orders. Consequently, the Tribunal must also dismiss these claims for lack of proof.

## VII. CLAIM NINE

### A. The Facts

67. After preliminary negotiations, Bendix and the Navy made two contractual arrangements for the purchase of helicopter-borne sonar systems at a total price of U.S.\$7,460,090.75. Accordingly, Bendix sent the Navy two pro forma invoices dated 4 February 1977, one (No. PF-28061) for U.S.\$2,871,659 and the other (No. PF-28062) for U.S.\$4,588,431.75. Each pro forma invoice contained a "Projected Schedule of Shipments" as well as "Terms of Payment" calling for payment by means of Letters of Credit to be established by the Navy. The agreement between the Parties also provided for advance payments to Bendix equivalent to 10 percent of each pro forma invoice, to be paid from each Letter of Credit. These advance payments would in turn be guaranteed by Standby Letters of Credit to be established by Bendix. The advances were to be liquidated as the shipments were made, by reducing 10 percent from the total amount in each invoice issued upon shipment.

68. As Bendix's claims arising under each of the two contractual arrangements established by the pro forma invoices and corresponding Letters of Credit are legally and factually distinct, the Tribunal will treat these claims separately, referring to them as "Claim Nine/Part I" (the claim relating to Pro Forma Invoice No. PF-28061) and "Claim Nine/Part II" (the claim relating to Pro Forma Invoice No. PF-28062).

(1) Claim Nine/Part I

69. Pro Forma Invoice No. PF-28061, for U.S.\$2,871,659, projected shipment of certain items for as late as 30 November 1979. Accordingly, on 1 April 1977, Bendix was advised by Chase Manhattan Bank ("Chase") that Bank Markazi had issued an irrevocable documentary Letter of Credit (No. 90304) for U.S.\$2,871,659, which, as eventually amended, would expire on 31 December 1979. Bendix, pursuant to the agreement, established on 13 September 1977 its Standby Letter of Credit for the advance payment, with an expiration date of 31 January 1980.

70. Bendix asserts that it was paid for every shipment that it made under this contract except for the final one. Bendix maintains that it made its final delivery, for an invoice amount of U.S.\$133,556.58 (including the final 10 percent advance payment liquidation), to Arya National Shipping Lines ("Arya"), the agreed freight forwarder in the United States. Bendix has submitted into evidence two signed Bills of Lading showing receipt by Arya of two shipments on 18 December 1979.

71. Bendix apparently submitted the appropriate collection documents to Chase for payment. On 2 January 1980, Chase acknowledged receipt of the documents which it found were "in order." Chase indicated, however, that it was unable to pay the U.S.\$133,556.58 against the Letter of Credit because

of the Presidential Order freezing Iranian assets in effect at that time.

72. The Navy has submitted into evidence a letter from it to Bank Markazi on 12 October 1980, cancelling the Letter of Credit and instructing the bank to forward to the Navy the unused balance.

(2) Claim Nine/Part II

73. Pro Forma Invoice No. PF-28062, for U.S.\$4,588,431.75, projected shipment of certain items for as late as 30 November 1980. In August 1977, Bendix was advised by Manufacturers Hanover Trust that Bank Markazi had issued an irrevocable documentary Letter of Credit (No. 91090) for U.S.\$4,588,431.75 which, at least initially, had an expiration date of 31 December 1980. Bendix, pursuant to the agreement, established on 12 September 1977 its Standby Letter of Credit for the advance payment, with an expiration date of 7 February 1981.

74. By November 1979, Bendix, under these arrangements, had manufactured, shipped, and had been paid for U.S.\$3,076,782.23 worth of equipment. Bendix alleges, however, that it had also manufactured but was unable to deliver unique, undivertable goods worth U.S.\$119,373.81. Bendix claims in addition that work was still in process for other items that it was never able to deliver, as a consequence of which Bendix incurred costs of U.S.\$619,688.52. The damages claimed by Bendix, therefore, totalled U.S.\$739,062.33, reduced by the U.S.\$151,149 in unliquidated advance payments still retained by Bendix.

75. Bendix maintains that it was unable to deliver the goods because the Navy had not paid for the delivered goods which are the subject of Claim Nine/Part I, and because of the cessation of Bendix's business relationship with the

Navy resulting from the hostage crisis and the ensuing freeze on Iranian assets. Consequently, Bendix asserts that in late 1982 it had to scrap all the undelivered goods.

76. The Navy denies any breach by it or any obligation to pay under the circumstances alleged by Bendix. In support of its argument, the Navy has submitted evidence documenting its attempts in 1980 and 1981 to extend the validity of the Letter of Credit beyond 31 December 1980.

77. The Navy has asserted, in addition, a counterclaim for a minimum of U.S.\$7,460,090.75, the total amount of the two contractual arrangements, representing unliquidated advance payments and damages resulting from its project not being completed due to Bendix's failure to deliver.

B. Jurisdiction

78. With respect to Claim Nine/Part II, the Tribunal notes that Bendix, in its Pleadings, asserted that the Navy had repudiated the sales agreement. At the Hearing, both Parties asserted that various periods of force majeure conditions had occurred. The Tribunal observes, however, that there is no evidence that either Party ever objected or complained of breach or frustration or ever notified the other Party, at least not before 19 January 1981, that the contract had been terminated for breach or for frustration. In addition, the Tribunal notes that there is no evidence that the Parties in the relevant period ever acted as if the contract was terminated. On the contrary, the Navy, for example, made several attempts, apparently as late as 1981, to extend the Letters of Credit. Furthermore, the Navy apparently made no attempt to draw on Bendix's Standby Letter of Credit, valid until 7 February 1981. On the Claimant's side, the Tribunal notes no evidence that Bendix ever attempted to contact the Navy and no evidence as to when Bendix eventually decided to cease manufacturing. The

Tribunal observes that Bendix waited, in any event, until late 1982 to scrap the undelivered items.

79. Under these circumstances, the Tribunal considers that it has been given no evidence that this aspect of Bendix's claim was outstanding on 19 January 1981, a jurisdictional requirement of Article II, paragraph 1, of the Claims Settlement Declaration. Consequently, the Tribunal dismisses Claim Nine/Part II for lack of jurisdiction. Accordingly, the Navy's counterclaim is also dismissed for lack of jurisdiction.

80. With respect to Claim Nine/Part I, Bendix did deliver the items to Arya and did make efforts to collect on the Letter of Credit. Therefore, there can be no doubt that this claim was outstanding on 19 January 1981.

C. The Merits

81. With respect to the Claim Nine/Part I, the Navy has asserted that there is no evidence of the final delivery of the items to Arya or that Bendix had presented all the necessary documents to Chase. The Navy further argues that there was no evidence that the proper documents had been forwarded to Bank Markazi, and that, in any event, the Navy was not responsible for the failure of Chase to pay out on the Letter of Credit. Bendix has asserted, however, that the Navy is in breach of contract as it never attempted to pay Bendix by alternative methods, such as arranging for payment abroad, or even to assure Bendix of eventual payment.

82. The Tribunal notes, on the other hand, that Bendix has presented convincing evidence that it made the asserted shipment to Arya, the Navy's freight forwarding agent, and

that such shipment was received on 18 December 1979.<sup>8</sup> In such circumstances, the Tribunal need not decide the question of breach of contract, because, irrespective of any decision on that question, an outstanding debt exists by which the Navy owes Bendix U.S.\$133,556.58 for the delivery of the items covered by Claim Nine/Part I. Consequently, the Tribunal awards Bendix that amount, plus interest at the fair rate of 10.5 percent per year to run from 2 January 1980, the date Chase acknowledged receipt of the appropriate documents drawing on the Letter of Credit.

VIII. COSTS

83. Each Party shall bear its own costs of arbitration.

IX. AWARD

84. For the foregoing reason,

THE TRIBUNAL AWARDS AS FOLLOWS:

- (a) The Respondent IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY is obligated to pay the Claimant BENDIX INTERNATIONAL SERVICE CORPORATION the sum of One Hundred Twenty-one Thousand Five Hundred Forty-nine United States Dollars and Thirty Cents (US\$121,549.30), plus simple interest on that amount at the rate of 10.5 percent per annum (365-day basis) from 21 March 1979 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.

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<sup>8</sup>The Tribunal also notes that the Navy apparently regained access at some point in time to the unused balance of its Letter of Credit.

- (b) The Respondent IRAN AIRCRAFT INDUSTRIES is obligated to pay the Claimant THE BENDIX CORPORATION the sum of Five Thousand Six Hundred Seventeen United States Dollars and Twenty-four Cents (U.S.\$5,617.24), plus simple interest on that amount at the rate of 10.5 percent per annum (365-day basis) from 1 February 1979 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.
  
- (c) The Respondent IRANIAN AIR FORCE is obligated to pay the Claimant THE BENDIX CORPORATION the sum of Nineteen Thousand Six Hundred Ninety United States Dollars and Fifty-seven Cents (U.S.\$19,690.57), plus simple interest on that amount at the rate of 10.5 percent per annum (365-day basis) from 26 January 1979 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.
  
- (d) The Respondent IRANIAN NAVY is obligated to pay the Claimant THE BENDIX CORPORATION the sum of One Hundred Thirty-three Thousand Five Hundred Fifty-six United States Dollars and Fifty-eight Cents (U.S.\$133,556.58), plus simple interest on that amount at the rate of 10.5 percent per annum (365-day basis) from 2 January 1980 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.
  
- (e) The obligations listed in paragraphs (a) through (d) supra shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria of 19 January 1981.



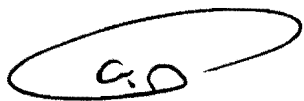
- (f) Claim Two and the counterclaim based on the contract at issue in Claim Two are dismissed for lack of proof. The remaining part of the counterclaim to Claim Two, as well as the Claimant's counterclaim, are dismissed for lack of jurisdiction.
- (g) Claims Five, Seven, Eight, and Ten are dismissed for lack of proof.
- (h) The counterclaim of the IRANIAN AIR FORCE is dismissed on the merits.
- (i) Claim Nine/Part II and the counterclaim to Claim Nine are dismissed for lack of jurisdiction.
- (j) Each Party shall bear its own costs of arbitration.
- (k) This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague  
15 June 1988

  
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Robert Briner  
Chairman

In the Name of God,

  
\_\_\_\_\_  
George H. Aldrich

  
\_\_\_\_\_  
Hamid Bahrami-Ahmadi  
Concurring in PARTS  
Dissenting in PARTS