IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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** DISSENTING OPINION of M. Aghahosseini

- Date 7 Nov '95

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

IN THE NAME OF GOD

CASES NOS. 213 and 215
CHAMBER THREE
AWARD NO. 567-213/215-3

DADRAS INTERNATIONAL, and
PER-AM CONSTRUCTION CORPORATION,
Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN, and
TEHRAN REDEVELOPMENT COMPANY,
Respondents.

DISSENTING OPINION OF MOHSEN AGHAHOSSEINI

Here comes again a dual national who, in line with many of his likes before this Tribunal, has found the temptation of a titanic Security Account too great not to concoct a claim. His name is Aly Shahidzadeh Dadras.

In the past, the favor extended to such claimants by this Tribunal has been of a limited nature. Where the evidence of forgery has been too obvious to ignore, the claim has of necessity been rejected, but with every effort made to find other grounds for the rejection, so as to rescue the forger from the stigma of his abominable act. Here, though, the Tribunal has gone much further. Despite a mountain of evidence which cries the forgery of the two documents on which the claims are exclusively

based, the Majority in the present Cases has, for reasons beyond me, rewarded the forger with over three million dollars, plus interest. I come back to this later.

In this Dissent, I propose to provide the reader, in Part One, first with a brief background (Section I). That will be followed by an examination of the main issue, to wit, whether or not the Claimants have carried, as they must, the burden of proving that the two documents on which they exclusively rely are authentic (Section II). It will be there concluded that they have not, and that, accordingly, there has been no need for the Tribunal to deal with the further issue, presented by the Respondents' secondary and additional defense, of whether the documents in question are forged. For the sake of argument, however, that second issue will nevertheless be dealt with (Section III). It will be there suggested that the evidence before the Tribunal is such that no conclusion other than an affirmative finding may be seriously supported.

The Majority's finding which, despite towering plies of evidence to the contrary, upholds the Claimants' case will be addressed in Part Two. It will be shown that this wholly arbitrary result has been achieved --and could only have been achieved-- by depriving the Respondents of their primary defense and then making grievous errors on certain most elementary rules of law (Section I), by attributing to the Respondents positions which they have not adopted, and have taken care to make this abundantly clear to the Tribunal, and by a most one-sided treatment of the Parties and of their arguments (Section II). For those who may not be sufficiently interested in, or may not have the time to go through, details of the pertinent evidence, a much shortened account will then be provided (Section III).

PART ONE: THE CASE BEFORE THE TRIBUNAL

Section I: A Brief Background

Although Mr. Dadras is an architect licensed to practice in the State of New York, he, during the time relevant to the present inquiry, sought his fortune elsewhere. Acting as a middleman, he looked out in the Iranian market for large construction projects, whose owners he might interest in a system of construction called the Dyna-Frame-Celdex, of which an American company, PKDR International ("PKDR"), was the patent-holder, and Mr. Dadras, the licensee in Iran. Under the system, concrete structural components are prefabricated by three plants erected next to the intended construction site.

Sometime in 1978, Mr. Dadras is informed of one such project, the North Shahyad Development ("Project"), under which a housing complex of some five thousand residential units is to be constructed on a site in Tehran. By then, the architectural work of the Project, assigned to Housing and Urban Services International Inc. ("Haus"), is virtually completed.

Mr. Dadras's initial negotiations with the Project's Owner, Tehran Redevelopment Corporation ("TRC") lead to the conclusion, on 29 March 1978, of a cost-free preliminary "Agreement". The document, in handwritten Persian, is signed, on the one side, by Mr. Dadras and his partner in Iran, Mr. D. Darehshuri of Kan Consulting Engineers ("Kan Consulting"), and, on the other, by certain officials of TRC. A typed version of this is signed by the same signatories four days later, 3 April 1978. Under Article 1 of the Agreement, Mr. Dadras "proposes the construction of the superstructure of the high-rise buildings... by American constructors whom he will introduce to the Owner."

Under Article 2:

> the Engineer [Mr. Dadras] shall, within two months, select the constructors and bring them to Iran so that the [Owner] arrange for the conclusion of the necessary contract with them.

The Agreement further provides that the constructors whom "the Engineer chooses shall be experienced and shall provide a performance bond acceptable" to the Owner. (Article 3.) The use of the Dyna-Frame-Celdex system requires certain changes in the engineering calculations and architectural designs of the superstructure, but the needed adjustments are evidently trivial enough not to warrant any discussion of a fee by the Parties at this stage. Thus, "the fee for the preparation of designs as well as preliminary and executive drawings of the Project shall be discussed and agreed upon in future." (Article 4.) The suggested overall cost of the intended construction is 4000 Rials per square meter. (Article 1.) With these the Owner agrees, with the express proviso that it shall make no payment "under this Agreement and for the work that the Engineer shall perform at this stage." (Article 5.)

Mr. Dadras then goes to the United States but, apparently unsatisfied with a middleman's commission, to which he would have been at most entitled if he were to limit his role to that set for him under the Agreement, he decides to go for a better share of the envisaged deal. Thus, instead of "selecting" and "introducing" to the Owner "experienced American constructors", he resolves to become the constructor himself.

On 30 May 1978, he establishes, under New York law, the American International Dynacel Corporation ("AIDC") in which he is the executive vice president and principal shareholder, and a Mr. George K. Duvé, Jr., president of PKDR, president and the only other minority shareholder. The corporation is intended to supply, erect, and operate the three plants to manufacture the prefabricated elements. On 5 June 1978, he forms, under the same law, Per-Am Construction Corporation ("Per-Am"), in which he is again the principal shareholder as well as the president, and a

Mr. Irving Rubin, executive vice president and the only other minority shareholder. Per-Am is the company intended to conclude the construction contract with the Owner, as well as the contract for the erection of the three plants with AIDC.

Mr. Dadras returns to Iran in early June, and informs the TRC officials of the formation of the two corporations. He also provides TRC with details of his offer to construct the superstructure of the Project, including the cost estimate. The cost estimate is in fact a copy of a proposal prepared by PKDR for its prospective customers. Mr. Dadras, in turn, is furnished by TRC with a set of drawings effected by Haus, so as to enable him to provide the construction documents. This task, as already stated, consists mainly of the adaptation, if needed, of the drawings for the superstructure of the Project to those required by the offered system.

On 14 June 1978, the two sides sign a "Proposal"; Mr. Rahman Golzar Shabestari, the TRC's managing director, on behalf of TRC, and Mr. Dadras, on behalf of Per-Am. Against a fee of 4517 Rials (or $63.98) per sq.m., Per-Am, which is there identified as the Builder, proposes to erect the Project's superstructure with the Dyna-Frame-Celdex construction System. This includes the designing of three plants and their equipment, shipping the equipment to Iran, setting up the plants, and supervising their operations. (Article E(9-13) of the Proposal.)

What must be noted here is the fact that although in the Proposal Mr. Dadras and his Iranian partner, Kan Consulting, are together identified as the "Consultant" to the venture, and although the Consultant undertakes in there to revise, within 60 days, the existing drawings so as to adapt them to the proposed structural system (Article E(2) of the Proposal), the Proposal is not signed by the Consultant. Nor is there any reference to a separate fee for the services of the Consultant. Indeed, the clause in the Agreement of 29 March 1978, that such a fee would be discussed in future, is no longer retained in there. In other

words, the cost of 4517 Rials (or $63.98) per sq.m. of construction is the only fee to which the Parties refer in the Proposal, despite the fact that in there the task of revising the existing architectural drawings is undertaken by the Consultant.

Once again, however, the Parties emphasize that the document is not binding:

> Neither Party assumes any obligation under this proposal. After an agreement has been reached, payment will be made according to the terms and conditions of the agreement. (Article J of the Proposal.)

Some two months later, on 19 August 1978, Mr. Dadras pays another visit to Tehran, taking with him the drawings which have been revised in the meantime by PKDR. He submits them to TRC through his letter of 19 August 1978 for approval. There is, as to be expected, no reference in that letter to any expected compensation for what has been done so far. It is Mr. Dadras's hope, clearly, that he would now be granted a binding contract.

So far I have relied, in giving the present brief account of the Parties' initial negotiations, exclusively on Mr. Dadras's version without, however, referring to the obvious cases of discrepancies in his account of the events. They are very many. But as the events in his next, and last, trip to Iran are central to the determination of the Parties' conflicting contentions, such discrepancies can no longer be ignored.

He says in his affidavit that:

> I arrived in Tehran on August 18, 1978.... On August 21, 1978..., I met at TRC Headquarters with Mr. Golzar, Mr. Golshani, Mr. Farahi, Mr. Morog, Mr. Jabary and Dr. Darehshuri.[1] I presented to Mr. Golzar a letter of Dadras International dated August

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1 Mr. Golzar, it will be recalled, was the TRC's then managing director, and Mr. Darehshuri of Kan Consulting, Mr. Dadras's partner in Iran. The rest were the then high officials of TRC.

> 17, 1978, stating that the construction documents had been completed in accordance with the June 14 Agreement. I also submitted the following documents....[2]

He then lists the sets of drawings prepared for the use of the system, and continues:

> After I had presented these documents to TRC... Mr. Golzar praised the work that had been produced and mentioned that we had to begin construction as soon as possible.

Elsewhere he says, as will be presently shown, that he arrived in Tehran on 14 August 1978, while his passport, produced at the Hearing, indicates that this was on 19 August 1978. And all this despite Mr. Dadras's express assertion before the Tribunal that in his recounting of the events he relies not on his memory, but on minute notes painstakingly taken by him at the time.[3] But be that as it may.

At the Hearing, the Tribunal is told of a rather different story.

> When I arrived on 18th I called him [Mr. Golzar] and he set up the meeting for August 19. Dr. Darehshuri and I, we took all these documents and drawings to his office and when we entered his office Mr. Golshani was there, Mr. Amini was there, Mr. Morog was there and Mr. Farahi were there. And we put all the documents there on the table and Golzar was working on his desk. He was occupied with what he was doing and suddenly he

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[2] His reference to a letter of 17 August is inaccurate. The letter is dated 19 August 1978.

[3] This is a colloquy at the Hearing:

> [Question from the Bench]: Are... these statements... based on your memory or do you have contemporaneous notes of that time on the basis of which you are saying these things now?
>
> Mr. Dadras: Yes, I have a record of the dates and the time that I meet and whom I met with.

> got up and he start walking. He just went out the room without greeting me or saying welcome or whatever and after working 60 days like a dog, day and night, to prepare the drawing and to bring it into him I didn't expect that treatment. I was very upset, as a matter of fact I just wanted, you know, to blow up. I was very upset.[4]

Later at the same Hearing, he summarizes Mr. Golzar's attitude towards him on his return:

> My complaint was that the way he acted and reacted on 19. He treated me like a dog and I am not used to that.

Mr. Dadras's description of his dealings thus far with TRC has not, despite the inconsistencies in its details, been materially challenged by the Respondents. It is, as will be explained in due course, true of course that they initially argued that the relevant files in TRC show no record of the asserted negotiations. But then, having found and voluntarily submitted to the Tribunal a letter by Mr. Dadras which, as will be seen shortly, records in broad terms the events outlined above, they amended their pleadings accordingly. As to the events thereafter, however, the Parties offer two wholly conflicting versions.

First, Mr. Dadras's contention. Having described the impudence with which he was treated in his meeting of 19 August 1978 with the TRC's officials, Mr. Dadras asserts that things then abruptly changed. When Mr. Golzar walked out of the meeting, he says, "we left the drawings with them and I left." And then the next morning, 20 August 1978:

> I talk Mr. Darehshuri... I said 'let's call Jabary' ... after all, he... introduced us to them... 'and tell him what's going on.' I did all the work. I went,

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[4] In this and other passages in which Mr. Dadras is quoted, grammatical flaws and lapses in his statements are retained without being indicated.

> as it was indicated in the proposal. Everything is there and why he has to treat me the way he did?

Mr. Jabary asks Mr. Dadras to go to his office that afternoon. There, Mr. Jabary explains that Mr. Golzar's behavior is the result of the fact that his other project "is behind schedule by eight or nine years." What Mr. Dadras should do, suggests Mr. Jabary, is to write a letter to Mr. Golzar in which the earlier events are fully described. This, Mr. Jabary assertedly says, will better "penetrate" Mr. Golzar. But before Mr. Dadras finds time to do that, there comes an unexpected invitation the following day, 21 August 1978, from Mr. Golshani to Messrs. Dadras and Darehshuri to go and see the TRC's officials. There, Mr. Dadras is told by Mr. Amini that all the drawings and other construction documents have been examined and approved. Indeed, Mr. Amini not only informs Mr. Dadras of the approval by TRC of all the revised drawings in less than 48 hours, but wants the text of a $63,980,000 contract[5] prepared, not by the TRC's presumably large legal department, but by Mr. Dadras, an architect by profession, within few hours only: "[S]tart writing the contract... [I] want it this afternoon."

In the afternoon of that same day, Mr. Dadras first prepares the draft contract and next writes a letter to Mr. Golzar, as recommended by Mr. Jabary. He takes both documents to TRC, and when he is about to leave, he is told, "much to his surprise", that Mr. Golzar wishes to see him. He is "happily shocked."

> At this time Mr. Golzar gave me an Iranian hug and he apologized for what he did on 19 and said he had lot of work to do and so on.

Details of the two sides' further meetings leading to the asserted signing of a contract on 9 September 1978, are

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[5] This is the total cost of the intended construction as later determined by the asserted contract. It is the result of multiplying the planned area of construction (1 million square meters) by 4517 Rials (or $63.98), the cost per square meter.

immaterial for the present purposes. What must be mentioned, however, is Mr. Dadras's further assertion that in this meeting of 21 August 1978, he hands over to Mr. Golzar a letter, dated 19 August 1978, through which the construction documents are formally transferred to TRC. On 27 August 1978, Mr. Dadras requests a letter from TRC to "show to my associates they have worked on this project and they want to see that you have approved and so on." The result is the letter of 27 August 1978, allegedly signed by Mr. Golzar, in which TRC not only formally approves of the construction documents but commits itself unconditionally to pay Mr. Dadras a fee of "6.75% of the total cost of the structural system" (or $3,235,756.81 when properly calculated) for his preparation of the construction documents as well as the future supervision of the construction.

This last-mentioned document, together with the asserted contract of 9 September 1978, are the only two binding agreements on which the Claimants in the present proceedings exclusively rely for the relief they seek. They are also the documents whose authenticity are, as will be seen in due course, challenged by the Respondents. On the first, Mr. Dadras, under the business name of Dadras International (hereinafter used interchangeably with Mr. Dadras), seeks compensation in the amount of $3,235,756.81 (plus interest) representing the fee assertedly set for him by TRC in the letter. On the second, Mr. Dadras, representing Per-Am, demands damages in the amount of $3,112,880.00 for the TRC's failure to proceed with the implementation of the asserted contract. It remains to be added that the terms of the asserted letter of 27 August 1978, including Mr. Dadras's entitlement to the set fee, are reflected in more details in the alleged contract of 9 September 1978.

Next, the Respondents' version. They submit, in effect, that Mr. Dadras's recounting of his encounter with the TRC's manager on 19 August 1978, is accurate. By that time, the Respondents suggest, disturbances in Iran had forced TRC to dismiss all the company's foreign, and in particular American, employees. It was

a time at which Iranian entrepreneurs would not be prepared to invest heavily on uncertain future enterprises; and TRC, having expatriated its American staff, could not conceivably invite at the same time yet another American company to set plants in Iran and to construct an extremely large housing project. These facts, they suggest, had led Mr. Golzar not to turn a cost-free preliminary understanding with Mr. Dadras into a binding multi-million dollar contract with him. These were the reasons, they argue, behind Mr. Golzar's refusal, in Mr. Dadras's words, to as much as acknowledge the latter's presence at the meeting of 19 August 1978. Mr. Golzar, in short, was no longer interested in what Mr. Dadras had brought with him.

Mr. Dadras, they submit, stays in Tehran for a while, trying to induce TRC to sign his offered contract. The evidence, including a letter admittedly written by Mr. Dadras on 11 September 1978, shows irrefutably that his efforts fail. It is only after this failure, and probably much later, that Mr. Dadras seeks to turn his preliminary work --work which he had volunteered to do, and which is normally done, gratuitously and as part of encouraging the prospective project owner to grant the contract-- into compensable work, and an incredibly expensive one, too. He produces two documents. First, a letter, dated 27 August 1978, from TRC to Mr. Dadras, in which TRC admits that for what had been done prior to the conclusion of the contract as well as for his future supervision of the construction, Mr. Dadras is due a fee of $3,235,756.81. And the second, a contract, dated 9 September 1978, in which TRC not only awards the construction of the superstructure to Per-Am for the sum of 63.98 million dollars, but goes on to once again affirm, in more details, its commitment, already made in the above-mentioned letter, to pay the Consultant "for the work already completed for the design and preparation of construction documents by computer" and for the supervision of the intended construction. (Articles E(1,2) of the asserted contract.)

Which of the two conflicting versions reflects the truth must now be examined. But first a passing reference to a point of law.

The Claimants in the present Cases have asserted the authenticity of two documents, on which assertion they rely as an integral part of their claims. These, as already stated, are: (a) the letter of 27 August 1978, in which TRC unilaterally sets a fee for Mr. Dadras's past and future services; and (b) the contract of 9 September 1978 in which TRC once again confirms that fee and goes on to grant the construction of the superstructure of the Project to Per-Am, represented by Mr. Dadras. Of these, the former is, for the present purposes, of greater importance, for it is in there that the commitment to pay the alleged fee is first made.

The Respondents, on the other hand, have denied the assertion of authenticity and have offered evidence in support of this denial. Indeed, they have made it amply clear that it is on this defense of denying the authenticity of the documents in question that they primarily rely. To quote the final words of the Respondents' counsel at the Hearing:

> I just gave you a narration. I said that there will be no need to get into the issue of forgery.

What they here argue, in other words, is that the evidence they have submitted refutes --disproves-- the veracity of the Claimants' evidence and, that being the case, there can be no holding of authenticity. The Respondents have, however, additionally asserted that the documents in question are forged. In support of this, too, they have adduced evidence.

Now, on this latter assertion --an affirmative defense-- it is the Respondents who must shoulder the burden of proof. Yet a failure on their part to carry this burden, though determinative of the defense of forgery, is not determinative of the Claimants' case. In respect of the Respondents' first defense, the evidence,

every piece of it, submitted by both Parties must still be examined. If, at the end of the day, the trier of fact should not be convinced of the authenticity of the disputed documents, the claims cannot be allowed. This is because, as stated before, the asserted authenticity of the documents in question forms a part of the claims. Indeed, for that reason, the Claimants would have been required to prove authenticity even if the Respondents had not put forward a defense of denial, but an exclusive defense of forgery. More on that will be said later.

Section II: The Inauthenticity of the Documents on Which the Claimants Rely

1. The Letter of 27 August 1978

This is the letter, it will be recalled, in which Mr. Golzar, referring to the Proposal, acknowledges the approval by TRC of the construction documents submitted by Mr. Dadras, and sets the latter's "professional fee based on our agreement for the above work including supervision of construction" at "6.75% of the total cost of the structural system." It is the letter, it will be further recalled, which is given to Mr. Dadras pursuant to his request at one of his meetings with Mr. Golzar --at the time when the two Parties were engaged in negotiating the main construction contract-- to be provided with a document to "show [his] associates [who] have worked on this Project" that TRC has approved the work.

The letter does not determine "the total cost of the structural system"; that cost is first fixed in the asserted contract, signed some fortnight later, at 63.98 million dollars. Nor does it state what portion of this 6.75% is meant to be the fee for "the preparation of the construction documents", a service already performed, as against the fee for "the supervision of construction", a service to be rendered in future,

and only if there should be a construction contract. Further, there is in there no reference to any share for Kan Consulting; an entity which, as noted before, is together with Mr. Dadras designated in the Proposal as "Consultant" to the Project, and made jointly responsible for the preparation of the construction documents. All these, too, are first dealt with in the contract, where the fee for "the preparation of the construction documents" is fixed at 5.4%, and that for "the supervision of construction" at 1.35%, of the total cost; and the portions of these to go to Mr. Dadras and to Kan Consulting are separately determined.

In support of the asserted genuineness of the document, Mr. Dadras relies exclusively on (a) the document itself, (b) his own testimony, (c) the testimony of a forensic document examiner, and (d) the pre-contractual documents confirming preliminary negotiations between the Parties. Of these, the last one is irrelevant, the issue being limited to whether or not the pre-contract negotiations resulted in a binding agreement. The expert testimony, too, may be more conveniently dealt with in relation to the Respondents' additional defense of forgery. The first two will now be examined in that order.

On the face of it, the letter, consisting of two short paragraphs, carries very little, if any, probative weight. It is true of course that it is typed on the TRC's stationary. But then taking into account Mr. Dadras's rather lengthy pre-contract negotiations with TRC, his access to such stationary should not come as a surprise. It has been testified, on the other hand, that the letter's type-face is entirely different from that produced by the typewriters then existing in the TRC's offices.

Against this, a host of extremely disturbing features of the letter may now be noted.

1.1. While the letter speaks of 6.75% fee for the preparation of "the construction documents" and the "supervision of construction", it surprisingly fails to separately determine

the fee for each of the two distinct services. The former, as noted before, was a service rendered prior to the date of the letter. The fee for it, therefore, had already been earned. The second, on the other hand, was a service to be performed after that date, and then only if there was going to be a construction contract.

It is true, of course, that in the alleged contract of 9 September 1978, the fee for each service is specified: 5.4% for the preparation of the construction documents, and 1.35% for the supervision of the construction. But that was some two weeks later, when the Parties had allegedly finalized their main agreement. Here, on 27 August 1978, there was as yet obviously no certainty that such an agreement would be reached --that a contract would be signed. How could the Parties possibly fail to separately determine the fees intended for these separate services? What if the negotiations, just started, did not lead to an agreement, allegedly reached some two weeks later? What, in other words, would have been the fee for the preparation of documents, a service which had been already offered, as against that for the supervision of the construction, a service which would not have been required in the absence of a construction contract?

1.2. Under the Proposal, on which the letter relies, the duty to prepare the construction documents --to make the necessary revisions to the existing drawings-- is undertaken, as previously explained, by the "Consultant"; a term which is there defined as Dadras International and Kan Consulting. Both, therefore, would have been entitled to any fee for this work. Yet, in the alleged letter, Mr. Golzar offers the entire fee not to the "Consultant", but to "Prof. Dadras".

It is true, again, that in the alleged contract of 9 September 1978, the right of Kan Consulting to part of this fee is recognized. Indeed, in there the exact figures to which each of these two are entitled are clearly fixed. But that, again, is

some two weeks away. A firm and binding commitment by TRC, on 27 August 1978, entitling Mr. Dadras to the entire "Consultant" fee to the exclusion of Kan Consulting, makes absolutely no sense. In the absence of the alleged contract some fortnight later, what would have been the fee for the services rendered by Kan Consulting? Indeed, how would Mr. Dadras have been persuaded to agree to pay a given portion of this fee --to which he was now exclusively entitled-- to Kan Consulting, and, if not persuaded, what would have been the TRC's defense against a claim in this respect by Kan Consulting?

1.3. The letter speaks of Mr. Dadras's "professional fee". The evidence shows, however, that this odd phrase is that of Mr. Dadras, and not of the TRC's personnel. This must be briefly explained.

Mr. Dadras's latest version, as we shall presently see, is that this letter was first dictated in Persian and later translated into English by the TRC's secretariat. Now, there is commonly no such expression in Persian, the translation of which would be "professional fee". And quite rightly so, for one may speak, for instance, of "fee for professional services", but fee itself cannot, sensibly, be described as professional or otherwise. On the other hand, we have in the original text of the Agreement of 29 March 1978, which is in Persian, a reference to Mr. Dadras's "fee" --not professional fee, but simply fee-- for the preparation of construction documents. Yet, Mr. Dadras, in a translation of the text which he has admitted to have been done by himself, has turned the Persian word for "fee" into the phrase "professional fee".

1.4. If Mr. Dadras's scenario is to be believed, on 27 August 1978, Mr. Golzar was still negotiating with Per-Am the terms of a contract for constructing the superstructure of the Project. Mr. Golzar was fully aware of the fact, of course, that the revisions made to the existing drawings could only be of any use to him, or to anybody else for that matter, if the

superstructure were to be actually built with the new system. He knew, in other words, that in the absence of a contract with Per-Am, the revised plans would not be worth the papers on which they were reflected. It defies imagination, then, that Mr. Golzar, in the middle of such negotiations, would nevertheless agree to pay nearly three million dollars to Mr. Dadras just for those revisions. Was he so naive as to completely ignore the possibility of not reaching an agreement with Per-Am? Can any businessman afford to be financially so naive?

1.5. As stated above, an unspecified portion of the 6.75% fee in the letter of 27 August 1978 is set for the "supervision of construction". Now, the supervision of construction is a service wholly dependent on the construction itself. While the terms for construction were being still negotiated, how was it that Mr. Golzar, on 27 August 1978, readily committed TRC to a fee for its supervision?

1.6. If what is meant by this service is the supervision of the construction of superstructure, then such a service, both in the Proposal[6] and in the alleged contract of 9 September 1978[7], was to be rendered not by the Consultant (Mr. Dadras and Kan Consulting), but by the Builder (Per-Am). It is, therefore, inconceivable that Mr. Golzar would reward Mr. Dadras with a fee for a service which was to be rendered by a different entity. It has been suggested, however, that by this the Parties may have meant the coordination of "the structural, architectural, and mechanical work"; a task which, both in the Proposal and in the alleged contract of 9 September 1978, is given to the Consultant. But then this would be in direct conflict with the terms of the TRC's Architect's Agreement with the Project's original architect, namely, Haus. It would, indeed, be in conflict with

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[6] Article E(13): "Builder shall supervise the construction and erection of each superstructure within the Project...."

[7] Article A(12), with identical wording.

the claim of Haus before this very Tribunal[8], and with Mr. Liebman's[9] statement at the Hearing in the present Cases that this last-mentioned service was to be rendered by Haus. On both interpretations, therefore, Mr. Golzar had committed TRC to twice pay for a single service.

1.7. The purport of a letter written on 11 September 1978 by Mr. Dadras to Mr. Golzar is also at odds with the asserted authenticity of the letter of 27 August 1978. That letter of 11 September will be shortly examined. Suffice it to say here that at the end of it, Mr. Dadras, having listed the preliminary steps taken by Per-Am, pleads with Mr. Golzar to favorably consider the signing of a contract with Per-Am. Now if some two weeks earlier Mr. Golzar had already committed TRC, in a written and binding letter, to pay some three million dollars to Mr. Dadras for the revised plans --plans which Mr. Golzar knew would be of no use to him unless Per-Am agreed to build the superstructure with the new system-- then it should have been Mr. Golzar, and not Per-Am, to press for the signing of such a contract. This is simply because, in the absence of an agreement by Per-Am to construct the superstructure, Mr. Golzar would have been left with certain drawings for which he was obligated to pay some three million dollars, and on which no constructor was capable or authorized to act.

1.8. The letter, as asserted by Mr. Dadras, was written in English only, with no Persian version. This is again very odd. It must be remembered that this was a letter which allegedly committed TRC to the payment of a very substantial fee to a foreign individual. As such, it did not only necessitate the close involvement of at least the TRC's financial department, but

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[8] Housing and Urban Services International, Inc. and Government of the Islamic Republic of Iran, et al., Award No. 201-174-1 (22 Nov. 1985), reprinted in 9 Iran-U.S. C.T.R. 313.

[9] Mr. Theodore Liebman, Haus's president, attended the First Hearing in the present Cases as a rebuttal witness for the Claimants.

also the tax authorities in Iran. Yet, this is a letter allegedly written in English only, and hence incapable of being processed by the TRC's financial department, or of being transmitted to the Iranian Ministry of Finance for taxation purposes. Nor can a translation replace the originally signed binding document, on which the Iranian authorities would invariably insist.

Such were the features of this extremely short letter. Attention must now be paid to Mr. Dadras's testimony before the Tribunal in support of the authenticity of this letter, and the circumstances under which it was assertedly written. It will be seen that he unfailingly contradicts himself on every material aspect of the letter.

1.9. On the date on which the fee of 6.75% was supposedly negotiated and agreed upon, Mr. Dadras refutes himself. He says that the figure of 6.75% mentioned in the letter in question was the result of serious negotiations which took place on 27 August 1978:

> [O]n August 27 we had meeting with Golzar and we working on the contract.... I ask him for our percentage of the construction cost. He said 'what you think it should be?' I said 'we normally charge 10% for our work of the total construction cost.' Then again he started with 4 or 5... the bargaining took place and we end up at 6.75, which from that it was understood that 5.4% would go for the work that already has been completed and 1.35 for the total of 6.75 would be for the supervision of construction.

In his Affidavit, Mr. Dadras says that these negotiations took place not on 27, but on 22 August 1978:

> On August 22, 1978 (31-5-2537) at 4:30 P.M., I met again with Mr. Golzar, Mr. Golshani, Mr. Amini and Mr. Morog at TRC Headquarters. Mr. Amini reported to Mr. Golzar our progress during earlier meetings. The construction documents including the cost estimate received Mr. Golzar's approval. Mr. Golzar asked his associates to finalize the contract as soon as possible with the cooperation of Mr. Jabary. It was agreed that the fee for Dadras International's professional services rendered and the supervision of

> construction would be 6.75% of the total cost of the structural system only.

It must be noted, further, that in both these documents he is recounting the events in chronological orders, describing the events which took place on each pertinent day. There is, therefore, no question of a simple mistake as to the date.

1.10. On the figure he allegedly proposed as his fee, Mr. Dadras again contradicts himself. At the Hearing, he says somewhere that his first offer was 10% of the total construction cost. Elsewhere, he says that his starting figure was 12%. That is, incidentally, some ten million dollars for a maximum of two months' work by a broker.

1.11. On the language in which the letter was supposedly dictated in Mr. Dadras's presence, he rebuts his earlier testimony. In his oral testimony, Mr. Dadras asserts that he witnessed Mr. Golzar dictating the letter to a secretary in English:

> Mr. Dadras: Then I asked for a letter that he would give us in this effect and he told his secretary and he dictated to her....
>
> [Question from the Bench]: When Golzar dictated the letter to the secretary, was it in English or in Persian?
>
> Mr. Dadras: That was in English.
>
> [Question from the Bench]: In English?
>
> Mr. Dadras: Yes.

This was in the morning of the first day of the First Hearing. In the afternoon of the same day, he has a different story.

> [Mr. Dadras's counsel]: You testified this morning that it [the letter] was dictated in English. Would you wish to clarify that?

> Mr. Dadras: I mentioned they were dictated by Mr. Golzar and I insisted that every document that comes to us has to be in English and he asked his secretary to make sure it is translated...
>
> [Question from the Bench]: This morning in answering my question you said Mr. Golzar dictated the letter in English to the secretary.
>
> Mr. Dadras: If I said that, I did not say it right.

More disturbing still is his admission a few minutes later that over the lunch break he had discussed this issue with his counsel; a person who had no occasion to know anything about this issue of fact, but was probably familiar with the evidence before this Chamber in another Case, establishing that Mr. Golzar was not conversant, at any rate at that time, with the English language.

> [Question from the Bench]: After I asked the question this morning and you gave an answer, rightly or wrongly, did you discuss this issue with anyone?
>
> Mr. Dadras: No, I did not. I did with my attorney...
>
> [Question from the Bench]: You mean over the lunch break?
>
> Mr. Dadras: Yes.

1.12. On the vital point of what services were supposedly covered by this over three million dollar fee, Mr. Dadras again belies himself. In all his pleadings and at the early stages of the First Hearing, he maintained that this was the fee for changes that had to be made in the architectural designs of the superstructure, plus supervision of construction. The TRC's alleged letter of 27 August 1978 is, of course, to the same purport:

> Your professional fee... for the above work [changes made to the drawings] including supervision of construction is 6.75% of the total cost of the structural system.

At the Hearing, Mr. Dadras's witness, Mr. Liebman, was invited to comment on this; to tell the Tribunal whether, in his professional view, such an exorbitant fee could have been genuinely granted for these services:

> [Question from the Bench]: Can you tell us then that with regard to the work of an architect, not the structure, not the building of it, but an architect who proposes to change the system of the superstructure only, would you be surprised if not flabbergasted to hear that for that part of the work alone a fee of over 3 million dollars has been set.

Mr. Liebman testified that this had sounded odd enough to him to raise the point with the Claimants. He had been told by the Claimants, however, that the fee was to cover, not just the structural "calculations and adaptation", but also the designing of the three plants and their equipment, intended to be erected near the site, as well as the "genius" that went with that work:

> Mr. Liebman: I would have been flabbergasted if I felt that it was the structural design of just a structural engineer for that project that was being paid for, but in fact, as I understand, because I asked these people the very same question, the design of the plants, all of the other patented stuff that was very difficult and many years coming to this point, all of that was built into the fee and actually there was a very small piece of that 3 million whatever, that was for the structural calculations for the adaptation to this. It was in fact for the genius that went into the design of the systems and the buildings of the plants to manufacture the systems that cost the money.
>
> [Question from the Bench]: So you have been told by Mr. Dadras or some other people that the cost of the plants being sold to Iran and the construction is included in the fee?
>
> Mr. Liebman: The design of the plant, not the cost of the plant!
>
> [Question from the Bench]: That is what you have been told?
>
> Mr. Liebman: Yes!

Later at the Hearing, the Claimants' counsel, aware of the fact that the task of designing the three required plants is undertaken in a different contract --the construction contract between TRC and Per-Am-- and is therefore wholly irrelevant to the fee here claimed by Mr. Dadras, attempted to "clarify" this unequivocal testimony. What the witness had said, asserted the counsel, was that the fee was intended to cover the redesigning of the structural plans, and not the designing of the three plants and their equipment. Mr. Dadras himself, however, noting perhaps that the exact words of the witness had been recorded by the Tribunal, later contended unequivocally that "The plants... the cost of designing the plants is included in our fee."

Still not the end of the story. Realizing, in between the First and the Second Hearings, that this last admission of his would make it legally unwarranted for him to pursue his claim to the entire fee set in the letter --for there has been no suggestion on his part that this additional service had been rendered-- he once again retracts:

> [Question from the Bench]: I quote from you from page 572 of the transcript.... At the bottom of that page, line 21, you state this, 'The cost of designing the plants is included in our fee'. And by 'fee' of course you mean the $3 million fee. Can you explain that one please?
>
> Mr. Dadras: Sir, you are absolutely correct... that is what I said.... Now, the design of the plant would come after the contractor would have received his 15% and would make the agreement with American Dyna-Frame Corporation to design the plant and send it to America. That would come out of their fee.
>
> [Question from the Bench]: You see, Professor Dadras, you are a party to a commitment. You have come before us saying that there was a letter committing $3 million to you for certain services rendered or to be rendered. I wish to know what those services were.... I have... your statement... that the fee did include the designs of the plant. I just want to know which of these two versions are correct so that I satisfy myself that at least you know what the fee was about.
>
> Mr. Dadras: Sir, by all due respect to you, I just did mention that you are absolutely correct. I did say

> that on 28th January, 1993. However, when I look at the contract and the letter, that states that the fee was for the work performed up to that date. I did make a mistake by saying that and I apologize and I correct it. I did make a mistake by saying that. I should have said 'no'.... The design of the plants were not done yet, so naturally could not have been included.

This is the sordid state of affairs into which one is likely to fall if one attempts to concoct a scenario at odds with all the realities of life, and with the clear text of his own evidence. Over three million dollars is claimed by a person for services which his own expert witness cannot believe to have attracted such a fee. When this is revealed, he asserts that other services --services that form the subject-matters of a separate contract for a separate consideration-- are also included in his fee. And finally, when he realizes that his last-mentioned admission would at any rate deprive him of his asserted fee, he once again retracts, claiming that those additional services have nothing to do with his fee.

1.13. On yet another vital point of just who was supposed to do the work for which the letter offers a fee of over three million dollars, Mr. Dadras belies himself. Contrary to all his other submissions, Mr. Dadras in his letter of 11 September 1978 to Mr. Golzar --a letter which, as will be seen, he admits to be authentic but asserts that it has been wrongly dated by him-- writes:

> Under our Pre-contract [Proposal signed on 14 June 1978] Per-Am Corporation was obligated to contact your architect, Haus International, in New York and within two months adapt the drawings of North Shahyad Project to Dyna-Frame-Celdex system and carry out the preliminary calculations.

These are Mr. Dadras's own words. If it was Per-Am that was required to make the calculations and adapt the drawings within two months, and it did so, how is it then that Mr. Golzar, in the midst of his negotiations with Per-Am, offers the asserted fee to Mr. Dadras for the same services?

Such, then, was the nature of Mr. Dadras's case in support of the authenticity of the letter in question. It is his claim that on 27 August 1978, when he was in the middle of negotiating with TRC the terms of a construction contract, he requested a letter to show to his associates that certain preliminary changes made to the architectural designs of the Project were approved of. He is then given a letter, prior to the Parties' agreement to employ the system, in which the Owner rewards him with some three million dollars for his work on those alterations. And yet the letter --its features and its contents-- is such that any examination of it, however superficial, reveals at once that it cannot possibly be a genuine document. As for Mr. Dadras's testimony in support of the letter's authenticity, there is not a single material aspect on which he does not flatly contradict himself. But that is not the end of it. There are still other reasons additionally demonstrating that Mr. Dadras's story is false.

1.14. The absolutely trivial nature of the work for which the fee in question is assertedly rewarded. This is, of course, directly relevant, for if it is established that the work performed by Mr. Dadras on the already completed architectural plans of the Project was of trivial nature --as a part, in the Respondents' submission, of Mr. Dadras's marketing efforts-- then it would be difficult to see how Mr. Golzar, himself an experienced architect and shrewd businessman, would nevertheless agree to offer the staggering figure of some three million dollars for such a work.

As it happens, the facts that this was a service of no significance, and that it was offered free of charge, can be readily drawn from the Claimants' own evidence, particularly from a document which bears the title of "proposal", and in which PKDR, the patent holder, provides its prospective customers with a detailed account of the work involved in the use of the system, and the costs thereof. It is, in other words, a comprehensive "terms of offer" by the developer of the system.

It will be recalled that this was a Project the architectural work of it, including the designs and the engineering calculations of its superstructure, had been contracted to, and completed by, another. The use of the suggested Dyna-Frame-Celdex system of construction, in place of the traditional method, required the taking of the following steps:

-- Revising the superstructure's engineering calculations.
-- Modifying, if necessary, the architectural designs of the superstructure so as to adapt them to the new system.
-- Designing three plants and their equipment, to be installed near the site for the production of prefabricated material.
-- Supervising the construction of the superstructure.

These are the exclusive areas in which the system's patent holder may possibly offer its services, and for which it may become entitled to a fee. Of these, the last one, supervising the erection of the superstructure is obviously irrelevant. As the evidence demonstrates, the superstructure of the Project was never built, either by the conventional or Dyna-Frame method. To this list, on the other hand, it must be added a fee for "royalty". Each of these will now be examined.

(a) The engineering calculations for the superstructure: Mr. Dadras admits that this was done by PKDR, while his own role was limited to checking the results:

> What we would do, we took the Haus International drawing... we would take the work done by Haus International and a copy was sent to PKDR. They would do the calculation and when the calculation was done we would get it in our office and I have professor Grass... and also Mr. Manoussof... both of them would check the work of PKDR to make sure that everything is right....

Mr. Duvé, the president of PKDR, fully endorses this admission:

> They [Haus] asked us... if we could adapt our system to it.... I said 'yes we could'... And we did the application engineering for all of those buildings.... [W]e finished those in August, in September of '78. We sent them on to Aly Dadras and he took those with him to Iran....[10]

Indeed, all the drawings submitted to the Tribunal by Mr. Dadras in support of his claim are on the PKDR's papers, which papers identify PKDR as the party responsible for those calculations.

Now, what is the PKDR's charge for this service? The answer is quite clear: a charge only in the form of "royalty", which is made if and when the three plants begin to produce. As Mr. Duvé himself states:

> All of our engineering design drawings would have been picked up on the ongoing royalty and application engineering, which was 16 cents per square foot of building produced.

The fact that no additional fee is charged for this part of the work is also unequivocally confirmed by the PKDR's own proposal, which contains, as stated above, an exhaustive list of all the charges made by PKDR for its services. The work, says

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[10] He has further testified that: "We worked everything through Professor Dadras's office. He took the work, put it on his drawings and went back... to Iran."

PKDR, is done in three phases,[11] and for the following exclusive charges:

Phase I: The design cost for three plants $213,400

Phases II and III: $649,000

To this, there is an additional charge: ongoing royalties, application engineering, and monitoring fees. It is $0.16 per square feet and it is collected as the plants begin to manufacture their product.[12]

Here is the total capital investment which, under the PKDR's proposal, must be made by an owner wishing to use the Dyna-Frame-Celdex systems:

Total Capital Investment:

Design [of the plants]	$ 213,400
Plant and Buildings	3,703,600
Bidding, supervision of fabrication & ins-	

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[11] Phase I: PKDR International will design and specify all equipment, machinery, foundations and power requirements to facilitate procurement of all necessary material to complete the three plants. Phase II: PKDR International will bid out all design criteria to receive and present to the buyer the best competitive prices, consistent with quality and performance of required equipment and machinery. PKDR International will, at the direction of the buyer, place orders, supervise fabrication and cause the above materials to be shipped to a port designated by the buyer. Phase III: PKDR International will work with the buyer to secure proper shipping arrangements and will, prior to arrival of specified materials, visit the plant site and building to guide the personnel of the buyer in preparing the plant for the receipt of all equipment. PKDR International will, upon arrival of said equipment, supervise the buyer's personnel in installing all equipment in accordance with the plant design. PKDR International will then indoctrinate the buyer's personnel in all of the production methods and techniques required to initiate plant production.

[12] Finally, there is the additional charge of $3,703,600 ("cost of machinery and equipment for the three plants including shipping from U.S.A., installation and estimated building costs"), should the client wish to entrust these tasks to PKDR.

tallation, indoctrination of personnel		649,000
total	$	4,566,000

It will be seen from the foregoing that the necessary engineering calculations for the building of superstructure through Dyna-Frame-Celdex systems are always made by PKDR. They were done here by PKDR and not by Mr. Dadras, as the evidence, including the submitted drawings, demonstrates. For this, PKDR makes no independent charge. In addition to its charge of designing the plants, PKDR charges a royalty which is collected only when the material is produced. And the material is produced, obviously, when the main construction contract is signed, when the plants are designed, and when they begin to produce the required material.

(b) The changes to the structural drawings of the superstructure: This service was to be rendered by Mr. Dadras. All the witnesses have confirmed, however, that this was very trivial:

> Mr. Dadras: I was asked if I could do whatever necessary. However, I think the changes that we made in the Haus design was less than I would say 5, 6% really. We didn't change much. We tried to keep it as it was because that's what they wanted and that's what they were going to get. It was not necessary to make drastic changes.
>
> [Question from the Bench]: In other words, if I understand correctly, the introduction of the Dyna-Frame system into this building did not bring about any modifications... any major modifications in the plans made by the architects?
>
> Mr. Dadras: You are absolutely correct, Sir. Yes, Your Honor! Yes.

And elsewhere:

> Mr. Duvé: However, in the North Shahyad Project there were very little, in fact very little changes needed to be made --if any-- to the architectural drawings, because they had used a put in place system and our

> members were smaller really than their members that they originally showed.

This is supported by another witness presented by the Claimant, Mr. Liebman, who, referring to the material submitted to the Tribunal by Mr. Dadras, states:

> [T]hese are not architectural plans, these are structural designs and calculations.

The triviality of this work will be better appreciated if it is contrasted with the architectural work undertaken by Haus, the Project's architect. There, against a fee of $2,300,000, of which $500,000 was exclusively for supervision of construction, Haus undertook to prepare architectural designs and engineering services for the entire site. That included, in the words of Mr. Liebman, designs for 5000 housing units, office structures, shopping centers, parks, pathways, crossings, hospitals, and mosques.

> In connection with its work HAUS engaged several consultants, including American, British and Iranian companies.... HAUS's own personnel have devoted tens of thousands of hours to the project.[13]

It was Haus's responsibility, further, to maintain a group of architects, headed by an architect-in-charge and a project architect, in Tehran for the entire duration of the contract, which extended well beyond a year and a half. Haus was to deliver different sets of drawings at different phases of the project, including the schematic drawings (phase one), preliminary drawings (phase two), and working drawings and specifications (phase three) for all the architectural, structural, mechanical, and electrical work of the Project.

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[13] Statement of Claim (Doc. 1) in Case No. 174, at 3 (emphasis added). See also Liebman Affidavit annexed to Doc. 77, filed on 8 Aug. 1983, in Case No. 174.

In contrast, the work performed by Mr. Dadras allegedly consists of 5% to 6% changes not in the entire work performed by Haus but in a fraction of it, i.e., the architectural part, and not in all the architectural part but again in a fraction of it, i.e., the architectural work related only to the superstructure of the Project. That is why Mr. Liebman, referring to Mr. Dadras's work states categorically: "In architectural terms it was nothing...." Indeed, invoking the Haus contract, Mr. Tabesh, an expert witness presented by the Respondents, has testified that only 12% (or $276,000) of the work undertaken under that contract related to the engineering calculations and architectural work of the superstructure:

> The amount of fees of Haus for the designing civil engineering, residential and commercial buildings amounted to $2,300,000 in consideration of studies, preparation of architectural and city planning designs, technical computations and preparation of power and technical designs, in which case only 12% of this sum (i.e., $276,000) was designated for the conduct of computations and preparation of framework layouts, while the fees in the Contract alleged by Mr. Dadras an amount of $3,000,000 was mentioned for designing, preparation of the layouts of prefabricated frames, and that only for residential and repeated buildings, which is quite astonishing.

In short, then, and accepting the assertions made by Mr. Dadras and his witnesses, the work performed here by Mr. Dadras is no more than minor modifications --amounting to no more than 5% or 6%-- in certain architectural designs for which, together with the required engineering calculations, the original architect has received a fee of merely $276,000.

(c) Designing the three plants and their equipment: As demonstrated above, this was to be done by PKDR. According to Mr. Duvé, and the PKDR's proposal, the suggested fee for this service was $213,000. The evidence --including Mr. Dadras's letter of 19 August 1978 to the Owner as well as the drawings submitted by him to this Tribunal-- shows that this service was never rendered. More importantly, this was a service to be rendered through Per-

Am against a fee agreed upon in the main construction contract by Per-Am and the Owner. It has, therefore, nothing to do with the fee which Mr. Dadras claims here.

(d) Possible royalty: This has already been dealt with. The only party entitled to this is, of course, the patent holder, i.e., PKDR. Yet, as demonstrated above, the statements by the PKDR's president at the Hearing as well as the very text of the PKDR's proposal make it crystal clear that this royalty is charged, logically enough, not when the conventional engineering calculations are modified, but when the factories are erected and material is produced.

> The only thing I have not mentioned was, there was also a royalty to be paid in the system and these were ongoing additional charges. They were based on the amount of square footage that was produced through these plants and erected.

It hardly needs repeating that this fee, too, is covered by the main construction contract --the alleged contract between Per-Am and the Owner-- and has, therefore, nothing to do with Mr. Dadras's services.

All these may now be summarized. Relying on Mr. Dadras's own evidence and assertions, the services which may have been conceivably rendered through the Consultant were limited to two types.

First, the engineering calculations of the superstructure and their computerization, a work which was done exclusively by PKDR free of charge. The following passage, quoted from Mr. Duvé, leaves no doubt that this service was offered as part of marketing services by the system's inventor:

> [W]hile he [Mr. Dadras] was in Iran with the Kan project somebody said to him... 'if you say this system is as good as it is and as fast as it is and you can produce buildings this fast, we would like to see if you can apply this to this North Shahyad

> Project.' He said: 'I could do that if I had the authorization to take those drawings.... We went to [Haus] International, got the drawings and we made our drawings just so, that the buildings would be the same shape as his buildings, the same height, the same penthouses. We took this information and we sent it back.

Second, the effecting of certain minor changes, amounting to no more than 5% to 6%, in the architectural designs of the superstructure of the Project. In order to realistically assess the possible value of this work, one should recall that for the original architectural as well as engineering calculations of the Project's superstructure a fee of no more than $276,000 had been agreed upon.

It has been suggested, on the other hand, that the deal involved a package which included the sale of technology, and, because of that, was worth the consideration asserted by Mr. Dadras. This, too, is simply misplaced. It is the result, again, of a failure to distinguish between the intended construction contract, under which Per-Am was to offer its technology against an agreed price, and Mr. Dadras's services. The latter, for which the present claim is made, has nothing to do with the offered technology.

Now, this being the trivial nature of the work performed by Mr. Dadras, Mr. Golzar is nevertheless said to have agreed to commit TRC to a fee of some three million dollars to compensate such work. This cannot be treated seriously, particularly if the fact is recalled, as it must, that on 27 August 1978, when Mr. Golzar is supposed to have written that letter, he had the PKDR's proposal in front of him, and was negotiating its terms. He knew, therefore, that the patent holder would make no charge against the required engineering calculations. He knew that this, at any rate, was part of the services which were to be offered by the Builder and not by the Consultant (Mr. Dadras). He could not be deceived, as Mr. Liebman could, into thinking that Dadras's fee covered the designs of the three plants or the royalty for the

system. He could see in the proposal before him that it was the Builder who was to design the plants and that the royalty was being charged, not by Mr. Dadras but by Per-Am, and not when the changes in the drawings were being made but when the three plants began to produce. He was, furthermore, himself a construction engineer and, being a party to a contract with Haus, fully familiar with fees for architectural services.

Mr. Golzar could not, therefore, have conceivably consented to the payment of this most ridiculously high fee for certain minor changes made by Mr. Dadras in the original architectural plans.

The importance for the present enquiry of a correct appreciation of the nature of the work in question cannot be overemphasized. Once the absolutely trivial character of the work on the engineering calculations and architectural designs of the superstructure is realized, the Parties' mutual understandings, reflected in the submitted documents, become all very clear. It becomes clear why, for instance, in the Agreement of 29 March 1978, the envisaged task of Mr. Dadras is determined to be, not to provide revised architectural plans, but to introduce competent constructors. It becomes clear, further, why the Parties, who have discussed and provisionally agreed upon almost all relevant points, have nevertheless not bothered to even discuss any fee for engineering calculations and adaptations of the architectural designs. Clearly, this was a task which Mr. Dadras was prepared to perform before his fee was discussed.

It becomes clear, again, why the Proposal, in which the Consultant undertakes to review and adapt the drawings within two months, is not even signed by the Consultant; nor does it refer to any future discussion of a possible fee. In other words, this is a document in which the Consultant (including Mr. Dadras) unconditionally commits itself to review the plans while Per-Am provisionally agrees to build the superstructure if and when a final contract is concluded. Yet the party who is to submit the

revised plans does not sign the document, nor is there any reference to any fee for such a service. Indeed, despite unconditional commitment by Mr. Dadras under this document, the Owner makes it absolutely clear that it assumes no obligation for work performed under the Proposal (Article J). Nothing but the triviality of the work, and the fact that it is offered as part of the marketing services for the intended construction contract, can justify or explain such arrangements.

It becomes clear why in the letter of 19 August 1978, through which Mr. Dadras submits revised plans, there is no demand for, indeed no reference to, payment of any remuneration for this work. Here is a case in which one Party, Mr. Dadras, assertedly performs certain work and submits the results to the other Party while, by his own admission, his fee is not even discussed, let alone agreed upon, until sometime after the work is submitted. He submits the work but, even at that stage, makes no demand for a fee. That, surely, must speak for the scope of the work.

Finally, it becomes clear why Mr. Dadras, at no stage after the submission of the work, ever attempted to press for payment of what he presently alleges to have been his due. As we shall see shortly, in between 27 August 1978, when Mr. Golzar allegedly committed himself to the asserted fee, until at least May 1979, when Mr. Golzar left Iran[14], Mr. Dadras had ample opportunity to do so.

The only explanation for all this is that the work, for which a claim of over three million dollars is now pursued, never occupied the Parties' minds during these preliminary negotiations. And it did not occupy their minds for the simple reason that it was a trivial work offered as an essential part of selling the system.

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[14] Abrahim Rahman Golshani and The Government of the Islamic Republic of Iran, Award No. 546-812-3 (2 Mar. 1993), at para. 22.

1.15. The absence of any words from anybody in support of the authenticity of the letter. The importance of this cannot be overemphasized. It will be recalled that on 27 August 1978, when the letter was allegedly signed by TRC, Mr. Dadras and TRC were negotiating --indeed finalizing-- the text of a contract in which, as we now know, the TRC's approval of the changes made to the drawings as well as the agreed fee for such a service were reflected. There was, therefore, no legally sound reason for TRC to prematurely write a letter in which these two points alone would be reflected. Mr. Dadras, however, has told the Tribunal of the only reason for which the letter had been requested and issued:

> [O]n August 27 we had meeting with Golzar and we working on the contract. I told him that I like to have a reply for my letter so I could show to my associates they have work on this project and they want to see that you approved and so on. He said alright, I give you....

Now, if the letter was requested so as to assure Mr. Dadras's associates of the approval by TRC of their work, they were presumably informed of it when it was issued. After all, TRC had not only approved of their work, but had rewarded them with a substantial fee. And yet not a single word from any of these "associates" to the effect that they were, at the time, told of this significant development. This absence is particularly conspicuous in relation to one of those "associates", Mr. Duvé, who, as president of PKDR, had in fact performed the work. But although he appeared before the Tribunal, and testified on other issues, he said nothing on the asserted authenticity of the letter of 27 August 1978.

1.16. The Parties' conduct <u>after</u> the asserted signing of the letter in question. The point has, again, a direct bearing on the issue of authenticity because, obviously, the existence, or lack of, an undertaking by TRC would lead the Parties to take wholly different courses of action.

Mr. Dadras asserts that on 27 August 1978 he received a letter from TRC in which TRC committed itself to pay him some three million dollars for Mr. Dadras's past services. If that was the case, there must surely be some evidence somewhere indicating that he acted as a creditor, i.e., that he sought the payment of his due. Yet there is not a shred of evidence before the Tribunal to that effect. One may justifiably wonder, for example, why Mr. Dadras, having received the letter, failed to request that his fee be paid there and then. His services, it will be recalled, had already been rendered. Mr. Dadras says that

> [o]n October 18, 1978, Dr. Darehshuri called me from Tehran and said that he had not been able to talk to Mr. Golzar about the payment owing to Dadras International. He added that many offices and agencies were on strike, and the situation in Tehran was not good.

This is hard to reconcile with Mr. Dadras's assertion elsewhere that on 9 September 1978 when he signed the alleged contract, there was no sign of any social or political problem in Tehran. Yet in between 27 August and 18 October 1978, his colleague in Iran fails to even talk to Mr. Golzar concerning this fee.

Mr. Dadras adds:

> On November 13, 1978, Dr. Darehshuri again called me to advise that he had finally reached Mr. Golshani of TRC. Mr. Golshani had told Dr. Darehshuri that TRC was waiting for the situation to get better <u>before proceeding</u>. (emphasis added.)

The reference to "before proceeding" indicates that what had been assertedly discussed with Mr. Golshani was the implementation of the main contract. It had nothing to do, therefore, with Mr. Dadras's claim to a fee for his past services. What is particularly noteworthy in this regard is the fact that at almost exactly the same time Haus International, the

North Shahyad architect, received a large instalment of its due. As has been held by this Tribunal in another Case:

> [T]he evidence shows that in December 1978 North Shahyad made a payment of Rials 10,000,000 to the Claimant [Haus], which the Claimant confirmed by a letter dated 4 December 1978 as partial payment....[15]

Yet Mr. Dadras evidently elected not to as much as make a demand, in writing, at any rate, for the payment of his fee. The only step in this regard was assertedly taken when Mr. Dadras returned to Iran and met the then TRC managing director on 30 July 1979. At that meeting, says Mr. Dadras, he was told not to even mention to anyone that he had been involved with TRC. Now this should have made him aware, more than anything else, that the payment of his due was in jeopardy, that he needed evidence to demonstrate that he did pursue a claim to which he regarded himself entitled. Yet he admits that until January 1982, when he first submitted his claim to this Tribunal, he did nothing, not as much as writing a simple note, to record his claim, to show that he did consider himself entitled to a fee which, by any standard, was very considerable.[16] This can hardly be reconciled with the assertion that there was indeed a written commitment by TRC that Mr. Dadras was owed some three millon dollars.

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[15] See Haus, 9 Iran-U.S. C.T.R. at 335.

[16] It should be emphasized that, unlike certain U.S. nationals who invoke the alleged prevailing anti-American atmosphere as an excuse for not being able to go to Iran, Mr. Dadras could have easily traveled back to Iran to collect his asserted due, for nothing prevented the physical presence in Tehran of an Iranian national. It must be noted, further, that for the great part of the period in question, Mr. Dadras could not have contemplated the creation of this Tribunal. His only hope at that time was, therefore, to seek compensation by pressing TRC.

2. The Asserted Contract of 9 September 1978

Many of the grounds referred to so far in support of the inauthenticity of the letter of 27 August 1978 are equally indicative of the inauthenticity of the asserted contract of 9 September 1978. The reason is obvious, for the same alleged commitment by TRC to remunerate Mr. Dadras for his past services is reflected --albeit with more details-- in the alleged contract. But there are further evidence of inauthenticity specific to this document, as will be demonstrated below.

2.1. There is, first of all, a letter dated 11 September 1978 --that is, two days after the date of the alleged contract-- in which the author, Mr. Dadras, recounts to Mr. Golzar the history of his earlier negotiations with TRC and, at the end, invites Mr. Golzar to favorably consider the signing of the offered contract with Per-Am. This was the letter, it will be remembered, the writing of which had been recommended by Mr. Jabary of TRC after Mr. Golzar's dismissal of Mr. Dadras at their meeting of 19 August 1978. Mr. Dadras admits the authenticity of the letter.

The date of the letter will have been noted: 11 September 1978. As such, the letter is a death blow to Mr. Dadras's entire scenario and his claim. Realizing that, Mr. Dadras, who asserts to have recorded every material and immaterial event throughout his dealings with TRC, and who recalls the exact date and time as well as the detailed contents of each of his meetings and encounters with the TRC's personnel, conspicuously fails to submit, or even to refer to, this significant document. That convenient failure is, by itself, very revealing.[17] The document, however, is subsequently submitted to the Tribunal by the Respondents and, faced with this unwelcomed development, Mr.

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[17] Mr. Dadras asserts, as an afterthought, that he had kept no copy of the letter for himself, an assertion which is difficult to believe. This does not, at any rate, explain why he should fail to at least refer to it, when giving a detailed account of the events, in his pleadings.

Dadras says the only thing left to be said: that the date of the letter is a mistaken date. As the celebrated saying goes, "he would, wouldn't he?"

In support of this, he seeks to resort to flimsy excuses about the difficulties he had at the time in converting dates in three calendars: Imperial, Iranian, and Gregorian calendars.[18] What he apparently overlooks is that this was not a date in the past, so as to require conversion, but the date of writing the letter. If he wanted to tell Mr. Golzar, for instance, on what date in the past a given event had taken, he probably had to consult a converting calendar, or convert the date by other methods.[19] But here, sitting in an office in Iran, all he needed was the correct date of the writing. For that, one does not begin by first thinking of a date in Gregorian calendar and then converting it into its equivalent in the Iranian calendar. Instead, one looks at the calendar on the desk, or simply asks the next person in the office what the date is.

Besides, Mr. Dadras has alluded to the typing of the letter, not by himself, but by a typist. Would the typist, then, not have told him what the date was, or, if Mr. Dadras had already given in the handwritten version of the letter the date of "20/6/1357" (11 September 1978) instead of "30/5/1357" (21 August 1978)[20],

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[18] In fact, the Imperial and Iranian solar calendars do not differ as far as the days and months are concerned. And here, the alleged mistakes are made in relation to the days and months only. Besides, the so-called Imperial calendar, inaugurated in 1976, was abandoned promptly after 27 August 1978 in Iran. Indeed, the fact that Mr. Dadras uses in the letter the Iranian solar year "1357", and not the Imperial year "2537", is itself a strong indication that the correct date of the letter could not have been 21 August, but 11 September 1978, i.e., after the date of the Country's reversion to the solar calendar.

[19] In fact, he did not need to. All the past events in the letter, with one exception, are referred to in their Gregorian dates.

[20] The date now alleged by Mr. Dadras to have been the correct date.

would she or he not have told him that the date he wrote was wrong with regard to both the day and the month? Would the typist not have told him that the written date belonged to a day some 20 days in advance of the date of writing?

But be that as it may, for what is by far more revealing in this respect is the very text of the letter. There are, to be more specific, passages in this letter which show, conclusively, that the letter could not have been written on 21 August, and that the correct date must have been the date recorded in the letter: 11 September 1978.

First, Mr. Dadras begins the letter by saying to Mr. Golzar that "pursuant to face to face discussions and telephone conversations with you, Messrs. Jabary, Golshani, Amini, Morog, and Engineer Farahi, it has become necessary to submit this letter to you before my departure for New York." (emphasis added.) The evidence shows that on that trip, Mr. Dadras had arrived in Tehran on 18 August 1978. He also says in the letter that he would be staying in Tehran until 18 September 1978. He gives a telephone number in Tehran and his address in New York, through which he says he can be contacted, should Mr. Golzar wish to do so, before and after 18 September 1978, respectively. This was, according to Mr. Dadras, a trip of one month duration made solely for the purpose of finalizing and signing a contract the terms of which had already been conditionally agreed upon between the prospective Parties.

Now, does it make sense that just three days after his arrival and while he still had some twenty seven days left for future meetings and face to face negotiations, he should write to tell the Owner that it had become necessary to write the letter before departing for New York, leaving an address where he could be contacted after his departure? Had he, in less than three days after his arrival, already concluded that there would be no future meeting with the Project Owner and that the contract

would not be signed during the rest of his stay in Tehran? If so, why did he still plan to stay in Tehran for another 27 days?

This statement, on the other hand, may be tested against the date mentioned in the letter, 11 September 1978. He has been in Tehran for 23 days, trying unsuccessfully to induce Mr. Golzar to sign a contract with him. He is to return to the United States in a week's time. Surely it would then, and only then, make sense for Mr. Dadras to write a letter, before his departure, to remind the Owner of the background, to invite him to consider the Proposal, and to leave an address in New York at which he can be contacted after his departure.

What is particularly noteworthy in this respect is what, according to Mr. Dadras, had taken place in those three days after his arrival in Tehran. After a brief and quite disappointing meeting with Mr. Golzar on 19 August 1978, things had drastically changed for better. Following a series of most successful meetings with two senior members of the Owner's corporation, his preliminary drawings, according to him, had been officially approved of. In the morning of 21 August 1978, he had been told to prepare the text of a contract and have it ready by the afternoon. Indeed, he implies that the Owner's representatives were not prepared to see any delay:

> Now in Amini's office all our documents were on his table. Evidently he had been going through it, because he asked me that I went through the document and they looked good, start writing the contract. He said 'I want you to write up the contract, based on our agreement.' He said he wants to have it this afternoon, that is on 21th. Now, it was something around 11:30 or 12 o'clock. (emphases added.)

Such was the state of affairs, according to Mr. Dadras, at noon on 21 August 1978. In just less than three days after his arrival in Tehran, so his story goes, Mr. Dadras had secured the Owner's approval of his drawings and had been requested to urgently bring in the text of the intended contract. By all accounts, therefore, he must by noon on 21 August 1978 have

thought that the contract had been in the bag. Yet Mr. Dadras now seeks to argue that in the afternoon of 21 August 1978, and before returning to TRC headquarters with the prepared text of the contract, he wrote a letter to the Project Owner telling him that the writing of such letter --in which the Owner is requested to consider the Proposal, and is left with an address in New York for future contacts-- had become necessary before his departure for New York in twenty seven days' time. It is an absurd contention.

In yet another passage in the letter, Mr. Dadras, referring to his then ongoing trip, says that

> since you were very busy, I finally succeeded to meet Mr. Golshani on 21 August who instructed me to meet with Mr. Amini. Mr. Amini, after consideration, told me to prepare the contract form and submit it to him. On the basis of the Proposal of 14 June 1978, I prepared a contract and submitted to him. (emphases added.)

It is Mr. Dadras's assertion, made repeatedly, that the letter was written around noon on 21 August 1978, and the proposed contract was delivered later that afternoon, after the letter had been written. Yet in the letter he says that he "submitted" the contract to Mr. Amini on 21 August 1978. The use of the phrase "I finally succeeded to meet Mr. Golshani on 21 August", and the use of the past tense "submitted" in reference to a contract which was prepared in the afternoon of 21 August 1978 prove, conclusively, that the letter could not have been written at noon on 21 August 1978, as alleged by Mr. Dadras.

In short, the text of the letter, nearly every passage of it, reveals not the state of a person who, three days into his intended trip of one month to Tehran, is about to finalize the contract but, on the contrary, the status of a person who, having unsuccessfully tried to induce the Owner, after the passage of the greater part of his stay, to grant the intended contract, pleads with him, for the last time, to reconsider his position,

and to contact the writer in New York after his departure, should the Owner decide, after all, to go ahead with the contract. The date of such a letter cannot be 21 August 1978, but sometime in September, to wit, the date recorded in the letter. As such the letter by its date and by its contents establishes irrefutably that the alleged contract cannot be authentic.

2.2. Of equally great significance in this respect is the phrase used by Mr. Golzar at the top left corner of the letter. Having read Mr. Dadras's letter, in which Mr. Golzar is requested to favorably consider its contents and to agree to the signing of a contract, Mr. Golzar instructs his top official, Mr. Amini, to "file away" the letter. The phrase has a fixed and clear meaning in Persian and, more so, in the Iranian administration jargon. It indicates the instructor's desire that no step should be taken in that regard. The date appearing under Mr. Golzar's signature is, as it is now conceded by all hands, "2/7/57" (24 September 1978). Mr. Amini, by putting his initial and giving the same date, indicates that the instruction has been followed. On the strength of this unrebutted evidence, too, it is clear that not only no contract had been signed until 24 September 1978, but that by that date Mr. Golzar had decided to shelve the proposal.

2.3. The testimony of the Respondents' witnesses to the effect that no trace of this so-called contract has been found in any of the TRC's files. Mr. Dadras has, also, failed to submit at least the Persian version of the asserted contract, a version necessary for use by the TRC authorities and by the Iranian tax authorities.

2.4. The fact that 9 September 1978 was just a day after what has since become known as the "Black friday", a day on which most serious clashes between the old regime's army and the demonstrators in Tehran brought the city into standstill. The signing of a contract for the construction of a half a billion dollar project, under the then prevailing conditions, seems most unlikely.

2.5. The alleged contract imposes certain duties on Kan Consulting, represented by Mr. Darehshuri, and sets certain fee for the services it is to offer. Yet there is no trace of Mr. Darehshuri's signature in there! Nor is there any evidence in the pleadings that Mr. Dadras had ever been authorized to sign on behalf of this independent entity.

2.6. With the signing of this contract, Mr. Golzar, a professional architect, would have agreed that two architects, Haus International and Mr. Dadras, should be separately paid for a single service: coordination of the structural, architectural, and mechanical work. This is because this service, referred to in Article A(2) of the alleged contract, is identically undertaken by Haus in its Agreement with the Owner; an Agreement on the basis of which Haus has sued and received compensation from TRC before this very Tribunal.

2.7. Under Article E(6) of the Proposal of 14 June 1978, "All structural analyses and the performance of the structure will be the responsibility of the Builder." (emphasis added.) In the alleged contract (Article A(5)) it is asserted that "All structural analyses have been done by the CONSULTANT." This is indeed amazing. One entity proposes to render a service, and while it is in the middle of negotiating the terms of it, another entity is said to have already rendered that service and is compensated for it!

2.8. It will be recalled that in the letter of 27 August 1978, the 6.75% fee is offered to Mr. Dadras alone; in the contract of 9 September 1978, Kan Consulting, which is mentioned in the Proposal of 14 June 1978 but not in the letter of 27 August 1978, appears again, and is offered a fee for its past services!

2.9. Yet another fact directly relevant to the present enquiry is Mr. Dadras's failure to demonstrate that he ever tried to meet a prerequisite to the signing of the contract or, at any

rate, the first condition for its performance. It will be recalled that in the first document signed by the Parties, the Agreement of 29 March 1978, the two most essential requirements for the prospective contractors were said to be: competence and ability to provide bank guarantees acceptable to the Owner. This latter requirement is again referred to in the Proposal of 14 June 1978:

> All the above work to be completed, provided the terms of contract, payment schedules and guarantees are satisfactory to both parties, OWNER and the BUILDER. (Article H, emphasis added.)

And in more detail, in the alleged contract:

> 15% of total cost or 677,550,000 Rials or U.S. Dollars 9,597,025 is payable to BUILDER after signing of the contract when BUILDER provides the OWNER with bank guarantee acceptable to OWNER for any amount up to 15% stated above. 5% of total contract or 225,850,000 Rials or U.S. Dollars 3,199,008 is payable when three plants stated on A-8 above have been delivered on the PROJECT site and are operational. All three plants will be kept as security down payments by the OWNER and the OWNER will release bank guarantee equal to the total cost of the plants. (Articles E(4) and E(5), emphases added.)

The contract was signed, assertedly, on 9 September 1978. If so, it fell on the Claimant, Per-Am, to take the first step towards the implementation of the contract by providing TRC with the required guarantees. Indeed, here was some nine and a half million dollars to be immediately collected by Per-Am if Mr. Dadras, having signed the contract, provided the required guarantees, a step which, according to his testimony, he was able to take without any difficulty. Yet there is no evidence, there is no suggestion, that Per-Am ever took any step towards the realization of this obligation.

The alleged telephone conversation, referred to earlier, between Mr. Darehshuri in Tehran and Mr. Dadras in the United States, in which the former is said to have informed the latter

of the TRC's financial difficulties is, even if true, quite irrelevant. Under the clear terms of the contract, this first step was to be taken not by TRC, but by Per-Am. Besides, according to Mr. Dadras's own testimony, he was first told of the TRC's financial difficulties on 18 October 1978. There was, therefore, a period of at least one month during which Per-Am had no reason not to begin to perform its obligations under the contract, had there been, of course, a contract.[21]

2.10. To the same effect is Mr. Dadras's failure to demonstrate that he ever took any other step which Per-Am was required to take under the supposed contract. No evidence of a single correspondence, or any other contact, with the Respondent corporation, with which there was now a contract with some sixty-three million dollars consideration. No evidence of seeking any instructions from the Respondent corporation as to what was to be done after the conclusion of the contract. No evidence or trace of a contract with PKDR or AIDC. In his affidavit, Mr. Dadras alleges that:

> On September 20, 1978 (29-6-2537), Per-Am entered into a contract with AIDC for the purchase of three plants to be shipped and erected on the site provided by TRC for the Project in Tehran, Iran.

As the only piece of evidence in support of the allegation that at least something had been done after the signing of the alleged contract, this sounded rather interesting. So, the question was put to him at the Hearing:

> You have stated in both your affidavits that Per-Am and AIDC signed a contract on 20th September 1978 to do work on the contract. I have not been able to see any document or any copy of such a contract. Will you tell us about that one as well?

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[21] In his affidavit, Mr. Dadras states: "On October 18, 1978, Dr. Darehshuri called me from Tehran and said that he had not been able to talk to Mr. Golzar about the payment owning to Dadras International."

Though in reply Mr. Dadras first asserted that he had the original of the alleged contract with him, he failed, despite repeated invitations, to provide the Tribunal with a copy of it, either then or afterwards.

Section III: The Documents in Question Are Forged

As stated above, the Respondents' first, and main, defense is that on the basis of the evidence before the Tribunal, Mr. Dadras has clearly failed to establish that the two documents on which he exclusively relies in the present proceedings are authentic. The evidence examined so far makes it abundantly clear --for some twenty five independent grounds-- that this indeed is the case.

Such a conclusion --an inevitable one-- would of course dispose of the present claims. No claim may be further examined where the claimant fails to satisfactorily carry his burden of proving the facts on which he relies in establishing his contentions. That is why the Respondents have here correctly submitted that the Tribunal need not, in determining the present claims, reach the issue of whether or not Mr. Dadras has in reality forged the documents in question. And yet it remains the fact that the Respondents have, in support of their additional defense, adduced evidence to the veracity of their further contention. It hardly needs emphasizing that each and every one of the twenty-five or so grounds of inauthenticity, discussed above, are directly relevant to this further inquiry. The grounds which will now be examined are, therefore, simply additional to those previously discussed.

1. The Testimony of a Forensic Expert

Mr. Entezari, a competent and credible expert has, based on fully explained technical reasons, concluded that the signatures

attributed to Mr. Golzar on the letter of 27 August 1978, and on the last page of the alleged contract, are forged. He has further testified that the sheets of paper on which the alleged contract is reflected do not belong to TRC.

First, with respect to the letter:[22]

> This letter was one of the pieces of paper that I have seen or studied.... [T]he signature which is related to engineer Mr. Golzar, when I compare it with his signature in other papers I see differences and discrepancies.... [T]here are differences[23] in the form.... And this is different from the authenticated signature of Mr. Golzar, which I have already seen in other documents....

Second, with respect to Mr. Golzar's alleged signature on the contract:

> I see a signature which looks like the signature of Mr. Golzar. However... this is not authentic.... As an expert in view of the various signatures that I have seen from Mr. Golzar in other papers, this is not Mr. Golzar's signature.

Third, with respect to the sheets of paper on which the alleged paper is written:

> [T]he papers of these six pages are not those... which are used by TRC.... None of these six pages possess those particulars of the TRC.

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[22] It should be pointed out that Mr. Entezari's oral testimony has been given through an interpreter.

[23] This is later explained by him:

> When an expert refers to differences in signature it does not mean the facial one, the appearance. It means the quality, the habit of the writer which unconsciously appears on the paper. All signatures of one person differ from one another all the time, but in substance, in quality such differences do not exist. That is what I am saying.

This last point is, of course, also significant. When the authenticity of a document is at issue, the fact that it is written on the original stationary of the challenging party will have to be explained by him, which is not the case where the document is merely a photocopy of the original.

Against these firm and unequivocal conclusions by a highly competent expert, the Claimants had until well after the First Hearing only offered the oral testimony of a layman, Mr. Liebman, who freely admitted to be wholly innocent of the science of forensic forgery detection, and of the Persian language and handwriting. Indeed, as he further conceded, his familiarity with Mr. Golzar's signature is merely derived from his presence, many years back, when Mr. Golzar put his signature next to that of Mr. Liebman's on the Haus contract, and when thereafter Mr. Golzar on occasions signed checks in favor of Mr. Liebman in the implementation of that contract:

> This is the contract you showed to me and this is the contract where I identified both the signature and the initials. As you recall I was very concerned that I have this correct. It has been many years so I went to my storage unit and found my contract [the HAUS-TRC contract] and compared them again, so I would be 100% sure.

It is hardly necessary to emphasize here that forgery detection is a highly technical science requiring extensive background studies and experience, and which cannot be conducted by every layman, including an architect. Equally essential is the knowledge of Persian alphabet where the subject of examination --here Mr. Golzar's signature-- partly consists of words in that language. This Chamber has already had the unhappy experience of a French lady who, wholly innocent of the Persian handwriting, had volunteered to offer her "expertise" on whether or not a Persian text had been written by a certain person. It eventually transpired that she was unable to distinguish between the Persian

handwritten and printed materials.[24] Mr. Liebman's testimony is very much of the same quality. This is how he describes his reasons for concluding that certain initials appearing at the end of each page of the asserted contract, are those of Mr. Golzar:

> [I]f you compare on page after page for 19 or 20 pages of mine that strange little initialling, repeated and repeated and repeated on his contract on every page, and on mine in little places where the dates are, that kind of forgery would be a monumental repetitive forgery. (emphases added.)

In fact, what appears to Mr. Liebman as "that strange little initialling" is nothing but the Persian word "Rahman", Mr. Golzar's first name. The appearance of the initials on five pages of the 9 September 1978 document does not, therefore, involve "a monumental repetitive forgery", but writing Mr. Golzar's first name --the simple word Rahman-- at the bottom of five pages of the document. Such a reasoning, however, is only to be expected from an American architect who knows nothing of the science of forgery detection or of the Persian language, and who offers his view on the basis of a layman's comparison between "the strange little initialling" in the document of 9 September 1978 and in a contract signed 15 years ago.

Sometime after the First Hearing, the Claimants submitted an affidavit by a Mr. John Paul Osborn, a forensic document examiner, in which he offered the highly qualified opinion that "it is probable" that the questioned signatures on the letter of 27 August 1978 and the contract of 9 September 1978 are the genuine signatures of Mr. Golzar. Mr. Osborn in his affidavit explained the reasons why he could arrive only at a qualified conclusion. First, he said, while "it is generally preferable that at least a portion of material submitted for comparison purposes be provided in original form", all the documents placed

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[24] See Concurring Opinion of Mohsen Aghahosseini in Abrahim Rahman Golshani and The Government of the Islamic Republic of Iran, Award No. 546-812-3 (2 Mar. 1993) at 74.

before him as bearing genuine signatures of Mr. Golzar appeared on reproduced, rather than original, documents. And secondly, "due to the degree of variation noted in comparisons conducted between and among the signatures submitted as known specimens, the undersigned is of the opinion that a larger quantity of known specimen signatures would be preferable." Indeed, analyzing the degree of variations between the known and questioned signatures, he observed that:

> [T]he specimens submitted do not bear the portion of the circular stroke which extends inside of the oval that it creates. This is a difference that cannot be accounted for with the material submitted to date and causes the undersigned to render an opinion that is probable.... [T]he presence of these variations does affect my conclusions.

In contrast to Mr. Osborn's restrained conclusion, Mr. Entezari in a supplemental affidavit again insisted on his earlier firm conclusions. First, commenting on the fact that Mr. Osborn had admittedly examined only reproduced known specimens, he stated that:

> Had Mr. Osborn examined the originals... and not limited himself to the photocopies thereof, there would have been no difference of opinion as such, because photocopies of documents greatly limit the scope of examination of forensic documents, and do not provide the features relied upon by the expert, such as writing speed, pressure on the pen, pause and hesitation demonstrated by the writer.

Next, with respect to Mr. Osborn's lack of familiarity with the Persian language:

> [H]ad Mr. Osborn been proficient in the Persian language and familiar with the perceptual relation between the Persian calligraphy and alphabet; in other words, if he could perceive the scriptural presentation of these Persian signatures vis-à-vis the Persian alphabet, he would have underlined more the discrepancies to which he himself made reference rather than the similarities between them.... [he] would have noticed that the small middle sections of these two disputed signatures... is at variance with

> the Persian language scriptural presentation, with its counterparts in the authentic signatures, which shows the word [Rahman], the signatory's first name, and indicates lack of any relation whatsoever between the "effect" and the "authentic cause", and consequently, demonstrates that they were not made by Mr. Rahman Golzar.

In a Supplemental Affidavit later filed with the Tribunal, Mr. Osborn modified his finding: it was "highly probable", rather than "probable", that the questioned signatures were executed by the same person whose signatures appeared on the known documents. This modified conclusion, he said, was mainly the result of the fact that Mr. Golzar's signature on the Proposal of 14 June 1978, previously treated by Mr. Osborn as a questioned signature, had in the meantime been admitted by the Respondents to be genuine. And yet the Respondents, as explained earlier had at no time questioned the authenticity of Mr. Golzar's signature on that document.

The evidence on the experts' testimonies may now be summarized. There is, on the one hand, the testimony of Mr. Entezari who firmly concludes: (a) on the basis of a detailed and convincing technical analysis of the questioned signatures, that they do not belong to Mr. Golzar, and (b) that the subject of the examination is such that it requires not only expertise in the field, but also knowledge of the Persian language and handwriting as well as access to the originals of the known signatures with which the questioned signatures are to be compared. Against this, there is, <u>first</u>, the testimony of a layman, completely devoid of any knowledge of the Persian language; and <u>second</u>, the testimony of an expert who, again with no knowledge of Persian and no access to the original of any genuine specimen offers a qualified conclusion. What all this must lead to is clear enough.

2. The Testimony of Mr. Golzar, the Alleged Signer of the two Documents in Question

It is Mr. Dadras's assertion that at the final stages of negotiations leading to the conclusion of the alleged contract of 9 September 1978, four officials of TRC actively participated. These were: Mr. Mehdi Amini, the TRC's then deputy managing director; Mr. Parviz Golshani, the TRC's then commercial vice president; Mr. Mohsen Farahi, then a member of the TRC's board of directors; and Mr. Joseph Morog, the TRC's then chief architect. It is, further, Mr. Dadras's assertion that when Mr. Golzar signed the final version of the contract, he did so in the presence of three of these individuals, namely, Messrs. Amini, Golshani, and Farahi. Together with Mr. Golzar, the alleged signer of the document, there existed, according to Mr. Dadras, at least five potential witnesses with direct knowledge of the pertinent facts.

Yet, even though the authenticity of the contended contract had from the beginning of the present proceedings some thirteen years ago been denied by the Respondents, and even though four of these individuals reside, as it has now been established, in the United States, the Claimants, who carry the burden of proving the authenticity of the contract, elected throughout the proceedings not to provide the Chamber with the written or oral words of either the alleged signer of the contract, or of any of these four individuals whose recollections would have provided the Chamber with direct evidence on the disputed facts. Indeed, up until the First Hearing, the Chamber had been provided with no explanation for this absence.

The absence of any word from any of these asserted witnesses was so conspicuous as to prompt the present Majority to repeatedly question the Claimants at the Hearing. What efforts, they wanted to know, had the Claimants exerted to secure the testimony of any of these individuals. In reply, nothing was said about the absence of Messrs. Amini, Golshani, Farahi, and Morog.

As for Mr. Golzar, the asserted signer of the contract, the representations were made that he had been approached, that he had agreed to testify in support of the Claimants' position, but that "the cost of bringing him over here was beyond the capability of Mr. Dadras"; a "golden jumbo" in the words of one member of the Majority.

This was in January 1993, when the existence of some substantial and ongoing legal disputes between the Respondent Government and Mr. Golzar had apparently made it impractical for the Respondents to either check the veracity of the Claimants' representations or otherwise seek Mr. Golzar's testimony. As stated by the Respondent Government in a subsequent submission, "Iran had reasons to believe that he [Mr. Golzar] would not cooperate with it to explain certain issues".

Still, and even though it was not required of the Respondents to elicit the testimonies of those whom the Claimants had named as direct witnesses to the existence of the asserted contract, the Respondents did eventually contact Mr. Golzar and, sometime after the First Hearing, provided the Chamber with his sworn affidavit. In there, Mr. Golzar testifies that TRC and the Claimants never concluded any contract, and that the signature attributed to him at the end of the asserted contract is not his.

The Claimants were then invited to comment on Mr. Golzar's affidavit. In response, they sought to challenge Mr. Golzar's general credibility, and further provided the Chamber with the testimony, for the first time, of a handwriting expert, to which reference has been made above. The Chamber then issued its Order of 23 February 1994, under which Messrs. Golzar's and Osborn's affidavits were specifically "accepted into evidence", and the Parties were invited to comment on "the relevance, materiality, and weight" of the submissions.

This led to the filing of further evidence. The Claimants offered an affidavit by Mr. Darehshuri who asserted that he had,

at the time, been told by Mr. Dadras that such a contract had been signed. The Respondents, on the other hand, submitted four affidavits. In the first three, Messrs. Amini, Golshani, and Farahi, whom the Claimants had named as individuals exclusively present when the contract was allegedly signed, testified that the Claimants' representations were utterly false, and that they know that the asserted contract between the Parties never existed. In the fourth, Mr. Morog, named by the Claimants as a witness who, having been the TRC's chief architect, has full knowledge of the existence of the contract, testified that indeed by virtue of his position with TRC, he does know that no such contract ever existed between the Parties.

All the affiants volunteered to appear before the Chamber, and to offer themselves for further explanations.

In a most surprising reaction to these highly significant revelations, the Majority in the Chamber hastily issued the Order of 27 April 1994, under which all affidavits submitted in relation to Mr. Golzar's testimony by those with intimate knowledge of the pertinent facts were simply excluded from the evidence. This, as I stated in a Dissent to the said Order, was utterly unjustified.

The only pretext offered by the Majority for not wanting to have before them the affidavits of those who are represented by the Claimants as having firsthand knowledge of the alleged transaction was that these submissions "were not in conformity" with the Order pursuant to which they were offered. This was then explained to mean that the Chamber's Order had only allowed "comments on Mr. Golzar's testimony", while the submission of affidavits went beyond the scope of "commenting". Strangely enough, this came from the very Majority who, in these very Cases and barely two months earlier, had readily admitted into evidence an affidavit submitted by Mr. Osborn on behalf of the Claimants, even though that affidavit, too, had been submitted, as explained

above, pursuant to an earlier Order in which the Claimants had been invited to merely "comment" on Mr. Golzar's testimony!

In response to the Respondents' subsequent request that the Chamber, having admitted into evidence Mr. Golzar's affidavit, convene a Hearing at which these highly significant revelations could be further explained and tested, the Chamber issued an Order in which the existence of "special circumstances " was recognized, and a Hearing was correctly, and as mandated by Article 29(2) of the Tribunal Rules, granted.

The Order went on, however, to repeatedly warn the Parties that at the intended Hearing no witnesses other than Messrs. Golzar and Dadras would be permitted to testify. This was done evidently with the objective of preventing from testifying, this time orally, those individuals who were supposed to have witnessed the signing of the contract, or were supposed to have otherwise direct knowledge of its existence, but who categorically denied the Claimants' assertion. Their written statements had, as already noted, been hurriedly and unjustifiably excluded from the evidence. That was disturbing enough. More disturbing was the decision not to even allow, at the intended Hearing, the oral presentation of facts by a number of witnesses who alone were privy to what came to pass. It was a decision impossible to reconcile with this forum's first and foremost duty of ascertaining the truth.

The vague and unexplained references in the Order to "the advanced stage of deliberations" and to "the interests of procedural orderliness" are hardly helpful. The fact should not be forgotten that the decision to reopen the proceedings in the present Cases had been taken. A party's decision, if made, to devote part of its allocated time to the presentation of facts through those who are intimate with the background and whose written statements had already been disclosed to the other party, could not affect, in the slightest, either "the advanced stage of deliberations" or "the orderliness of the proceedings". The

question, the real one, was how committedly the task of ascertaining the truth was being approached.

Still, at the Hearing Mr. Golzar testified, in essence, that as a industrialist in charge of an economic "empire" in Iran, he would not remember details of less significant events, including the holding of negotiations or signing of cost-free documents with hundreds of entities and individuals who daily dealt with his corporation. He would, however, have definitely remembered the signing of a $63,000,000 contract, had this in fact occurred. He was absolutely sure, he testified, that TRC did not conclude any contract for the construction of North Shahyad Project with Mr. Dadras, or with any other individual or entity for that matter. The political and social conditions of the country were such, at the time, that no businessman in his right mind would venture a Project of that size. He had, he further explained, by then taken steps to terminate the employment contracts of all his foreign, including his American, staff due to the same prevailing circumstances. It would have been sheer madness to nevertheless invite, at the same time, a United States' corporation to construct a long-term, five hundred million dollar Project.

PART TWO: THE AWARD'S TREATMENT OF THE CASE

Such was the evidence before the Tribunal on the asserted authenticity of the two documents, for the alleged breach of which remedy is sought in the present proceedings; evidence which, in whatever light is considered, does at once reveal the inauthenticity of the said documents. The question will then naturally arise as to how the Majority in the within Cases could conceivably arrive at a different conclusion.

The answer is not difficult to detect. As will be seen in the pages that follow, that different conclusion is arrived at --and could only be arrived at-- by depriving the Respondents of their primary defense, by misapplying certain elementary rules

of law on the burden of proof, and by partially treating the Parties and their evidence.

Section I: The Award Deprives the Respondents of Their Primary Defense and Errs in Law

1. The Award Deprives the Respondents of their Primary Defense

The Award states --correctly, I suggest-- that "the burden of proof rests on the party asserting or alleging a fact." Now, the Respondents' primary defense in the present proceedings is, as previously demonstrated, that on the basis of the evidence before the Tribunal, the Claimants have failed to prove the authenticity of the documents on which they rely. The passage quoted earlier, reflecting the final words of the Respondents' lead counsel at the Hearing, will be recalled:

> I just gave you a narration. I said that there will be no need to get into the issue of forgery.

It is only as a secondary --additional-- defense that they assert the forgery of the said documents. The Award seems to have understood this vitally important fact:

> In these Cases, the Claimants allege that they engaged in a process of contract negotiation with TRC, and that this negotiation process resulted in the signing of the 9 September 1978 Contract, which Contract was breached by the Respondent TRC. On these and supplementary issues the Claimants bear the burden of proof, and they can prevail only if they meet their burden on these issues. The Respondents, in addition to disputing the Claimants' version of events, have raised the affirmative defense that some or all of the Claimants' documents have been forged. The burden of proving that a forgery was committed therefore falls on the Respondents.[25]

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[25] Award at para. 122 (emphasis provided).

And elsewhere:

> Another objection raised by the Respondents regarding the authenticity of the Contract arises from the Persian phrase... handwritten on the top of the letter dated 11 September 1978....[26]

And again:

> The Respondents appear to have produced the "11 September" letter to challenge the authenticity of the 27 August 1978 letter and the Contract. [27]

But there then comes a clear misrepresentation of the Respondents' defense and an astounding confusion on a point of law. First, the Respondents' secondary defense of forgery --their "additional" defense, to quote the Award-- is presented, quite simply, as the Respondents' primary defense:

> The facial validity of the Contract and the rational nature of the transaction do not, of course, fully answer the Respondents' primary defense in these Cases --the contention that the 9 September 1978 Contract and the preceding contractual documents are forged.[28]

This is indeed remarkable. The Respondents submit, in their closing argument, that "there will be no need [for the Tribunal] to get into the issue of forgery".[29] The Award, having reported

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[26] Award at para. 235 (emphasis added).

[27] Award at para. 202 (emphasis added). See, to the same effect, para. 136: "In the same Memorial in which a blanket denial of the authenticity of these documents was found...." (emphasis added.)

[28] Award at para. 134 (emphasis added).

[29] See also the Respondents' submission in Doc. 93, at 29:

> Based on the inconsistencies in the statements of Claimant and affidavit of Shahidzadeh [Mr. Dadras] with the letter dated 11 September 1978 of Shahidzadeh [Mr. Dadras](Exh. 12 to this Memorial) the Respondent concludes that on 9 September 1978 the agreement invoked by the Claimant did not exist. The claim of signing the agreement [i.e., the

this fact, goes on to decide for the Respondents that forgery is their "primary" defense.

That, however, is not the limit of prejudicial treatment to which the Respondents' position is subjected. As its next step, the Award simply denies, in black and white, the very existence in the present proceedings of any defense other than forgery:

> Because the Respondents relied exclusively on the allegation of forgery in contesting the validity of the Contract....[30]

The same sudden turnabout and mischaracterization of the Respondents' defense will be found in respect of almost all pieces of evidence invoked by the Respondents in support of their defense of lack of authenticity. The letter of 11 September 1978 will provide a clear example. From the very Award which accurately states that: "The Respondents appear to have produced the '11 September' letter to challenge the authenticity of the 27 August 1978 letter and the Contract"[31], comes the assertion that:

> This can be concluded from the letter dated 11 September 1978 submitted by the Respondents and relied on to support their defense of forgery....[32]

And further:

> Contract] on the alleged date is unfounded and simply not true.

[30] Award at para. 241 (emphasis added).

[31] Award at para. 202 (emphasis added).

[32] Award at para. 140 (emphasis added).

> One of the pieces of evidence relied on most heavily by the Respondents in support of their forgery allegation is the letter dated 11 September 1978.[33]

One would prefer to think that these do not necessarily reveal an attempt to misrepresent the facts, but a failure, albeit a very serious one, to distinguish between a defense of denying the authenticity, and an affirmative defense of forgery. That is why, for instance, a single piece of evidence, the letter of 11 September 1978, is said in the Award to have been submitted "to challenge the authenticity" of certain documents, on the one hand, and in "support of forgery allegation", on the other. This, however, is most difficult to reconcile with the Award's quoted reference to the defense of forgery being submitted "in addition" to the Respondents' defense of "challenging the Claimants' version of events."

More importantly, whether this is a misrepresentation of the Respondents' stated position or a fatal error in law --a failure to distinguish between the two distinct defenses of denying the authenticity of a given document and an affirmative allegation of its forgery-- the outcome, in so far as the Respondents here are concerned, is the same: they are simply deprived of their primary defense. For a better appreciation of the prejudicial effects of this on the Respondents' case, a few words must first be said on the Award's misapplication of the rules on the burden of proof and its standard. For it is the combined effects of these that have utterly divested the Respondents of a meaningful defense.

2. The Award Errs in Law by Misapplying Elementary Rules on the Burden of Proof

Coming to the application of the first rule on the burden of proof, under which, as correctly stated in the Award, each

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[33] Award at para. 200 (emphasis added).

party must bear the burden of proving the facts on which he relies in support his claim or defense, the Award first sets to examine the Claimants' challenged documents. Without bothering at this stage with the pertinent Respondents' evidence, it concludes that the documents appear to be "facially valid". It then turns to the Respondents' evidence to see if this sufficiently proves a forgery contention. This is an utterly wrong application of the rule.

The Award does not explain what it precisely means by the appearance of "facial validity"; there is elsewhere in the Award a reference to the alleged contract constituting a binding agreement "on the face of it". It may, however, be safely assumed that the phrase is intended to refer to what is known in the law as a prima facie case.

Now, the term prima facie case, as used by both municipal and international courts, refers to either of the following two distinct situations.

First, where the "evidential burden" is discharged.[34] The proponent's first duty is to take the allegation "out of the realm of conjecture into that of permissible inference"[35]:

> One often gets cases where the facts proved in evidence --the primary facts-- are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately, refuse to draw any inference at all.[36]

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[34] Alternatively referred to as the "burden of adducing evidence", "burden of production", "burden of passing the judge", or "burden of going forward with the argument".

[35] See the English case of Caswell v. Powell Duffryn Associated Collieries, Ltd., [1940], A.C. 152, at p. 169.

[36] Per Denning, L.J. in Smithwick v. National Coal Board, [1950] 2 K.B. 335, at p. 352.

When this much is offered, the evidence is said to constitute a "prima facie" case.[37]

The evidential burden --the duty of a proponent to demonstrate that there is evidence sufficient to raise an issue with respect to the existence or non-existence of the contended fact-- is more peculiar to the jury system of the common law, where such evidence is required, in the first place, "to induce a judge to leave an issue to the jury". Yet it is a sense in which the term "prima facie" is used by international tribunals as well:

> Before declaring a State to be bound to submit a dispute to the decision of an international tribunal, the Permanent Court and the present Court have always considered it necessary to establish positively, and not merely on prima facie or provisional grounds, that the State in question had in some form given its consent to this procedure.[38]

The most distinctive feature of the prima facie case, in the sense of discharged evidential burden, is that it does not prove anything[39], and, because of that, the opponent is not called upon to rebut the case; he does not run the risk of conviction,

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[37] On this and many other points referred to hereinafter, I have the authority of formerly my long-time tutor, the late Sir Rupert Cross, commonly regarded as the foremost authority on evidence at the common law. See especially his discussion on the two senses of prime facie evidence in Cross on Evidence (5th ed., 1979) at 28-29.

[38] See Sandifer, Evidence Before International Tribunals 171 (1975), quoting with approval Judges McNair, Basdevant, Klaestad, and Reed in their Dissenting Opinion in the Ambatielos Case, [1953] I.C.J. at 29. The American law is identical: "When the party [required to meet the burden of production] introduces such evidence as to each element of the claim for relief, he is said to have presented a prima facie case." Graham, Federal Rules of evidence 44 (1987).

[39] "[T]he discharge of... the evidential burden proves nothing." Cross, supra, at 87.

at this stage, if he chooses to remain silent and not to produce any counter-evidence.

> As in national and domestic proceedings, proof is of capital necessity and importance in international litigation. The parties contend and the judges demand that their affirmation be proved and reinforced by evidence. A party who makes an allegation cannot be believed prima facie, nor can one who denies it, and for choosing between one and the other it is necessary to create conviction with objective proof.[40]

Second, where the "burden of persuasion" is discharged.[41] This is the obligation of a proponent to satisfy the requirement of a rule of law that the asserted fact be established either by a preponderance of evidence (in a civil case) or beyond reasonable doubt (in a criminal case).

> The next degree of cogency is where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favor in the absence of further evidence.... It would be convenient to describe evidence of this degree of cogency as "presumptive", but it is usually said to be prima facie.[42]

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[40] Sandifer, supra, at 172 (quoting with approval Judge de Bustamante's comment during the revision of the rules of P.C.I.J. in 1926). American law is the same. When a prima facie case, in the present sense, is made out, its effect is that

> While the opposite party is entitled to introduce contrary evidence, he is under no compulsion to do so and may submit the issue to the trier of fact on this evidence alone. No burden of producing evidence is cast upon him.

Graham, supra, at 44-45.

[41] Also referred to as "the legal burden", "burden of proof simpliciter", "the burden of proof on the pleadings", "the fixed burden of proof", "the persuasive burden", "the probative burden", or "the risk of non-persuasion".

[42] Cross, supra, at 28.

As with municipal courts, international tribunals have sometimes this second sense in mind when they refer to a prima facie case:

> Prima facie evidence has been defined as evidence "which, unexplained or uncontested, is sufficient to maintain the proposition affirmed".[43]

The most distinctive feature of a prima facie case in this sense --the adduction of persuasive evidence-- is this, that when offered by the proponent of an issue, the opponent runs the risk of conviction if he fails to challenge the submitted evidence. He is said, therefore, to bear an "evidential burden"[44]. Not that he is under a duty to persuade the trier of fact on any issue --for it is a contradiction in terms to speak of the proponent's burden of proof and, at the same time, of the opponent's burden of persuasion-- but simply to adduce challenging evidence. This is most important to realize. The legal burden of persuading the trier of fact never shifts. What is sometimes shifted, and what is intended by any reference to a shifted burden, is the burden on the defendant to produce evidence when the claimant's evidence has attained the level of persuasion. In the words of Lord Denning:

> The burden of proof on each of the separate issues is a legal burden which never shifts.[45]

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[43] Lillie S. Kling Case (8 Oct. 1930) (Mexican-U.S. General Claims Commission), reprinted in 4 U.N. Rep. Int'l Arb. Awards 585.

[44] In such a case, the opponent must "call evidence or take the consequences". Per Lord Denning in his seminal work, Presumptions and Burdens, 61 L.Q. Rev. 379 (1945), at 380.

[45] Id. at 381. Again: "When the law puts on a party the burden of proving certain fact in issue as a condition of giving him judgement, that burden never shifts and must be discharged or he will fail." Id. at 379. And again: "The legal burden never shifts. Many errors have occurred because judges have not kept the distinction in mind and the position has had to be put right by appellate tribunals." Id. at 382.

It was with this in mind that the House of Lords in England in the landmark case of Woolmington v. D.P.P.[46] stated some sixty years ago that, even when the defense is something other than a denial of an integral part of the allegation, the defendant does not bear the legal --as against the evidential-- burden.

The point is important, and relevant, enough to merit yet another quotation in which it is succinctly summarized:

> In order to discharge a legal burden, the person on whom it lies will often prove relevant facts or rely on presumptions.... Those relevant facts or circumstances are often said to raise a "presumption" or make a "prima facie" case.... The Court... will leave it to the other party to take his own course. He may seek to repel the inference by argument... or by contradicting the evidence... but if at the end of the case the evidence is so evenly balanced that the Court cannot come to a determinate conclusion, the legal burden comes to play and requires the Court to reject the inference.[47]

International tribunals adhere to the same rule. As stated by the Mexican-United States General Claims Commission:

> [T]he Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a prima facie case and the respondent has offered no evidence in rebuttal, the latter may not insist that the former pile up evidence to establish its allegation beyond a reasonable doubt without pointing out some reason for doubting.[48]

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[46] [1935], A. C. 462.

[47] Id. at 379-80.

[48] William A. Parker Case (31 March 1926) (Mexican-U.S. General Claims Commission), reprinted in 4 U.N. Rep. Int'l Arb. Awards 39.

In other words, where a prima facie case, in the sense of discharged "conclusive" evidence, is made out, the opponent must offer evidence pointing to some reasons "for doubting". If he does so, then, and this is most important, the evidence before the tribunal, whether adduced by the proponent in support of his contention or by the opponent in support of his denial, must be considered together in order to determine whether or not the proponent's burden of proof is met:

> The question whether a fact in issue has been proved can only be answered after both parties have called their evidence....[49]

In short, the proponent's obligation is to make out his asserted proposition when, in the words of J.B. Thayer, "all has been said and done."[50]

Applying these well-established and undisputed rules to the present Cases, the Claimants are required to discharge:

(a) The burden of adducing evidence sufficient to raise a reasonable possibility of the asserted authenticity of the two documents on which they rely as an integral part of their claims (prima facie case in the first sense of the term).

(b) The burden of adducing evidence sufficient to persuade the Tribunal of the authenticity of the said documents.

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[49] Cross, supra, at 91 (emphasis added).

[50] Thayer, Preliminary Treatise on Evidence at the Common Law 355 (1898) (emphasis added). See also Rothstein, Evidence, State and Federal Rules 108 (1981), who warns against the error of believing that "only evidence proceeding from the side with the burden is considered in deciding whether the burden is discharged, which is not so."

If and when these conditions are met, it becomes incumbent upon the Respondents to adduce contrary evidence, in which case the evidence before the Tribunal --the whole of it-- must be examined with a view to ascertain whether or not the appropriate standard of proof is met by the Claimants. An identical process will then have to be followed with respect to the separate issue of asserted forgery. Only this time, it is the Respondents who assume the role of a proponent.

And now back to the Award. As previously stated, the Award fails to define "facial validity". From what is said by the present Majority in Golshani, it must be inferred that the first sense of the term "prima facie" is intended:

> [T]he Tribunal need only concern itself with the question [of forgery]... if the Claimant has submitted a document inspiring a minimally sufficient degree of confidence in its authenticity. It is therefore up to the Claimant first to demonstrate prima facie that the deed is authentic.[51]

Indeed, this is conclusively supported by the fact that in here, as in the case of Golshani, the Tribunal's conclusion on whether or not a prima facie case is made --whether or not a given document is facially valid-- is based on an examination of the document alone, to the exclusion of any challenging evidence before the Tribunal:

> Based upon the foregoing [a description of the contract's terms] the Tribunal concludes that the 9 September 1978 Contract contains all of the elements necessary to create a binding agreement between the parties and therefore appears, on its face, to constitute a valid and binding contract. Its facial validity is further supported....[52]

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[51] Golshani, supra, para. 49 (emphasis added).

[52] Award at para. 132.

There then follows a most regrettable disregard for the law of evidence, fatally detrimental to the Respondents' case. That is to say that, while the law on the burden of proof, as explained above, prescribes:

(a) that "the discharge of... the evidential burden proves nothing"[53],

(b) that the trier of fact must still consider whether or not the burden of persuasion is satisfactorily carried by the proponent of an issue, and

(c) in doing so, it must take into account not "only evidence proceeding from the side with the burden" but from the other side as well,[54]

the Award first concludes, on the basis of a cursory and exclusive review of the disputed documents, that they are "facially valid" --that they discharge the Claimants' "evidential burden". It then turns to the Respondents --previously deprived of any defense other than an affirmative defense of forgery-- to see whether their evidence meets a very high standard of proof which, according to the Award, is required in a case of alleged forgery. Having concluded that such a burden is not met, it holds --on the basis alone of its earlier finding that the documents are facially valid, and without as much as taking note of the Respondents' evidence-- that the documents are authentic.

By doing so, the Award fails to distinguish between the "evidentiary burden" and "the burden of persuasion". It fails, further, to realize that the former "proves nothing", and that in all cases the proponent of an issue must, having successfully shouldered the "evidential burden", proceed to meet the "burden

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53 Cross, supra, at 87.

54 Thayer, supra, at 355.

of persuasion". And, finally, it fails to realize that a conclusion on the discharge of the latter --the burden of persuasion-- may not be made on the basis of the proponent's evidence alone; it may not be made by putting aside the opponent's challenging evidence.

This is particularly relevant in a case in which, as in here, the opponent's defense, though affirmative, is by its very nature also a denial of the original allegation and, because of that, any evidence adduced in support of the affirmative defense is germane to the assessment of the original allegation. In short, a piece of evidence offered in support of the affirmative defense of forgery is not to be ignored when the trier of fact sets to determine an assertion of authenticity, even where that defense is the only defense in the case, and even where that piece of evidence should establish the affirmative defense.

Before demonstrating in concrete terms the magnitude of the injustice to which the Respondents are subjected by the Award, one further point of law --on which the Award errs again to the detriment of the Respondents-- must be dealt with: the standard of proof required in an allegation of forgery.

The Award asserts that the allegation of forgery in a civil case is such that an enhanced standard of proof must be met. Invoking the American law in which, according to the Award, "clear and convincing" evidence is required, and the English law which, according to the Award, speaks of a "flexible civil standard", the Award concludes:

> The allegations of forgery in these Cases seem to the Tribunal to be of a character that requires an enhanced standard of proof. Consistent with its past practice, the Tribunal therefore holds that the allegation of forgery must be proved with a higher degree of probability than other allegations in these Cases. See, e.g., Oil Field of Texas, Inc. and Government of the Islamic Republic of Iran, et al., Award No. 258-43-1 (8 October 1986), reprinted in 12 Iran-U.S. C.T.R. 308, 315 (holding that alleged bribery would not be established if, on the evidence

> presented, "reasonable doubts remain"). The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as "clear and convincing evidence," although the Tribunal deems that precise terminology less important than the enhanced proof requirement that it expresses.[55]

Now all this is wrong. First, as to the Case invoked by the Award. In there, as it is correctly noted, the Tribunal refers to an "allegation of bribery" --though this was not a major issue in that Case-- and, in a single sentence, to the failure of a proponent to prove his case, should "reasonable doubts remain". In the absence of any discussion, however cursory, of the issue in the Award in that Case, this passing remark may not be invoked as the Tribunal's precedent on this important point of law. More so because the reference by the Tribunal to the failure of a proponent to prove his assertion where "reasonable doubts remain", indicates, quite clearly, how innocent the Tribunal in that Case must have been of the issue. This is an standard peculiar to a criminal case, and no one, not even the present Award, has gone as far as to require it in a civil case.

As to the common law, it is now settled, in England for instance, that:

> An allegation of criminal conduct, even of murder, need only be established on a preponderance of probability in a civil action.[56]

The "clear and convincing proof", which the Award categorically attributes to the American law, is rather required in that jurisdiction in what is there termed "civil equitable cases":

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[55] Award at para. 124.

[56] Cross, supra, at 116. The author refers to a number of cases in which the rule has been accepted by the courts of Australia, Canada, and New Zealand.

> A standard somewhere between the civil and the criminal standard is frequently applied to proof of certain special issues in certain civil cases. These are often issues of an equitable nature, such as "mistake" in a suit for reformation of a deed or contract. This standard is most often phrased as "clear and convincing evidence."[57]

There is, clearly, no justification for the adoption by an international Tribunal of a standard of proof which is specific to a municipal system and, more importantly, with limited application within that jurisdiction. Besides, the standard has no fixed meaning. Indeed, its preferred definition, as stated in the Black's Law Dictionary (5th ed.), is "proof beyond a reasonable doubt".[58] That is sensible enough. Where there is "a clear and convincing" proof, there is no room for a "reasonable doubt"; there may be room for doubt, but not for reasonable doubt. Conversely, where the mind continues to entertain reasonable doubt, it cannot be nevertheless described as "clear and convinced".

This is why the English common law, at any rate, is said to recognize no more than two standards of proof: "proof on the balance of evidence" --sometimes referred to as "on the balance of probabilities"-- and proof "beyond reasonable doubt"; the first is required in civil matters, including where the commission of a crime is asserted, and the second in criminal proceedings. As stated by a prominent English judge, Lord Tucker:

> I am quite unable to accede to the proposition that there is some intermediate onus between that which is

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[57] Rothstein, supra, at 110.

[58] "Clear and convincing proof. Generally, this phrase and its numerous variations mean proof beyond a reasonable, i.e., a well-founded doubt. Some cases give a less rigorous, but somewhat uncertain, meaning, viz., more than a preponderance but less than is required in a criminal case."

required in criminal cases and the balance of probability which is sufficient in civil cases.[59]

3. The Effects of All This on the Respondents' Case

The immensely detrimental effects of these erroneous factual and legal premises on the Respondents' case can best be concretely demonstrated by reference to a single piece of evidence adduced by the Respondents: the letter of 11 September 1978.

There is before the Tribunal a document which, as alleged by the Claimants, reflects a genuine agreement between them and TRC concluded on 9 September 1978. The Respondents, challenging the allegation, offer a letter which bears the date of 11 September 1978, and in which the Claimant Mr. Dadras pleads with the TRC's managing director to favorably consider the signing of an agreement with him in future. Mr. Dadras admits the authenticity of the letter, but contends that it has been wrongly dated by him.

What the trier of fact must do, then, is to put these two documents together, with the Claimants carrying the burden (both evidential and persuasion) of proving that the letter does in fact bear a wrong date, and that their document is authentic. This is with respect to the Respondents' primary defense that the agreement presented by the Claimants is not authentic. And the Respondents' last words, informing the Tribunal that it need not get into the issue of forgery clearly relieves the Tribunal from any additional task.

But the Award does no such thing. Instead, it simply ignores the Respondents' clear submission and, disregarding its own earlier admission that the letter is offered in support of the

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[59] Dingwall v. J. Wharton (Shipping), Ltd., [1961] 2 Lloyds Rep. 213, at p. 216.

Respondents' defense of lack of authenticity, it contends that "[o]ne of the pieces of evidence relied on most heavily by the Respondents in support of their forgery allegation is the letter dated 11 September 1978." There goes the Respondents' primary defense. They must now limit their use of the letter to an affirmative defense of forgery.

Still, since an affirmative defense of forgery does by its very nature contain a denial of authenticity and, consequently, any evidence produced in support of the affirmative defense is relevant to the issue of authenticity, the trier of fact must once again assess the two documents together, albeit that this time it would be on the Claimants to carry the evidential burden as well as the burden of persuasion with respect to the letter's date and the authenticity of their document, and on the Respondents to carry such burdens with respect to their allegation of forgery.

Once again, however, the Award does no such thing. Instead, and ignoring the interrelation between the two defenses of lack of authenticity and forgery, it proposes to separately examine the two documents, as if they are wholly unrelated; each party being required to explain its own evidence. There goes, again, the Claimants' duty to overcome the letter of 11 September 1978.

And then, one last step. Ignoring its own earlier admission that even where the defense is limited to an affirmative allegation of forgery, the proponent of authenticity must still prove --carry the burden of persuasion-- with respect to his contention, the Award lowers the standard of proof of authenticity to that of a "facial validity". As a result, Mr. Dadras, whose document is challenged and who is the Claimant, meets his burden <u>by simply showing that his document is facially valid</u>. The Respondents, on the other hand, whose document is admittedly authentic, must prove conclusively that Mr. Dadras's document is forged. Quite some result, indeed!

Section II: The Award Most Partially Treats the Parties by Its Misrepresentation of Their Submissions and by Its Biased Interpretation of the Evidence

Having deprived the Respondents of their main defense, having lowered the standard of proof for the Claimants to that of showing only a "facial validity", while raising it for the Respondents to that of "clear and convincing", the Award proceeds to examine the evidence before the Tribunal. And it is in there that the Award once again reveals its evidently uneven attitude towards the Parties.

1. The Award Misrepresents the Parties' Submissions

Instances in which the Award attributes to the Respondents certain submissions which they have never made are too many to be comprehensively reviewed in the limited scope of this Dissent. Instead, one or two examples of this will be offered.

The Award asserts that:

> Throughout the pleadings and at the First Hearing, the Respondents denied all knowledge of contractual negotiations between the Parties.... The Respondents further alleged that they could find no trace in their records of any documents relating to contractual negotiations between the Claimants and TRC.... [S]pecifically, they asserted that the signature[] purporting to be [that] of Mr. Golzar on the 14 June 1978 Proposal... [is] not genuine....[60]

This assertion is simply untrue. For a proof of this, one need not go further than the Award itself. Referring to the letter of 11 September 1978, submitted into evidence by the Respondents well over a year before the First Hearing, the Award admits:

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[60] Award at para. 113.

> [T]he letter had the collateral effect of clearly confirming the entire history of contract negotiations until 21 August 1978 as recounted by Prof. Dadras....[61]

And so, with regard to the Proposal:

> [A]t the First Hearing, the Respondents' own forgery expert testified that the 14 June proposal bore an authentic signature of Mr. Golzar.[62]

In fact, the Respondents have at no time throughout the present proceedings denied the authenticity of this Proposal. With no reference to it in the Statement of Defense, the document is first dealt with by the Respondents in their next submission, filed with the Tribunal in January 1987, some four years before the First Hearing. In there, no suggestion is made that the document is not authentic, but that it creates no obligation for TRC:

> [T]he supplied papers were not contracts, but they were proposals drawn up first in handwriting and then typed, in which there may be observed no material that might be binding for the Tehran Development Corporation.

The only other place in which this Proposal is discussed in the Respondents' written briefs is in their submission of November 1991, and this is all that is said in there:

> According to rules and principles of law, the preliminary negotiations... reflected in the writing dated 14 June 1978 (assuming it to be genuine) are not binding and do not create an obligation for the Respondent Company. Moreover, para. (J) of the writing in question provides: "Neither party assumes any obligation under this proposal."

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61 Award at para. 136.

62 Id.

The Respondents then go on to argue that since the document fails to meet certain conditions laid down by "the standard rules and regulations" of TRC, it cannot "be attributed to the Respondent". It may be concluded, therefore, that the allegation in the Award that the Respondents have "throughout the pleadings and at the First Hearing" denied any knowledge of contractual negotiations and specifically challenged the authenticity of the Proposal of 14 June 1978, is a clear case of misrepresentation. It is made, as will be seen shortly, simply to later accuse the Respondents of being inconsistent in their positions.

The next example will perhaps be found more striking. It is in respect of Mr. Golzar's testimony. The circumstances under which the Respondents had found it necessary to present Mr. Golzar as well as four other individuals as witnesses in these proceedings will be recalled. As contended by the Claimants, Mr. Golzar had supposedly signed, and the four individuals had supposedly witnessed his signing, the alleged contract of 9 September 1978. Yet the Claimants had failed to secure a word of support from any of these asserted witnesses. And then when at the First Hearing the present Majority had reminded the Claimants of this "obvious" gap in their evidence, the Claimants had misleadingly, as it later turned out, contended that they had in fact approached Mr. Golzar, that he had agreed to testify in support of the authenticity of his signature, but that Mr. Golzar's requested fee for doing so had proved too high.

This, then, was the only reason behind the Respondents' decision to do what the Claimants had failed to do. The point is clearly made in the Respondents' letter of 2 August 1994:

> The Respondents... logically expected the Claimants to present to the Tribunal their evidence in support of genuineness of the said documents, including the affidavit of Mr. Golzar confirming his signatures, or otherwise to present him to the Tribunal for giving evidence. However, Claimants did not present such affidavit, nor Mr. Golzar was introduced at the Hearing before the Tribunal so much so that this fact was noted by the Judges who raised certain questions

> in that respect. Pursuant to this and after the Hearing, the Respondents tried to obtain an affidavit from Mr. Golzar and to present it to the Tribunal for further clarifying the matter at issue. Thus this affidavit was presented to the Tribunal at the first possible opportunity.

As for the significance of Mr. Golzar's testimony, and its place among the Respondents' other pieces of evidence, the letter is again too clear to leave any room for misunderstanding:

> Mr. Golzar's statements, in fact, merely provide further confirmation of the more than sufficient evidence Iran has already provided to prove the lack of authenticity of the documents under discussion. The Tribunal may, therefore, find this piece of evidence superfluous. (emphases added.)

Such was the Respondents' expressly stated reason for presenting Mr. Golzar as a witness: to clarify for the Tribunal, pursuant to its enquiries at the First Hearing, Mr. Golzar's version of the pertinent facts. And such was the Respondents' expressly stated view on the place of Mr. Golzar's testimony in the Respondents' case: a mere confirmation which the Tribunal might, in light of the Respondents' other pieces of evidence, find it "superfluous".

The Award, however, will have none of these. Ignoring the background to the presentation of Mr. Golzar as a witness, overlooking the fact that the witness had been presented well over a year after the First Hearing (at the close of which the Parties, including the Respondents, had exhausted the presentation of their evidence), and disregarding its own earlier words that by the time the witness was presented "the Tribunal had reached an advanced stage of its deliberations in these Cases", the Award states:

> In support of their contention that the 9 September 1978 contract is forged, the Respondents rely in large measure upon the testimony of Mr. Golzar....[63]

The fact that the Respondents have themselves made it absolutely clear that this is not the case, that the testimony is submitted as a mere "confirmation" of the previously submitted evidence --a confirmation which may be found "superfluous"-- has apparently been found to be of no relevance. The Award then goes on to speak page after page about Mr. Golzar's rejected testimony in another Case, in order to impair the Respondents' case in the present proceedings; an issue which will be dealt with soon.

To be fair, the Award's gratuitous interference with the submissions before the Tribunal is not limited to those of the Respondents. It does also meddle with those of the Claimants. The fact that this latter interference happens to invariably assist the Claimants' case is, of course, purely accidental! The point may be illustrated by a short reference to an important event in Mr. Dadras's version of events.

It is Mr. Dadras's story, it will be recalled, that when he, having completed his preliminary work, returned to Iran and went to see Mr. Golzar, expecting to be offered the intended contract, he was most discourteously received; he was treated, to quote Mr. Dadras's words, "like a dog". It is his further assertion, however, that in just less than two days, things abruptly changed. He was, for no apparent reason, invited back to TRC on 21 August 1978 to be told that all his drawings had been approved of, and that he should prepare the text of a contract by the afternoon of that same day.

But the version, as related by Mr. Dadras, is easier said than satisfactorily proved. It places on Mr. Dadras --who freely admits of the total rejection of him and of his project by the TRC managing director in the meeting of 19 August 1978-- the

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[63] Award at para. 149.

burden of showing that things did abruptly change. It calls for a sufficiently convincing explanation on his part as to why TRC, which was at the time trying to terminate the services of all his United States' employees, should nevertheless decide to entrust a new, and gigantic, project to an American entity. It requires of Mr. Dadras, in short, to convince the Tribunal that an asserted event which, in his own words, "happily shocked" him did in fact occur.

Not a very light burden, one might think. But the Award comes with an easy solution: a simple omission from the record of all the events which, according to Mr. Dadras, took place on 19 August 1978:

> The Claimants allege that after an initial meeting with TRC officials on or about 19 August 1978, Prof. Dadras was told on 21 August that the drawings had been approved and was instructed to draw up a draft contract.[64]

With that difficulty out of the way, the ground is prepared in the Award for the making of an uninterrupted and facially logical connection between the pre-contract negotiations and the asserted contractual documents. The exercise has the additional benefit of allowing the Award to speculate, on page after page, about the imaginary advantages of the offered technology to TRC, and on that basis, about the TRC's assumed eagerness to acquire such technology at all costs. This would not have been possible, of course, if one was told of the fact that in that crucial meeting of 19 August 1978, in which Mr. Dadras had hoped to impress TRC with the outcome of his preparatory labor and with a detailed demonstration of how his system worked, the disinterest shown by TRC was to such a degree as to make him "leave the drawings on the table" and walk out of the room.

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[64] Award at para. 106.

2. The Award One-Sidedly Interprets the Evidence

So far, certain instances in which the Award simply meddles with the Parties' submissions have, by way of examples, been exposed. This is all done, it must be said, to assist the Award in upholding the authenticity of the Claimants' documents at all costs. But the evidence of inauthenticity is too great for such a limited exercise. Hence, the Award's next step of an unfailingly partial interpretation of the evidence in favor of the Claimants and against the Respondents.

As in the case of the Award's interference with the Parties' submissions, the limited scope of this Dissent would not permit a comprehensive coverage of all the instances in which the evidence is so one-sidedly interpreted. Instead, a few representative cases will have to be contended with. It is best manifested in the Award's treatment of Mr. Golzar, on the one hand, and of Mr. Dadras, on the other.

Mr. Golzar's credibility as a witness is harshly and incessantly attacked in the Award for his inaccurate testimony in Golshani, a Case previously before this Chamber. "The Tribunal cannot but justifiably fear", says the Award, "that a man who has once presented highly suspect documentation and testimony under oath to an international arbitration tribunal may have few scruples in repeating the act."[65] With such a background, the Award concludes, "Mr. Golzar cannot be conveniently rehabilitated by his conversion into an 'independent' witness" in the present Cases.[66]

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[65] Award at para. 158.

[66] Award at para. 165. This is made easy by the Majority's decision, discussed earlier, to exclude the testimonies of four other witnesses who had similarly denied the existence of any contract between Mr. Dadras and TRC, and who had no similar backgrounds for the Award to attack.

What makes all this very suspect, however, is the fact that the Majority who in these proceedings seek to so readily dismiss Mr. Golzar's testimony for his testimony in a previous Case, is the very Majority who, being fully aware of Mr. Golzar's background, had repeatedly questioned the Claimants at the First Hearing on why he had not been presented as a witness. It appears, therefore, that Mr. Golzar's problem as a witness lies, not so much with his background, but with his refusal to support the Claimants' false contentions.

The Award further relies, extensively, on what I have said on Mr. Golzar's testimony in a "Concurring Opinion" in that Case. This, too, is highly suspect. First, I wrote separately in that Case only because the present Majority, who now quotes me with apparent approval, had refused to share my views on the subject. Secondly, what the Award conveniently fails to mention is the fact that in that very "Opinion" I have made it quite clear that what is important is not the character of a witness as a whole, or his conduct elsewhere, but whether or not his present testimony is credible; whether his testimony fits the known facts. Indeed, this is what I say in there with respect to the testimony of a witness who had admittedly forged the document under consideration:

> [The witness] may not be a man of the best character. ... Yet the facts he has revealed about the forgery and the manner in which it was committed are simply impeccable, and bear the stamp of the truth.[67]

We now know of course that what that self-confessed forger had testified to was true, and what Mr. Golshani --the Claimant in that Case who had no known blameworthy background-- had asserted, was not. Had the Award in that Case followed the reasoning of the present one, Mr. Golshani's claim would have been wrongly upheld.

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[67] Concurring Opinion in Golshani, supra, at 65.

In contrast with its treatment of Mr. Golzar, the Award is full of admiration for Mr. Dadras's background. "Prof. Dadras's curriculum vitae", says the Award, "reveals that he combines academic work with that of a practicing architect."[68] There then follows an extensive reference to Mr. Dadras's academic positions held with various American teaching institutions. What is again conveniently omitted here is the fact that what took Mr. Dadras to Iran, and then before this Tribunal, was not his academic background, but his role as a "broker"; his desire to look out for hefty construction projects to whose owners he might introduce "competent American constructors". It is in that light that his background should have been more appropriately assessed for the present purposes.

And now to the real issue: the substance of what these two --Mr. Golzar and Mr. Dadras-- have testified to.

As stated before, Mr. Golzar has testified, in essence, that as a highly successful entrepreneur in charge of a construction "empire" in Iran, he would not remember details of insignificant events, including pre-contract negotiations, or signing of cost-free documents with hundreds of entities or individuals who daily dealt with his enterprise. He would, however, have definitely recalled a decision by him, had he made one, to entrust the construction of a five hundred million dollar Project to a foreign entity. He would have definitely remembered the signing of a sixty three million dollar contract with Per-Am, had this in fact occurred.

He says, further, that this could not have possibly happened because of, inter alia, the very uncertain sociopolitical conditions prevailing in Iran just prior to the approaching Revolution. TRC could not have conceivably agreed, he states, to invite an American team of constructors to start a Project of this magnitude in Iran at a time when all the TRC's foreign

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[68] Award at para. 181.

employees were being asked to leave the Country. This, he suggests, would have been sheer madness.

Instead of concentrating on these material points, to see whether they stand to reason or not, the Award devotes its attention exclusively to minor points which are of no relevance to the issues before the Tribunal. Mr. Dadras is at length criticized in the Award for not remembering, or being inconsistent as to, whether he had, in 1994, made one trip to Iran or two; whether the first approach by the Respondents to solicit his testimony had been made at a meeting or through a telephone conversation; whether he had known Mr. Dadras prior to the Hearing; whether he had in fact signed certain obligation-free pre-contract documents with Mr. Dadras; whether the decision not to offer the construction of the Project to Mr. Dadras was based on the inquiries he made personally or through his staff; and whether at the time of the alleged contract, TRC had any other offers for the construction of the Project. It is on these points --which are either absolutely irrelevant or too insignificant to expect Mr. Golzar to remember them after the lapse of some sixteen years-- that the Award proposes to reject Mr. Golzar's testimony for lack of credibility. Not a word about the real points at issue.

In total and striking contrast, the Award seeks to either ignore, or to explain away with the shakiest of excuses, Mr. Dadras's outrageously contradictory testimony not only on irrelevant points, but on every point absolutely vital to Mr. Dadras's claims. First, just one example on the former.

Mr. Dadras is repeatedly praised in the Award for being consistent and sincere regarding his preliminary negotiations with TRC. It must not be forgotten, of course, that what is before the Tribunal in the present Cases is not whether the Parties had or had not conducted certain pre-contract negotiations, but whether these had led to the conclusion of a contract. As the Award correctly notes:

> The issue for decision thus becomes whether the negotiations and preliminary agreements between the Claimants and TRC culminated in a binding contract, as the Claimants contend, or whether no contract was ever executed, as the Respondents maintain.[69]

The lengthy treatment of, and the heavy reliance put on, these negotiations in the Award are, therefore, quite uncalled for. But be that as it may, for even here Mr. Dadras's testimony has neither been consistent nor offered with the least sincerity.

On the preliminary Agreement of 29 March 1978 --one of only two pre-contract documents exchanged between the Parties-- Mr. Dadras for long maintained that he had personally witnessed the signing of the original handwritten version of the document by Mr. Golzar:

> [A]ll the lady typers or the ones who were doing the typing were gone... and Mr. Jabary wrote the agreement in his own handwriting.... I did saw Mr. Golzar signing that document in the front of me. (emphasis added.)

Indeed, in his own translation of the document submitted as evidence to the Tribunal, he identifies Mr. Golzar as a signatory; he allows himself to add, at the bottom of the translated text, the following phrase: "(Managing Director of Tehran Redevelopment Corp.) Rahman Golzar."

There is, in fact, no trace of Mr. Golzar's signature on that document, and when Mr. Dadras is invited at the Hearing to point to Mr. Golzar's signature, he readily retracts:

> Now, of one those signature or initial could be his or could not be his. I don't know.

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[69] Award at para. 146.

Let us now see how the Award proposes to deal with this directly contradictory stance on the part of Mr. Dadras. First, no reference to the point at all:

> The handwritten Agreement, in Persian, was signed by Prof. Dadras and various of the TRC officials present.[70]

And then, dealing with Mr. Dadras's credibility:

> Another dispute arose at the First Hearing as to whether Mr. Golzar had signed the 29 March Agreement, or whether it had been signed by other TRC officials. Prof. Dadras maintained that Mr. Golzar's signature could be seen on the document, and that he believed Mr. Golzar had signed. At the Second Hearing, however, he admitted that he was "not 100% sure that [Mr. Golzar] did do that." It is in fact not entirely clear to the Tribunal whether Mr. Golzar signed the Agreement himself (in addition to other TRC officers) due to the illegibility of the signatures on that document. As this issue cannot be regarded as significant, the confusion is minor.[71]

This is indeed amazing. Here is an affiant who first testifies that he "did saw [sic] Mr. Golzar signing [the] document", and later that one of the signatures on that document could or could not be that of Mr. Golzar; that he does not know. The Award, on the other hand, suggests that Mr. Dadras initially maintained that Mr. Golzar's signature "<u>could be seen</u> on the document"; and that he "<u>believed</u> Mr. Golzar had signed" it. These underlined words are not Mr. Dadras's; they are the Award's inventions.

As for the Award's assertion that "[i]t is in fact not entirely clear to the Tribunal whether Mr. Golzar signed the Agreement himself... due to the illegibility of the signatures on that document", this is simply untrue. As it happens, the signatories to that documents have all clearly identified

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[70] Award at para. 100.

[71] Award at para. 182, fn. 41.

themselves, above their signatures, in Persian. The name of Mr. Golzar does not appear there. Besides, this Tribunal has had before it, in these as well as in other proceedings, tens of samples of Mr. Golzar's signatures on various documents. It ought not to have been difficult for the Tribunal, therefore, to make a cursory comparison between those samples and the signatures on the Agreement so as to see for itself that nothing remotely resembling Mr. Golzar's signature is reflected on that document. It is on the basis of this type of reasoning that the Award concludes that "the confusion is minor". Note, incidently, how the issue of whether or not the affiant has flatly refuted himself on a given point is described in the Award as a "confusion"!

As for Mr. Dadras's sincerity in appraising the Tribunal of pre-contract negotiations, suffice it to recall that Mr. Dadras --who alleges to have recorded every material or immaterial event throughout his dealings with TRC, and who says he remembers the exact dates and hours of, as well as the issues discussed in, each of his meetings with the TRC's personnel-- conspicuously fails to submit to the Tribunal, or even to refer to, the significant letter of 11 September 1978; a document which, dated two days after the date of the asserted contract, shows, at least on the face of it, that there had been no contract between the Parties on the date contended by Mr. Dadras.[72] The Award's efforts to support Mr. Dadras's belated attempt to explain away this most crucial piece of evidence will be reviewed shortly. Suffice it to say here that in relating the pre-contract negotiations, Mr. Dadras has been anything but sincere.

So much for the preliminary negotiations. It is, however, with respect to Mr. Dadras's shockingly self-refuting representation on every material aspect of the basic issue -- whether or not the letter of 27 August 1978 and the contract of 9 September 1978 were signed by TRC-- that the Award reserves its

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[72] See, Supra, note 17.

unfailing readiness to overlook the facts. Once again a few examples:

There is before the Tribunal, for instance, the testimony of Mr. Dadras, first that he had personally witnessed Mr. Golzar dictating the letter to his secretary in English, and later, having in the meantime consulted with his attorney, that Mr. Golzar's English at the time was not good enough to allow him to dictate the letter in that language. What is the Award's reaction to this contradiction on a highly relevant point? It is, says the Award, an inconsistency "of a minor nature". The important thing is, says the Award further, that Mr. Dadras "in any case corrected his own testimony"![73]

There is before the Tribunal, again, Mr. Dadras's testimony first that with regard to the fee reflected in the letter he had originally demanded a 10%, and later, that he had demanded a 12%, of the total cost of construction. This, too, says the Award, is a confusion of "minor nature".

There is before the Tribunal, again, the testimony of Mr. Dadras --who asserts to have taken minute notes of all his meetings with the TRC's officials-- once that it was on 22 August 1978 that he requested TRC to write, and was given, the letter, and once that this occurred on 27 August 1978. This, too, is found by the Award to be a "small" and "immaterial" inconsistency.

There is before the Tribunal, again, Mr. Dadras's conspicuous failure to disclose in his extensive written affidavits the fact that in his meeting of 19 August 1978 at the TRC headquarters, the TRC's managing director "had walked out on him"; a fact which is first revealed at the Hearing. "This passage of testimony", says the Award, "seems to the Tribunal to

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[73] Award at para. 182, fn. 41. (emphasis added.)

be confused and emotional, rather than to reveal any significant cracks in Prof. Dadras' story".[74]

There is before the Tribunal the fact that Mr. Dadras --who wishes to make believe that the three million dollar figure mentioned in the letter is a fair compensation for certain clearly defined services-- cannot be consistent at least as to what those services were. He first asserts that this was a fee for the preparation of the construction documents and supervision of construction only, and then, when his own witness testifies that such a large fee could not have possibly been awarded for these limited services, he refutes his own earlier testimony and alleges that the fee is meant to also cover the cost of designing the three plants required for the manufacturing of the prefabricated material. Finally, realizing that under this latter version he would not be entitled to the asserted fee, he again goes back on his words and states, at the Second Hearing, that:

> I did make a mistake by saying that and I apologize and I correct it.... I should have said 'no'.... The design of the plants [was] not done yet, so naturally could not have been included.

How does the Award proposes to treat this highly relevant point, that a person who contends to have been genuinely awarded a fee cannot make up his mind as to what services that fee was meant to cover? First:

> The Tribunal considers this question to be one more relevant to the internal relations of the group of contractors Prof. Dadras had gathered together to work on the... Project, rather than to the claims against TRC. [75]

But that group of contractors, to which the Award refers, itself asserts to have had a different contract with the

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[74] Award at para. 182, fn. 41.

[75] Id.

Respondents. It is the Per-Am/TRC contract, in which the designing of the plants is undertaken by Per-Am for a fee, and which is the basis of a different claim, dismissed by this very Award! How can this most relevant question --whether TRC is responsible for this service to Mr. Dadras, whose claim has been here upheld, or to Per-Am, whose claim has been here dismissed-- be so contemptuously by-passed as being related to "internal relations of the group"? And then:

> At the First Hearing, Prof. Dadras testified that "the cost of designing the plants is included in our fee". At the Second Hearing, however, he corrected his testimony.... The Tribunal considers that the corrected testimony by Prof. Dadras at the Second Hearing is credible and that the confusion in this regard is a minor matter....[76]

Note that according to the Award, all that Mr. Dadras did here was to "correct" his earlier testimony. Note, further, that he did so at the Second Hearing, to the holding of which the Claimants had vehemently objected. In the absence of a reopening, therefore, there would have been no "correction".[77] And note, finally, that in the absence of such "correction", Mr. Dadras would not have been entitled to the entire fee referred to in the letter, a fee which the Award now proposes to so generously grant.

More interesting still is the Award's treatment of Mr. Liebman's testimony on this very point. It will be recalled that when he is asked whether he, as an architect, can accept that such a large fee would be given for the two services of preparing the construction documents and supervision of the construction, he says that he cannot. He states, further, that this had bothered him as well; that he had therefore "asked these people

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[76] Award at para. 218.

[77] It should be borne in mind, further, that the 22 July 1994 Order, reopening the Hearing, confined the subject of the proceedings to the authenticity of Mr. Golzar's signatures, "in the interests of orderliness and fairness".

[i.e. the Claimants] the very same question"; and that, in response, they had told him that other services --including the designing of the plants-- were included in the fee. And now the Award:

> The Tribunal does not consider Mr. Liebman's testimony as direct evidence of what was included in Dadras International's fee. Rather, the Tribunal finds that the most reasonable interpretation of this testimony is that Mr. Liebman was expressing his understanding that Dadras International's fee was intended to compensate the creativity and uniqueness of the D-F-C technology, which he expressed as "the genius that went into the design of the systems."[78]

One is at a loss with all these. The witness says that the Claimants have, in order to convince him of the genuineness of the fee in question, told him that services other than those referred to in the letter were included in the fee. The Award says that this is not "a direct evidence of what was included in Dadras International's fee", but Mr. Liebman's "understanding" of what was included!

The Tribunal has before it, further still, the letter of 11 September 1978. Written by Mr. Dadras two days after the date of the asserted contract, the letter reveals that the Claimants' contention of having signed a contract with TRC on 9 September 1978 is false. Mr. Dadras's explanation that he simply made a mistake in dating the letter, says the Award, is credible. There then follows a series of most amazing, and factually incorrect, grounds invoked by the Award to justify this unjustifiable conclusion. Mr. Dadras's claim to have dated the letter "20/6/1357" (11 September 1978) instead of "30/5/1357" (21 August 1978) is in common with "the daily work at the Tribunal and elsewhere", says the Award.[79] What is significant in this regard, the Award contends, is that the writer was required to overcome the "fairly complicated" process of conversions between

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[78] Award at para. 218, fn. 47 (emphases added).

[79] Award at para. 205.

Iranian and Gregorian calendars, compounded by the fact that two different calendars were used in Iran at the time --the Iranian solar Hejri-Shamsi and the Iranian Imperial calendars. These are all utterly unfounded.

First, as stated before, what is forgotten here is the fact that the date as to which a mistake is assertedly made is not a date in the past, so as to require conversion, but the date of writing the letter. Besides, Mr. Dadras has elsewhere referred to the typing of this letter by a typist in Mr. Darehshuri's office. Would he, then, not have been informed of how terribly wrongly he had dated his letter?

The Award's next justification in support of Mr. Dadras's alleged mistake is that:

> [T]he letter was written in Persian, a language in which Prof. Dadras was no longer comfortable after having lived in the United States for almost thirty years, during most of which time he was married to a non-Persian speaker.[80]

Well, here is a sample, quoted on just a few pages earlier, of Mr. Dadras's degree of familiarity with the English language, in favor of which, we are invited to believe, he has lost his ease with the Persian language.[81] It is spoken in 1993, some fifteen years after the date of the letter, during which period Mr. Dadras has continued to live in the United States, and with an American wife:

> [A]ll the lady typers [sic]... were gone... but I did saw [sic] Mr. Golzar signing that document in the front [sic] of me.... Now, of those [sic] signature

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[80] Award at para. 210.

[81] It should also be noted that, according to Mr. Dadras, the translation from English to Persian of certain documents he has submitted to the Tribunal is done by himself. In response to a question from the Bench as to who had, for instance, translated the 29 March 1978 Agreement from Persian to English, he says: "I did it myself."

> [sic] or initial [sic] could be his or could not be his. I don't know.

Still, there is before the Tribunal the fact that the contents of the letter cannot be reconciled with Mr. Dadras's asserted date. In there, for instance, Mr. Dadras uses the past tense with respect to certain happenings which he admits to have taken place after the writing of the letter. What is the Award's answer to that? This, says the Award, may be answered by the purpose of the letter. By the time the letter was received and read by the addressee, Mr. Golzar, those events which the writer reported to have happened, had in fact happened!

Finally, there is before the Tribunal the fact that a prospective constructor who is told by a Project owner that all his preliminary work is approved of, as Mr. Dadras on 21 August 1978 allegedly was, a prospective constructor who is instructed by a Project owner to quickly prepare the text of a contract to be signed by the Parties, as Mr. Dadras on 21 August 1978 allegedly was, would not sensibly write a letter in which the Project owner is invited to favorably consider the writer's offer. The Award seems to have realized this much:

> During this meeting [that of 21 August 1978] the letter was given to TRC, although by that time it appeared to have become superfluous.[82]

What the Award fails to say, however, is that the letter would have been "superfluous" if it had been written on 21 August 1978, as Mr. Dadras asserts. It would not have been "superfluous" if it was in fact written on its recorded date, i.e., 11 September 1978. Yet the Award, which is here supposed to examine the evidence and determine which of the two contended dates is the correct one, says not a word on why a date which admittedly renders the letter "superfluous" should be accepted, and a date

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[82] Award at para. 206 (emphasis added).

which would make the writing of the letter meaningful should be rejected.

The Award's partial treatment of the Parties is by no means confined to its assessment of the credibility of Messrs. Dadras and Golzar. It permeates through the entire body of the evidence submitted by the Parties:

On the fact, for instance, that by signing the alleged contract, TRC would have illogically made itself liable to the payment of two fees to two contractors --Mr. Dadras and Per-Am-- for the single service of "supervising the construction of the superstructure", the Award suggests:

> To the extent, if any, that his [Mr. Dadras's] supervisory services may have been duplicative with those of Per-Am, or HAUS, such duplication resulted from the different functions being performed....[83]

How can "different functions" result in duplicative services is of course anybody's guess!

On the fact, again, that not a single sole --not even Mr. Duvé whose corporation, PKDR, did in fact perform the preliminary work and was therefore entitled to the asserted fee-- has testified to the authenticity of the letter of 27 August 1978, or of the contract of 9 September 1978, the Award chooses not to say a word. It does, however, say that:

> [The Contract's] facial validity is further supported by credible testimony and evidence. Such testimony includes that of... Mr. Duvé from PKDR, who corroborated Prof. Dadras's contentions in crucial respects. [84]

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[83] Award at para. 221.

[84] Award at para. 132.

As we have seen, however, Mr. Duvé has only testified that upon Mr. Dadras's request, his corporation, PKDR, performed the preliminary work on the Project's architectural drawings, a point not disputed before the Tribunal at all. He has not testified, although he did appear before the Tribunal, that either of the two documents in question is authentic. And yet, he would have been a beneficiary of both, had they been genuine. He would have been entitled to the greater part, if not all, of the fee mentioned in the letter of 27 August 1978. It was his corporation which rendered the service. And he would have been, together with only a few other individuals, party to a $63,000,000 construction contract. He would have been appraised of these alleged facts at the time, if they were not later concocted by Mr. Dadras as facts.

On the fact, further, that Mr. Dadras has testified that shortly after his return to New York on 13 September 1978, he caused Per-Am to enter into a contract with AIDC for the purchase of the three on-site plants, but has failed, despite repeated inquiries from the Bench, to produce the said contract, the Award maintains its usual silence. The importance of such a contemporaneous evidence for Mr. Dadras's case, and the ease with which he ought to have been able to produce the asserted contract, have been previously demonstrated and, hence, need not be repeated here.

On the fact, further, that the service offered by Mr. Dadras was so trivial that no fee remotely as high as the one asserted here could have possibly been given for it, the Award resorts to some very strange and utterly unjustifiable excuses. It says, for example, that:

> [T]he Tribunal finds that the fee to be paid to Prof. Dadras should be properly understood as covering more than alterations to the drawings and calculations; instead, its most important element was access to, and

> the expertise necessary to use, the D-F-C technology.[85]

What is conveniently forgotten here is, of course, that "access to, and the expertise necessary to use, the... technology" was a service offered, not by Mr. Dadras, but by the owner of the technology, Per-Am; not for the fee asserted by Mr. Dadras, but for a different fee asserted by Per-Am; not in Case No. 213, which is upheld by the Award, but in Case No. 215, rejected by the Award.

Realizing the untenability of that excuse, perhaps, the Award suggests another one. Because the understanding amongst all concerned was that the architectural plans should be altered as little as possible,

> Prof. Dadras's having made only 5% to 6% alterations in the drawings would have signaled a job well done, rather than suggesting that the function performed by Prof. Dadras was in any way trivial.[86]

What is again conveniently overlooked here is the fact that when Mr. Liebman, the Claimants' own architect witness, testifies that such a fee could not have, conceivably, been awarded for such a trivial work, he is not talking in abstract --he is not assessing the value of the work on the basis of the degree of change made to the drawings-- but in concrete terms, and with reference to Mr. Dadras's "well done" job. He would be the first to appreciate the quality of that job, for it was he who had insisted on as fewer changes in his drawings as possible. He, nevertheless, says that what was done by Mr. Dadras could not have attracted even a fraction of the fee assertedly granted by TRC. The Award, on the other hand, contends to know better, and suggests that since the effected changes were minor, a fee of this magnitude was justified!

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[85] Award at para. 230.

[86] Award at para. 217.

More importantly, the Tribunal knows from the evidence before it, and more specifically from the clear text of the PKDR's detailed terms of offer, that PKDR --the developer of the technology in question and the body which in fact performed the work of altering the drawings-- does not charge its clients for this service. This, too, is no impediment to the Award's attempt at realizing its preset objective. "This argument", says the Award, "overlooks the fact that the PKDR Proposal, although part of the record in these Cases, does not form part of the Contract."[87]

Is this an innocent failure on the part of the Award to grasp the argument? The clarity of the Respondents' submission on this point makes it difficult to think so. What they suggest is not that the PKDR Proposal is a part of the contract, but that it reveals the terms of the offer. Here is a service, or technology, offered for sale. Mr. Dadras, who is the license holder of the technology in Iran, is expected to determine the terms of his offer. In order to do that, he, and not the developer, submits to the prospective purchaser a detailed Proposal; the PKDR Proposal which, according to him, is later negotiated upon and turned into the alleged contract.

The point --a very convincing one-- is then made by the Respondents that where the prospective seller himself provides the prospective buyer with a written and detailed Proposal in which no charge is made for the changes which may have to be made to the architectural drawings, his assertion that he has nevertheless and in disregard of his own terms of offer extracted a fee of three million dollars for this same service may not be logically heard. He may not, further, be heard to say that although in my own Proposal the royalty for the offered technology was to be compensated in the main construction contract, and by the payment of a modest amount to the patent holder only, I nevertheless managed to charge the prospective

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[87] Award at para. 214.

purchaser twice: once as part of the constructor's fee, and once as part of the consultant's.

The Award's "additional" point in this respect is equally untenable:

> [O]ne crucial point should not be forgotten, namely that Prof. Dadras and not PKDR was negotiating with TRC.... As such, he could negotiate a fee and contract conditions different from the standard Proposal of the developer of the technology (PKDR)....[88]

To this offending contention, there is a short answer: the Proposal constituted Mr. Dadras's terms of offer for construction, and not PKDR's; an entity with which TRC had no business or contact. It was given to TRC by Mr. Dadras, and not by PKDR. One does not provide a prospective client with his "contract conditions", and then propose to negotiate "different" conditions.

The list of instances in which Mr. Dadras has similarly received the Award's unqualified favor is a long one; a very long one indeed. Enough has been said, however, to show how every piece of evidence, however conclusive of the inauthenticity of the documents in question, has been contemptuously explained away to avoid an unavoidable conclusion.

3. A Few Final Points of Different Nature

Before a nutshell summary of the evidence in the Case is attempted, a few points not within the scope of the foregoing discussions may be very briefly referred to.

First, that this Dissent has been rather exclusively concerned with the issue of the inauthenticity of the documents in question is due, only, to the vital importance, and the

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[88] Award at para. 215.

determinant role, of that issue in the present proceedings. Unless otherwise specifically stated, therefore, the absence of any reference in this Dissent to any other point addressed in the Award should not be taken as an indication of acceptance.

Second, on 31 July 1986, two members of the New York Bar, who thenceforward acted as counsel for the Claimants in these proceedings, wrote to inform the Tribunal that they had been appointed "as attorneys-at-law and legal representatives... for... Per-Am Construction Corporation."

And yet the evidence subsequently submitted to the Tribunal shows that well over four years prior to that date, on 29 December 1982, Per-Am had been dissolved, and its charter forfeited, by a proclamation of the New York Secretary of State. It has been later suggested by the Claimants that this dissolution was, pursuant to the steps taken under the laws of New York, annulled on 21 January 1987.

Assuming this to be true, the fact remains that at the time the counsel asserted to have been retained by Per-Am, that corporation had ceased to exist for at least four years, and was not to be revived for some six months later. Such misrepresentation before an international Tribunal, to which the Award not surprisingly makes no reference, is to be regretted; particularly where it comes, as it does here, from men of law who, by virtue of their profession, owe a special duty to the courts of law.

Third, on 22 July 1994, this Chamber issued on Order in which the Parties were informed, as previously explained, of its decision to reopen the Hearing for the sole purpose of orally examining the testimony of Messrs. Golzar and Dadras. The Order further refused to allow the presentation of evidence by any other witness. With this Order, in so far as it decided to reopen

the Hearing, I concurred[89], while the third member of the Chamber disagreed.[90]

The present Award now proposes to "explain the underlying reasons for [that] decision."[91] Having devoted page after page to a lengthy discussion of the issue, it concludes, with a view apparently to assure certain claimants, that this was "an unprecedented situation, and one unlikely to recur."[92] This is all very odd indeed. The underlying reasons for the said decision ought to have been explained at the time when it was made, and not sixteen months later, long after it was subjected to detailed concurring and dissenting views of other members.

That, however, is not my main point. I write here, rather, to record the fact that all the observations made in this respect in the Award are merely indicative of the thoughts of a single member and, as such, carry no force of precedent. That is because I, who, together with another member, formed the Majority for the decision to reopen the Hearing, do not share any of the explanations now given as the "underlying reasons" for that decision.

Section III: A Much Shortened Account of the Case

The case before the Tribunal may now be summarized. There is a Claimant, a Mr. Dadras, who relates that sometime in 1978, the Respondent TRC becomes interested, for the building of the superstructure of its gigantic housing project, in a system of

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[89] See Concurring Opinion of Mohsen Aghahosseini to the Order of 22 July 1994.

[90] See Dissenting Opinion of Richard C. Allison to the Order of 22 July 1994 Reopening Hearing.

[91] Award at para. 49.

8 [92] Award at para. 53. In fact, it was recurred barely a month ago. See the Order of 20 September 1995 in Cases Nos. 842, 843, and 844 issued by Chamber One of this Tribunal.

construction for which Mr. Dadras is then the licensee in Iran. The two sides' negotiations lead to certain preliminary understandings, reflected in an Agreement dated 29 March, and a proposal dated 14 June, 1978. In both, however, the Parties expressly stipulate that they would not assume any liability unless and until such time as a binding contract is later concluded.

Having signed these documents, says Mr. Dadras, he goes to the United States to prepare the groundwork; work which consists of forming two companies in the United States --Per-Am and AIDC-- and the adaptation of the then existing architectural designs of the Project's superstructure into his system of construction.

He freely admits, however, that when some two months later he returns to Iran and attends a meeting with the TRC's officials to appraise them of the results of his labor, the TRC's managing director, Mr. Golzar, simply walks out of the room, without as much as acknowledging Mr. Dadras's presence. He is, and these are Mr. Dadras's own words, "treated... like a dog". This is on 19 August 1978.

The main reason behind the TRC's later disinterest, the Tribunal has now been told by the Respondents, was the rapidly changing social and political atmosphere in Iran; an atmosphere that had already forced TRC to request its foreign employees to leave the Country, and had made it therefore inconceivable for that corporation to simultaneously invite an American company to Iran to construct the superstructure of a Project of enormous magnitude. It did not do so, submit the Respondents.

Mr. Dadras, on the other hand, offers a different version of the subsequent events; a version which is beyond belief. In less than 48 hours --and Mr. Dadras having done nothing in the meantime to affect the TRC's attitude-- there assertedly comes a rebirth of interest, on the TRC's part, in Mr. Dadras's offer. For this fanciful contention --an abrupt change of mind by TRC

to invite an American firm to construct a massive Project despite the prevailing conditions-- Mr. Dadras has no explanation to offer, except to say that this "happily shocked" him.

In less than 48 hours, he wishes to make believe, he is invited to a meeting at TRC to be told that all his drawings --drawings which the TRC's manager had just refused to look at-- have been formally approved of. As to how this extensive task could be performed in such a short time, he has, again, no explanation to offer.

At this last-mentioned meeting --and this is in the morning of 21 August 1978-- he is told to prepare the text of a contract by the afternoon of that same day; and he does so, he says. As to why a corporation with the stature of TRC, with presumably a large and sophisticated legal department, should ask an architect with rather poor knowledge of English to prepare the text in English of a legal instrument --a legal instrument which is expected to determine with sufficient precision the rights and duties of the parties under a complex, multi-million dollar transaction-- Mr. Dadras has, once again, no explanation to offer. Nor does he explain just how he in fact managed to prepare such a text with only a few hours at his disposal.

The rest, he says, was plain sailing. Few days into his subsequent negotiations with TRC, he asks for and receives a letter dated 27 August 1978, and some fortnight later, on 9 September 1978, the main construction contract is signed; the two documents on which the present claims are exclusively based.

So much for Mr. Dadras's version of the background events. next, there are the texts of the two documents. In the former, TRC acknowledges that for certain services rendered or to be rendered by Mr. Dadras, he is due some three million dollars. In the latter, the construction of the superstructure of the Project, worth some sixty three million dollars, is awarded to Per-Am, with Mr. Dadras and his partner in Iran, Kan Consulting,

acting as consultant to the Project. Details of the TRC's earlier commitment to Mr. Dadras are there given for the first time.

In support of the authenticity of these two documents, Mr. Dadras mainly relies on the documents themselves, and on his own testimony. The latter will be dealt with shortly. As for the former, their inauthenticity is readily revealed not only by their features and contents, which defy common sense and all prudent business practices, but by the circumstances admitted to have existed on and following the date they were allegedly executed. First, the letter of 27 August 1978.

-- While Mr. Dadras admits that he had only requested TRC to provide him with a letter "to show his associates that TRC has approved of the drawings", TRC is asserted to have signed a letter in which not only the drawings are approved of, but a fee of over three million dollars is voluntarily offered to Mr. Dadras for his past and future services. And this, despite the admission by Mr. Dadras that on the date of the letter --27 August 1978-- TRC and Mr. Dadras were in the midst of discussing the latter's terms for the sale of a particular system of construction, for which system alone these drawings could be used. In other words, TRC is supposed to have committed itself to pay an exorbitant fee for drawings which were of no value to TRC if a particular construction system was not to be employed, and did so at a time when there was no certainty that an agreement to employ that system would be reached.

-- While the letter expressly states that part of the fee referred to in there is for Mr. Dadras's "supervision of construction", the Parties had not, by that time, reached any agreement on whether or not Mr. Dadras would be entrusted with the construction of the Project. In other words, TRC is supposed to have first committed itself to pay a fee for Mr. Dadras's supervision of the Project's construction, and then begun to negotiate Mr. Dadras's terms for the construction itself.

-- While the letter speaks of a single fee for the "submission of the construction documents" and the "supervision of construction", these were two utterly unconnected services for which an undivided fee could not have sensibly been set on the date of the letter. The former was a service rendered, and therefore the fee for it earned, prior to the date of the letter. The latter, in contrast, was a service to be rendered after the date of the letter, and then only if the Parties agreed on the terms of a future contract on the construction of the Project. In other words, in the absence of the asserted contract of 9 September 1978 --surely a distinct possibility at the time-- the alleged letter of 27 August 1978 would simply have not determined Mr. Dadras's fee for the services he had rendered.

-- While in the preliminary documents, and more specifically in the Proposal of 14 June 1978, it is expressly stated that Mr. Dadras and Kan Consulting would be jointly responsible for the preparation of the construction documents --for the making of the required revisions in the drawings-- the letter offers the fee for this service not to both of them, but to Mr. Dadras alone. This is again remedied in the asserted contract of 9 September 1978. Had the parties failed to conclude that contract, however, Mr. Dadras would have been entitled to demand the entire fee for services partly rendered by Kan Consulting.

-- While the fee offered to Mr. Dadras in the letter is, as stated above, partly for the "supervision of the construction", this was a service which, according to the Proposal of 14 June 1978, as well as the contract of 9 September 1978, was to be rendered not by Mr. Dadras, but by Per-Am. In other words, TRC is supposed to have rewarded Mr. Dadras for a service which in documents signed by TRC both before and after the date of the letter was allocated to a different entity.

-- While the pertinent rules, and certainly the practice, in Iran require that letters of this nature, committing an Iranian corporation to the payment of a very substantial fee to

a foreign individual, be originally written in Persian, so as to enable, for instance, the corporation's financial department or the tax authorities in Iran, to act upon it, Mr. Dadras concedes that no Persian text, not even a translated version, was ever prepared or signed.

-- While the work --slightly modifying certain already completed architectural drawings-- is so trivial that PKDR, the very entity which holds the patent to the system and does in fact perform the task, itself states in its detailed and published terms of offer that a customer will not be charged for it, and while this terms of offer is amongst the very few documents which Mr. Dadras first submits to TRC for study, TRC is nevertheless supposed to have agreed to compensate the work with a most substantial amount. In other words, TRC is supposed to have discarded a free-of-charge offer, made by the patent holder and transmitted to TRC by a middleman, in favor of a fee of some three million dollars for the middleman. A fee, further, which the Claimants' own witness, a Mr. Liebman, says he would be "flabbergasted" if he were to learn that it was rewarded for such a service alone; and a fee which is unreal enough to cause Mr. Dadras to falsely testify, and then perforce retract, that other services, never performed, were also intended to be covered by it.

-- While the news of the unconditional approval by TRC of the work, and the award of some three million dollars to compensate it, is significant enough not to remain within the exclusive knowledge of Mr. Dadras --not to be kept away at least from Mr. Dadras's close associates-- the Tribunal has been provided with no words in support of the authenticity of the letter, not even from the president of PKDR a Mr. Duvé. The particular significance of the absence of any words from this last-mentioned individual will not escape attention. As the president of PKDR, Mr. Duvé was the very person who in fact performed the entire, or at any rate the major part, of the work in question. As such, he must have been amongst the very first

to be told of the TRC's approval, and of its firm commitment to compensate the work with an exorbitant figure. He did appear before the Tribunal, and did testify that he performed the work. But he said nothing in support of the alleged authenticity of the letter; he gave no indication that he had ever been told of the existence of such a letter.

-- While the final and binding commitment in the letter, if genuine, would have immediately entitled Mr. Dadras to some three million dollars, a very substantial amount for an architect with modest earnings, there is not a shred of evidence that he made any demand for its payment at the time when the commitment was made, or long thereafter. More significantly, not a shred of evidence that he, having not received his due, ever tried to register a claim for it, either before TRC or anywhere else for later use before a competent forum.

And then there is Mr. Dadras's testimony in support of the authenticity of a document with such features. A testimony, however, which by itself reveals the falsity of his asserted version of events, and hence the inauthenticity of the letter:

-- He says --and this, according to him, is based on his notes taken at the time-- that the fee referred to in the letter was negotiated and agreed upon on 27 August 1978. Elsewhere in the evidence, he retracts from this and asserts that it was in fact on 22 August 1978 that the fee was negotiated and finalized.

-- He says that for his fee, he initially asked for 10% of the total cost of construction. Elsewhere, he refutes himself and contends that his initial proposal was for no less than 12% of the total cost of construction.

-- He testifies at the Hearing and under oath that he was present when Mr. Golzar dictated the letter to his secretary in English. Few hours later, he seeks the Tribunal's permission <u>to clarify</u> that testimony, and argues that Mr. Golzar's poor

knowledge of English at the time did not permit him to dictate the letter in English. He further confesses that in between these two flatly contradictory representations, he has discussed the issue --an issue of fact-- with his attorney. The record before the Tribunal in another Case shows, it is interesting to note, that Mr. Golzar was not at the time conversant with the English language.

-- He says --and on this he is, as stated before, supported by the texts of the asserted letter of 27 August and the alleged contract of 9 September 1978-- that the fee mentioned in the letter is for two services alone: the revisions made to the architectural drawings, and the supervision of construction. But then when his own witness, Mr. Liebman, testifies that such a large fee could not possibly have been given for such a trivial work, and that he (Mr. Liebman) had himself been perplexed by this, but had been told by Mr. Dadras that other services were also included in the fee, Mr. Dadras, as is his usual habit, retracts from his earlier representation and asserts that the fee was indeed to cover the additional service of designing three plants to be erected near the construction site. All this occurs at the First Hearing. And then, having realized in between the First and the Second Hearings that this last representation would be incompatible with his demand for the entire fee mentioned in the letter --for he has never suggested that this additional service was ever rendered-- Mr. Dadras once again goes back on his words, at the Second Hearing, and submits that for the fee set in the letter, he was required to perform no task other than those he had initially described.

-- He says in his oral testimony --and this is again the purport of the letter of 27 August, the contract of 9 September 1978, and his written pleadings-- that the task of revising the architectural drawings, for which part of the fee in the letter of 27 August is set, was to be performed, and was performed, by the consultant: that is, Mr. Dadras and Kan Consulting. Yet in a letter of 11 September 1978 to the TRC's managing director, Mr.

Dadras unequivocally states that this was a task to be performed by Per-Am; an entity which makes no claim in the present proceedings with respect to the fee in question.

The evidence referred to so far, establishing firmly the inauthenticity of the asserted letter of 27 August 1978, is an equally valid ground for the inauthenticity of the alleged contract of 9 September 1978. There are, however, yet other additional bases for such a conclusion.

-- While the contract is asserted to have been signed on 9 September 1978, there is before the Tribunal a letter of 11 September 1978, in which Mr. Dadras invites the TRC's managing director to favorably consider the signing of a contract with Per-Am. Mr. Dadras, who has otherwise provided the Tribunal with every relevant and irrelevant document on his pre-contract negotiations with TRC, fails to submit, or even to refer to, this seemingly important piece of evidence. And when the same is later produced by the Respondents, he suggests that the letter is wrongly dated by him; that it ought to have borne the date of 30/5/1357 (21 August 1978) instead of 20/6/1357 (11 September 1978). Yet --and quite apart from the adverse inference to be reasonably drawn from Mr. Dadras's failure to provide the Tribunal with this significant piece of evidence, and quite apart from the extremely unreasonable nature of the asserted mistake-- the content of the letter reveals, beyond the shadow of a doubt, that it could not have possibly been written on the date suggested by Mr. Dadras. It contains, for instance, references to the taking place of events which, according to Mr. Dadras's admission, occurred after the asserted date of writing.

-- While the alleged contract speaks of Kan Consulting, represented by a Mr. Darehshuri, as a co-consultant to the venture; while it acknowledges Kan's pre-contract services and defines its post-contract duties; and while it determines Kan's remuneration for both pre and post-contract work, there is, astonishingly, no sign in the contract of Kan's consent to any

of these. The document is not signed by Mr. Darehshuri, and there is no evidence anywhere that Kan was represented by anyone else.

-- While under the TRC's contract with the Project's architect, Haus International, the latter is made responsible, and entitled to receive fee, for the coordination of the Project's structural work, the contract here invoked speaks of this very service being the responsibility of Mr. Dadras. TRC, in other words, is supposed to have agreed to employ, and pay to, two separate entities for a single service.

-- While under the Parties' pre-contract agreements "all structural analyses" are said to be the responsibility of Per-Am, the asserted contract states that "all structural analyses have been done by the consultant". It then goes on, of course, to determine, not Per-Am's, but Mr. Dadras's fee for the said service.

-- While the asserted contract expressly entitles Per-Am to immediately receive some nine and a half million dollars by simply providing TRC with bank guarantees to the same amount, and while Mr. Dadras has testified before the Tribunal that Per-Am did not have the slightest difficulty in securing the required guarantees, there is no evidence --there is no suggestion-- that Per-Am ever took any step to collect this very large sum; a failure that cannot be explained by any standard of sound business practice.

-- While the signing of a contract with some sixty three million dollar consideration --a very considerable sum by any standard-- must inevitably involve post-contract activities, Mr. Dadras has failed to demonstrate that he, or Per-Am, did, at any time, take any measures towards the implementation of the asserted contract. No evidence, for instance, of seeking any instructions from TRC, or of reporting any progress on the part of Per-Am. No evidence of any correspondence on the asserted contract, and no evidence of any objection to the TRC's failure

--if that was the case-- to implement the agreement. In short, not a shred of evidence, of any weight, related to the post-contract period.

-- While the alleged contract requires Per-Am to purchase, ship to Iran, and erect near the site three plants for the manufacturing of prefabricated material, and while Mr. Dadras has initially testified that on 20 September 1978, Per-Am entered into a contract with AIDC for the same purposes, he has declined to provide the Tribunal with any evidence that such a contract was in fact concluded. And this despite the facts that he had been repeatedly invited to do so, and he, being an officer in both these American entities, must have had direct access to their records.

Of the same conclusive nature is the evidence before the Tribunal on the Respondents' defense of forgery. Quite apart from the grounds discussed so far, many of which are direct proof of this additional defense, there is the firm and unequivocal testimony of a forensic expert, a Mr. Entezari, whose competence and credibility have been tested by the Tribunal on other occasions. With knowledge of the Persian language (alphabet), and with access to the originals of the examined documents --both of which he considers to have been essential for discovering the true nature of the questioned signatures-- he concludes that the two signatures on the letter of 27 August 1978 and on the contract of 9 September 1978, purporting to be those of the TRC's managing director, Mr. Golzar, are clear forgeries. Against this, there is the testimony of the Claimants' forensic expert, a Mr. Osborn. With no knowledge of the Persian language (alphabet), and with no access to the originals of many of his examined documents, he expresses the qualified opinion that the two signatures in question are "probably" or "highly probably" those of Mr. Golzar. The conclusion which must be drawn from all this is clear enough.

Of similar significance is Mr. Dadras's failure --calculated, one must presume-- to support the asserted authenticity of the two documents by any word, written or oral, from any of a number of individuals whom he claims to have been intimately involved throughout the pre-contract negotiations, and physically present when the contract was signed. Mr. Golzar and all the other individuals identified by Mr. Dadras as having exclusive and full knowledge of the relevant facts are then presented as witnesses by the Respondents, though the latter carry no burden of providing the Tribunal with the testimonies of individuals named by the Claimants as witnesses to the truth of their story. Mr. Golzar testifies, both in writing and orally at a Second Hearing, that his signatures on the two documents in question are forged; and all other witnesses categorically deny the existence of any contract between TRC and Per-Am. With a view to suppress the facts, the written affidavits of all these witnesses are hastily excluded by the Tribunal from the evidence, and the affiants are themselves prevented, for no reasons to speak of, from appearing before the Tribunal; all to serve the cause of justice, we are told nevertheless.

Now this being the evidence on the disputed nature of the Claimants' documents, it is difficult to see how one can possibly fail to see the case for what it is. A case in which Mr. Dadras, having had certain successful preliminary discussions with TRC on the sale of a given construction technology, sets to do whatever is necessary on his part to induce TRC to sign with him a binding contract. This includes the forming of two corporations in the United States, and making minor changes to the existing architectural drawings of the Project so as to demonstrate to the Owner the viability of the offered technology. Indeed, the conclusion of an initial, though obligation-free, Proposal with TRC in June 1978, convinces him at that point that the desired contract is virtually secured.

He becomes, however, bitterly disappointed when on his visit to Iran in August 1978, he detects a clear lack of interest on

the part of TRC in him and in his offer; when he is, in his words, "treated... like a dog". His letter of 11 September 1978 establishes the fact that he nevertheless remains in Iran for some time, trying to change the TRC's stance not to go ahead with the Project. But it is a stance not for TRC to change. A corporation which, because of the then prevailing social and political conditions, seeks to discontinue the services of its foreign employees, may not, at the same time, venture into a five hundred million dollar project with yet another foreign construction company.

Instead of accepting a fact of life --that not every effort is successful, that not every marketing step leads to a final agreement-- he resolves to capitalize on the documents in which his earlier negotiations and preliminary agreements with TRC are recorded. Seizing the opportunity presented by the creation of this Tribunal, he prepares two rudimentary documents in which TRC not only grants him the desired construction contract, but unconditionally commits itself to pay him nearly three million dollars for a two-months' work on the Project's structural drawings; work which, under those very preliminary agreements, is specifically offered free of charge.

The Award, however, asserts to have come to a different conclusion; one according to which Mr. Dadras's version of events is believed. In the face of a host of evidence to the contrary, how does the Award propose to justify this unjustifiable conclusion? The answer, as any cursory review of the treatment of the case in the Award will readily reveal, is quite disturbing.

Having first correctly reported that the Respondents' main defense is the lack of authenticity of the Claimants' documents --that the Respondents' affirmative allegation of forgery is only their "additional" defense-- the Award proceeds, disregarding its own earlier description, to inaccurately assert, first that

forgery is the Respondents' "primary" defense, and later that it is their "exclusive" defense. On this, words simply fail.

Still, it is elementary that an allegation of forgery is by its very nature also a denial of authenticity and, hence, any evidence adduced in support of the allegation must, even where it fails to meet the standard of proof for that affirmative defense, be taken into account when the claim of authenticity is being examined. The Award, however, proposes to have none of these. Having deprived the Respondents of any defense other than the allegation of forgery, it sets to further confine the relevance of the Respondents' evidence to the assessment of that allegation. Such evidence, according to the Award, is not relevant when the claim of authenticity is being assessed. As a result, the Claimants are offered the easy way of showing the authenticity of their documents in isolation, and unchallenged by the Respondents' rebutting evidence.

And then one final step. In total disregard of the universally recognized rule of evidence that, even in the absence of any contrary evidence from the opponent, the proponent of an issue may not rely on a discharge of "evidential burden", but must carry the further "burden of persuasion", the Award requires of Mr. Dadras no more than showing that his asserted documents are "facially" valid. The standard of proof for the Respondents' assertion of forgery, on the other hand, is inaccurately stated to be that of "clear and convincing".

This is the groundwork. There then follows a most partial treatment of the Parties and interpretation of their evidence--invariably in favor of the Claimants and against the Respondents. This, at times, goes as far as an uninhibited meddling with the Respondents' clearly stated positions. While, for instance, the Respondents have at no time throughout the proceedings challenged the authenticity of a given document, they are said in the Award to have initially done so, preparing the ground for the Award's

subsequent accusation of inconsistency in the Respondents' position.

Where, again, the Respondents have made it absolutely clear that a given piece of evidence --the testimony of Mr. Golzar, for instance-- is submitted merely as a "further confirmation" of their evidence already before the Tribunal, and that, as such, it may indeed be regarded as "superfluous", the Award wantonly replaces this with the position it wishes to have been taken by the Respondents: that it is on that evidence that the Respondents centrally rely. With this done, the foundation is laid in the Award for seeking to defeat the Respondents' entire case by rejecting the credibility of the witness on the basis of his background; a background which had been well known to the Majority when they, at the First Hearing, had expressed surprise at the witness's absence in the proceedings.

The Claimants' submissions, too, are interfered with, but with an entirely different result. Where Mr. Dadras has admitted, for instance, that at a meeting with the TRC officials, during which he had expected to receive the TRC's approval of his preliminary work, he and his work were discourteously ignored, the Award simply by-passes this crucial part of the evidence. As a result, the required connection between the pre-contract documents and the asserted contractual documents is made; and the Claimants are relieved from their duty to satisfactorily explain the TRC's asserted change of mind towards Mr. Dadras's work after that meeting.

The degree of partiality with which the rest of the Parties' evidence is treated in the Award is no less. Time and again the Respondents and their witnesses are accused of being inconsistent, and their credibility is rejected, for things they have not said and, more importantly, with regard to issues which are utterly irrelevant to the points before the Tribunal. Mr. Golzar, for instance, is made the recipient of repeated and unseemly attacks in the Award for being vague on whether his

first contact with the Respondents had been made through telephone or at a meeting; or on whether after this contact he had made one or two visits to Iran. What is the relevance, in the first place, of such inquiries to the issue of authenticity of the Claimants' documents remains, of course, a mystery.

In stark contrast, Mr. Dadras's deplorable self-refuting testimony on every material --not irrelevant, but material-- point is either simply overlooked or most charitably explained away. It is, for instance, the authenticity of the letter of 27 August 1978 which is before the Tribunal. And yet there is not a single aspect of this singularly relevant document on which Mr. Dadras can maintain the least degree of consistency.

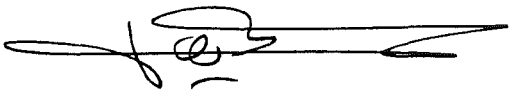
He contradicts himself, unambiguously, on the date the letter was assertedly requested by Mr. Dadras and issued by TRC. This, says the Award, is only a "small" and "immaterial" point. He challenges his own earlier testimony as to what language it was dictated in. This, says the Award, is also immaterial, if only because Mr. Dadras has later "corrected" his previous stance. He refutes his own earlier testimony as to his original offer, later negotiated and reflected in the letter. This, too, is a "minor confusion" on Mr. Dadras's part, says the Award. He belies himself, time and time again, on what the fee reflected in the letter was for; he claims to have been granted a three million dollar fee, but does not know for precisely what services. This, again, is a "minor matter", says the Award. He rebuts his own evidence as to who --Per-Am or he himself-- was supposed to render the service for which the fee in the letter was allegedly granted. This, the Award finds not worth referring to.

The question is, then, that if a Claimant's contradictions on every cardinal point in a document which forms the very basis of his claim are to be regarded as either immaterial or not worthy of attention, what is there left for him to do to fail in his claim? Or, where such contradictions are revealed by a

respondent, what is there left for him to do to succeed in his defense?

It is through this approach in the Award to the Case at hand --and through this approach alone-- that Mr. Dadras now attains his unsavory objective. He would not have been able to do so, had the Respondents not been deprived of their primary defense, had the elementary rules on the burden of proof been understood or respected, and had the evidence been treated with the least degree of objectivity.

Dated, The Hague
7 November 1995



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