423-209

CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

209

Case No. 423 Date of filing: 18 Dec 87

** AWARD - Type of Award Final
- Date of Award 18 Dec 87
46 pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____
_____
- Date _____
_____ pages in English _____ pages in Farsi

R/12

CASE NO. 423
CHAMBER THREE
AWARD NO. 343-423-3

MINNESOTA MINING AND MANUFACTURING COMPANY,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
MINISTRY OF HOUSING AND URBAN DEVELOPMENT,
ARME CONSTRUCTION COMPANY,
ABOL-HASSAN DIBA & CO. LTD.,
and POLYACRYL IRAN CORPORATION,
Respondents.

FINAL AWARD

Appearances:

For the Claimant: Mr. Steven C. Nelson,
Ms. Madge S. Thorsen,
Mr. Bruce R. McCrae,
Mr. Gary F. Lyons,
Attorneys for the Claimant.

For the Respondents: Mr. Mohammad K. Eshragh,
Agent of the Government of the Islamic Republic of Iran;

Mr. Nematollah Mokhtari,
Legal Advisor to the
Agent of the Government
of the Islamic Republic
of Iran;
Mr. Mehdi Moinfar,
Advisor to the Ministry
of Housing and Urban
Development;
Mr. Zabihollah Alavi Harati,
Attorney for the Ministry
of Housing and Urban
Development;
Mr. Yahya Aghalou,
Witness;
Mr. Mousa Fazl Alizadeh,
Attorney for Arme
Construction Company and
Abol-Hassan Diba & Co.,
Ltd.

Also Present:

Mr. Michael Raboin,
Deputy Agent of the
United States.

I. INTRODUCTORY ISSUES

A. PROCEEDINGS

1. On 18 January 1982 MINNESOTA MINING AND MANUFACTURING COMPANY ("Claimant") filed a Statement of Claim against "GOVERNMENT AND STATE OF IRAN" ("Iran"), MINISTRY OF HOUSING AND URBAN DEVELOPMENT ("Ministry of Housing"), MINISTRY OF HEALTH, DAROU PAKHSH, MINISTRY OF DEFENSE, and IRANIAN NAVY ("Navy"). Statements of Defense were received from the Ministries of Housing, Defense and Health, Darou Pakhsh and Iran. In addition, three entities which were not specifically named as Respondents in the Statement of Claim but whose interest was described in the text thereof filed Statements of Defense. These entities were ABOL-HASSAN DIBA & CO. LTD. ("Diba"), ARME JOINT STOCK PRIVATE COMPANY ("Arme") and POLYACRYL IRAN CORPORATION ("Polyacryl"). By Order filed 30 October 1986 the Tribunal formally accepted the addition of Arme, Diba and Polyacryl as Respondents in this Case. Arme and Diba have also raised counterclaims against the Claimant.

2. On 20 December 1984 the Claimant and Iran, the Ministry of Health and Darou Pakhsh filed a joint request for a partial arbitral award on agreed terms, settling those portions of the claim directed against the Ministry of Health and Darou Pakhsh. The settlement was entered as a Partial Award. Minnesota Mining and Manufacturing Co. and Islamic Republic of Iran, Award No. 160-423-SC (22 January 1985).

3. In a submission filed 23 December 1985 the Claimant withdrew its claim against the Navy and the Ministry of Defense. Following the Pre-Hearing Conference on 24 January 1986, during which the Respondents raised no objection to the withdrawal, the Tribunal terminated the claim against

the Navy and the Ministry of Defense by Order filed on 19 February 1986.

B. TIMELINESS AND ADMISSIBILITY OF FILINGS AND CLAIMS

4. The Claimant has objected to certain submissions filed by two of the Respondents. On 7 January 1987 the Ministry of Housing submitted an unauthorized "Supplemental Brief" in which it purported to join Arme's counterclaim. Furthermore, in its Rebuttal Memorial filed 27 February 1987, the Ministry of Housing purported to assert a new counterclaim. On 4 February 1987, one month after the deadline set by the Tribunal, Diba also submitted a Memorial. While it is true that the Ministry of Housing's supplemental Brief was unauthorized and that Diba's Memorial was filed after the deadline without explanation or justification, in view of the Tribunal's disposition of the merits, admission of these documents creates no prejudice to the Claimant and the Tribunal decides not to reject these documents. The Tribunal finds, however, that the counterclaim raised by the Ministry of Housing is untimely and is thus refused.

5. As originally stated, the claim against Arme amounted to $955,709.06. By the submission of its Memorial on 2 June 1986, the Claimant amended its claim by raising the amount of the claim to $1,152,177.10. As the Respondent has raised no objection to this amendment, and the Tribunal finds Arme is caused no prejudice by it, the amendment is accepted.

6. A Hearing was held on 29 April 1987. Two days prior thereto, on 27 April 1987, the Claimant submitted a document containing information on its alleged costs of arbitration, a recapitulation of the positions of the Parties concerning amounts invoiced and paid on the claim against Arme and an excerpt from the Iranian Official Gazette. The Respondents objected to the admission of this document. In accordance

with earlier Tribunal practice the Tribunal determined at the Hearing that the first two sets of information were admissible. As regards the excerpt from the Official Gazette, however, the Tribunal decided that such new evidence was inadmissible at that late stage of the proceedings.

II. JURISDICTION

A. THE CLAIMANT'S NATIONALITY

7. The Claimant alleges that it is a United States national entitled under the Claims Settlement Declaration ("CSD") to bring claims before this Tribunal. It also alleges that it is entitled to bring indirectly the claims of Minnesota (3M) Middle East, S.A.L. ("3M Middle East"), its wholly-owned Lebanese subsidiary, in accordance with Article VII, paragraph 2, of the CSD.

8. On the basis of the evidence submitted the Tribunal is satisfied that the jurisdictional requirements of the CSD as to the Claimant's nationality are satisfied. It is established that the Claimant is a Delaware corporation in good standing, that more than 98% of the stockholders of record had United States addresses, that no shareholder had 5% or more voting power, and that the percentage of common stock of the Claimant held by non-United States citizens residing outside the United States was no more than 1.3%. This latter figure was obtained by reference to income tax withholdings made on a dividend payment the Claimant made to its shareholders in March 1981. Of the total dividend payment of $88,503,102.75, a withholding of $170,633.79 was made with respect to dividends paid to persons with non-U.S. addresses who had not informed the Claimant that they were United States citizens. At a withholding rate of 15%, this

means that $1,137,558, or 1.29% of the total dividend, was paid to persons having foreign addresses.

9. Accordingly, the Tribunal is satisfied that it has jurisdiction over the claims asserted by the Claimant.

10. Parts of the claims in this Case, however, are owned by the Claimant's allegedly wholly owned subsidiary 3M Middle East. In support of its right to assert indirectly the claims of 3M Middle East the Claimant relies on Presidential Decree No. 602 of the Lebanese Republic showing that 3M Middle East was incorporated in Lebanon on 18 December 1964 and that 2,400 shares have been issued. The Claimant also submitted an affidavit of its certified public accountant Coopers & Lybrand, which states that on 31 December 1975 and 31 December 1981 3M Middle East had 2,400 issued and outstanding shares and that "such shares were owned of record by 3M" on these dates. In addition, the Claimant has submitted a copy of a Share Certificate according to which shares "numbered from 301 to 2400" were issued to the Claimant as the registered owner. Finally, the Claimant has submitted a statement by its "Vice President and Secretary," Mr. Arlo D. Levi, who submits that:

> 3M is the holder of record and beneficial owner of shares numbers 301 through 2400 of [3M Middle East]. Shares numbers 1 through 300 were issued in the names of three individuals who were directors of 3M Middle East. All of these shares were held by those directors as nominees of [The Claimant], which remained the beneficial owner. [The Claimant] believes that all of these share certificates have been cancelled but has not been able to verify this as all these certificates are now in Lebanon. . . .

11. The Tribunal finds that the evidence so adduced in any event establishes that the Claimant owns 2,100 shares of the issued and outstanding shares of 3M Middle East. Consequently, and in accordance with Article VII, paragraph 2, of the CSD, the Claimant is entitled to assert an indirect claim on behalf of 3M Middle East before this Tribunal.

12. The Respondents object, however, to the Claimant's right to maintain the claim in its entirety on the ground that it has not evidenced ownership over more than 2,100 of the 2,400 issued and outstanding shares.

13. The Tribunal considers that the evidence regarding the nature of Claimant's ownership of the shares numbered 1 - 300 is partially contradictory. It is not clear whether the Claimant is the beneficial owner or the owner of record of these shares. The Tribunal finds, however, that in either case the Claimant would have the right to assert the entire indirect claim. Consequently the Tribunal finds it established that the Claimant is entitled to assert the claim in its entirety.

B. THE RESPONDENTS' STATUS

14. The only dispute as to the status of the Respondents concerns Arme, Diba and Polyacryl. They each have denied that they are controlled entities of Iran under the CSD and therefore argue that claims asserted against them cannot be properly brought before this Tribunal.

15. The record shows that pursuant to a notice published in the Iranian Official Gazette on 10 October 1979 Iran appointed provisional directors for Arme. Another Government director was appointed in December 1981. The Claimant alleges that this shows that Arme is an entity controlled by Iran. Arme does not deny that Iran appointed provisional directors or that those directors are still performing their function in Arme. Rather, it argues that governmental appointment of provisional directors is not sufficient to constitute control by Iran. In prior cases the Tribunal has held that appointment of managers by the government is a prima facie indication of control. DIC of Delaware, Inc.

and Tehran Redevelopment Corporation, Award No. 176-255-3 at 15 (26 April 1985), reprinted in 8 Iran-U.S. C.T.R. 144, 155; Kimberly Clark Corp. and Bank Markazi Iran, Award No. 46-57-2 at 9 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334, 338; Rexnord Inc. and Islamic Republic of Iran, Award No. 21-132-3 at 7-8 (10 January 1983), reprinted in 2 Iran-U.S. C.T.R. 6, 9-10. Arme, which would be in possession of this information if such existed, has not provided any evidence that the shareholders of Arme continue to exercise control over the corporation or that the provisional directors who admittedly were appointed by Iran have relinquished their control. Accordingly, the Tribunal determines that Arme is a controlled entity under the CSD against which claims may properly be brought before this Tribunal.

16. The Claimant likewise alleges that Diba is a controlled entity. As evidence of this proposition the Claimant submitted a letter to 3M Middle East dated 8 January 1980 from F. Diba, Managing Director of Diba, which states as follows:

> You may not be aware that our Company has been taken over by a number of armed guards of the Revolution, calling themselves Boniad Mostazaffin [sic]. They have looted our assets, bank accounts, etc., and taken over the premises.

In its Statement of Defense Diba denied the Claimant's allegation that it had been nationalized by Iran. The Statement of Defense itself, however, makes clear that Diba has in fact been taken over by the Bonyad Mostazafan; the English version of that pleading was signed by "Mostazafan Foundation" on behalf of Diba, and the entity was described in the caption of its Statement of Defense as "Abol-Hassan Diba & Co. Ltd., (Bonyad Mostazafan)." The Tribunal has previously found that Bonyad Mostazafan is an instrumentality controlled by Iran. See Hyatt International Corp. and Islamic Republic of Iran, Award No. ITL 54-134-1 at 23-31

(17 September 1985). Accordingly, as Diba has provided no evidence refuting the documents contained in the record which show that it is controlled by the Bonyad Mostazafan, the Tribunal decides that Diba is a controlled entity under the CSD and therefore is subject to its jurisdiction.

17. To prove its contention that Polyacryl is also a controlled entity the Claimant has submitted a "Decree With Regard to the Appointment of Provisional Directors for Polyacryl Iran Company" which was published in the Iranian Official Gazette of 7 June 1979, as well as a notice of 13 July 1983 concerning changes in the government-appointed directorate of Polyacryl "[i]n accordance with letters of appointment issued by the National Iranian Industrial Organization." Polyacryl has admitted that the Government "participated in its management since May 26, 1979, on a provisional basis," but argues that such temporary participation is not sufficient to constitute control. Polyacryl has not, however, invoked any evidence in support of its contention that the management participation was temporary or provisional. On the basis of the foregoing the Tribunal determines that Polyacryl is a controlled entity of Iran for purposes of the CSD.

C. OTHER ISSUES

18. There is no question but that the claims asserted arise out of debts or contracts as required by the CSD.

19. Arme, however, has asserted that the claim against it is excluded from the Tribunal's jurisdiction by an alleged forum selection clause contained in the contract at issue. The provision referred to provides that any dispute "will be subject to the governing laws of Iran." Arme argues that this means any dispute must be adjudged solely in the courts of Iran, and thus removes the claim from the Tribunal's

jurisdiction. The Tribunal has already found, however, that such a clause has no effect on the Tribunal's jurisdiction. Gibbs & Hill, Inc. and Iran Power Generation & Transmission Co., Award No. ITL 1-6-FT (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 236.

20. Accordingly the Tribunal finds that it has jurisdiction over the claims asserted by the Claimant in this case.

21. The Tribunal's jurisdiction over the counterclaims asserted by the Respondents will be considered below together with the merits of the counterclaims.

III. THE MERITS

22. This Case consists of three claims of the Claimant or its subsidiary 3M Middle East for goods and services provided to various Iranian entities. The first and by far the largest of the claims asserted concerns a contract between 3M Middle East and Arme for application of a special deck coating substance to a portion of the Tehran Sports Stadium. The Claimant alleges that an amount totalling $1,136,289.87[1] is owed to 3M Middle East under the Contract by Arme or, in the alternative, by the Ministry of Housing.

23. Arme and the Ministry of Housing have asserted counterclaims. Arme contends that 3M Middle East owes it a total of $1,352,406.80 on account of overpayments it made under the contract and repairs it was required to make because of

---

[1] At the Hearing, the Claimant conceded certain rectifications to two invoices and acknowledged an additional sum of rials 800,000 received as payment for another invoice. Thereby it reduced its claim by rials 1,112,106. Converted into dollars the total claimed amount of $1,152,177.10 was thus reduced by $15,887.23 to $1,136,289.87.

3M Middle East's defective performance of the project. The Ministry of Housing has joined Arme's counterclaim and, in addition, asserted in its Rebuttal Memorial a new counterclaim for $3,662,270 based on damages it suffered by virtue of alleged defects in 3M Middle East's performance.

24. The second claim is a claim for $8,067.72 remaining unpaid for certain photographic equipment sold by 3M Middle East to Diba. Against this claim Diba has raised a counterclaim for rials 200,000,000 purportedly representing damage suffered by Diba due to 3M Middle East's alleged non-delivery of certain chemicals necessary to operate the equipment it purchased from 3M Middle East.

25. The final claim is for a number of goods the Claimant sold to Polyacryl. The allegedly unpaid invoices for the goods total $30,100.91.

26. Both Parties have throughout their submissions consistently used an exchange rate of 70 rials per U.S. dollar to convert rials to dollars in their claims. That exchange rate also appears in the related contract between Nobal Trade Company ("Nobal") and 3M Middle East (see para. 27, infra) and seems to be reasonable. Accordingly, all rial amounts under contracts will be converted into U.S. dollars at a rate of 70 rials per dollar unless otherwise specified in this Award.

A. THE ARME CLAIM

1. Factual Background

27. In early 1976 Abdol Aziz Farmanfarmaian & Associates ("AFFA") contacted 3M Middle East concerning the possibility of it providing waterproofing for the seating areas at the Arya Mehr Sports Stadium (now known as the Tehran Sports

Stadium). AFFA was an Iranian firm of consulting engineers working for the Ministry of Housing in connection with the supervision of renovation work on the stadium. After submission of pro forma invoices, technical specifications and samples, and visits by AFFA personnel to other buildings and stadiums which had been waterproofed with 3M products, on 21 August 1976 3M Middle East entered into a sale and installation contract ("Contract") for the application at the stadium of a 3M waterproofing material called Scotchclad. The Contract was executed between 3M Middle East and Arme, an Iranian contracting firm which was the prime contractor for the renovation work on the stadium under a contract with the Ministry of Housing. The Contract specified that AFFA was appointed by the Government of Iran "to plan and supervise works at the stadium." The application work was subcontracted by 3M Middle East to its Iranian subcontractor, Nobal, by contract dated 1 September 1976 ("Nobal Contract").

28. The Contract between 3M Middle East and Arme obligated 3M Middle East to supply all materials and labor to apply Scotchclad at the stadium. It further provided that the "[q]uantity of SCOTCHCLAD required at this time is to be for an area of approximately 40,000 sq. meters."

29. The relevant payment provision reads as follows:

> Cost of the Materials and Services.
> (40000 sq.meters SCOTCHCLAD only excluding special surface preparation and supervision of seat replacement.)
>
> (i) MATERIALS FOB/USA . . . $345678.20
>
> (ii) SERVICES $193802.40

30. Payment of the $345,678.20 for materials was to be effected by letter of credit. The price for materials was exclusive of shipping costs, but it was agreed that actual

shipping costs would be paid in addition to the price listed. The Parties agree that all materials were shipped and that Arme made full payment by the letter of credit for all materials shipped, including freight charges, pursuant to the Contract. The full amount thus actually paid for the materials provided under the Contract was $514,064.73, including shipping costs.

31. Payment of the $193,802.40 for the application of the materials was payable 25% on commencement of work, 30% on 50% completion of work, 25% on full completion of work, and 20% "on issuance of a certificate signed by [AFFA] to the effect that the contracted work has been approved for payment in the final statement. (Limit - 12 months after completion)." The Parties agree that no payments have been made for these services.

32. The Contract further obligated 3M Middle East to provide two performance guarantees. One of the guarantees was for 8% of the total Contract price and was to be retained until the expiry of a three-year guarantee period for the application ("Performance Guarantee"). To meet this obligation 3M Middle East obtained guarantee No. 24/414, originally in the amount $51,035 and later increased to $70,793 after certain increases in the Contract price. $70,793 was 8% of the total price of $884,916 as stated in the pro forma invoices, including the original estimated shipping costs, plus an additional pro forma invoice for special surface preparation. (See para. 39, infra.)

33. The second guarantee was for 100% of the materials cost of the Contract -- as collateral for Arme's commercial letter of credit in the same amount -- and was to be released upon installation of the air-freighted portion of the materials. For this guarantee 3M Middle East obtained guarantee No. 24/588, in the amount of $652,914.60 ("Materials Guarantee"). It was in the full amount of the

materials cost listed in the original pro forma invoices including estimated freight charges. The Claimant explains that because shipping costs were substantially lower than estimated, the actual total price invoiced and paid was $514,064.73. The amount of the guarantee was not lowered, however.

34. Prior to the application of Scotchclad the seats of the stadium had to be removed and the surface had to be prepared. The actual execution of this special surface preparation was Arme's responsibility but 3M Middle East was required to supervise this work. The price for this supervision was not included in the Contract price, however; rather 3M Middle East's fee for this supervision was quoted in a pro forma invoice dated 11 August 1976.

35. The preparatory work began in September 1976 and 3M Middle East provided two consultants on site to supervise the work.

36. The execution of the special surface preparation took longer than originally expected. On 9 March 1977 and again on 27 March 1977 Arme instructed 3M Middle East that the application of the Scotchclad could start 6 April 1977. Thereupon 3M Middle East instructed Nobal to mobilize the application team but in fact the necessary surface preparation work was not completed by the promised date. Nobal's application team therefore could not proceed, but was kept on standby throughout April and into May. On 6 May 1977 3M Middle East disbanded the majority of the application team and informed Arme it would not remobilize until the preparation work was proceeding satisfactorily.

37. The Contract provided for standby payments of up to $3,000 per day for delays outside 3M Middle East's responsibility. Pursuant to this provision, on 10 May 1977 3M Middle East invoiced Arme for rials 2,331,680 for standby

fees for the period 6 April 1977 to 6 May 1977 constituting the actual standby charges Nobal had charged 3M Middle East pursuant to a similar provision in the Nobal Contract. On 8 June 1977 and 12 July 1977 Nobal issued 3M Middle East two additional invoices for standby costs in amounts of rials 745,428 and rials 799,448, respectively. 3M Middle East presented these invoices to Arme for payment as well.

38. On 26 May 1977 3M Middle East notified AFFA that standby charges were being incurred and requested AFFA to ensure that a firm starting date was determined in order to avoid further delay and expense.

39. At this stage Arme entered into three additional agreements ("Ancillary Agreements") with 3M Middle East. First, Arme requested 3M Middle East to execute the remaining surface preparation work for the stadium, specifically the caulking of joints and cracks. On 7 May 1977 3M Middle East proposed its rates and conditions for performing this work. On 8 June 1977 Arme instructed 3M Middle East to start the caulking work immediately, while stipulating that, contrary to 3M Middle East's proposal, Arme would supply the necessary Iranian personnel required to perform the work, under 3M Middle East's supervision. On 22 June 1977 3M Middle East accepted the modification and work commenced.

40. Second, Arme requested that 3M Middle East directly supervise other portions of the remaining work, including cement cutting, patching and cleaning. On 3 August 1977 3M Middle East agreed to do that work as well on the same conditions as the caulking work.

41. Third, Arme required certain additional materials which it purchased from 3M Middle East. These materials included materials which were to be used in the additional surface preparation work 3M Middle East had agreed to perform as well as certain materials needed to replace

material that had become unusable due to the delays incurred in the special surface preparation. The total price for these materials was $123,213.20. They were shipped in August 1977 and fully paid for by means of Arme's previously established letter of credit.

42. Nobal, 3M Middle East's subcontractor, issued a series of eleven invoices between 16 July 1977 and 5 November 1977 for its services under the Ancillary Agreements, totalling rials 21,455,631 (or $306,509.01) ("Nobal Invoices"). The Parties agree that partial payment was made but disagree on the amounts outstanding.

43. By mid-July 1977 the surface preparation work was sufficiently completed to permit 3M Middle East to commence application of Scotchclad to the stadium. On 20 July 1977 3M Middle East presented an invoice (dated 29 October 1976) for the initial 25% Contract payment to be made upon commencement of actual work as specified in the Contract. Three invoices for the remaining three installments to be paid for application work were all issued on 12 October 1977. These latter invoices were in the amount of $58,200, $48,500 and $38,602, respectively, and together equal the remaining 25% of the contractually provided service price, i.e., $193,802. The Parties agree that no amount was ever paid on account of any of these four invoices. Also on 12 October 1977, 3M Middle East billed Arme $38,200 for "special surface preparation, supervision and inspection pursuant to pro forma invoice of 11 August 1976." The Parties agree that this invoice remains unpaid but Arme disputes its validity.

44. In its letter of 20 July 1977, in which it requested the first payment under the Contract for the application of the Scotchclad, 3M Middle East wrote to Arme as follows: "We take this opportunity to kindly request you to release our bank guarantee issued in 1976. This bank guarantee

valued $652,000 represents the total value of the materials already completely delivered to Arme."

45. It appears that the application work was substantially completed by early October 1977 with only minor finishing work and small areas awaiting repair by Arme still to be completed. Subsequently, however, a major dispute arose between the Parties. Arme contends, and the Claimant disputes, that there were certain major defects in the Claimant's performance of the Contract.

46. In late October 1977 AFFA advised 3M Middle East that water leakage had appeared in waterproofed portions of the stadium and suggested that the leakage was the result of faulty application of the Scotchclad. Having conducted several investigations the Claimant responded that, in its view, the alleged defects were caused either by faulty pipework, by nails which had been driven through the Scotchclad surface by Arme in affixing signs to walls, or by cracks in the underlying cement substructure. The Claimant further contended that these causes were specifically excluded from 3M Middle East liability under the Contract.

47. Later, in November 1977, after the stadium had been reopened to the public, AFFA complained to 3M Middle East that, contrary to the specifications and warranties given, Scotchclad was burning during sporting events. Upon investigation the Claimant believed that the alleged flammability of the Scotchclad occurred during sporting events when fans set on fire piles of programs and newspapers on the Scotchclad surface as part of the sporting festivities. According to the Claimant, its investigations also established that it was not the Scotchclad itself that burned but a certain solvent used in caulking cracks under the Scotchclad.

48. The Parties seem to have met on several occasions to try to find a negotiated solution. At a meeting on 7 December 1977 between representatives of 3M Middle East and AFFA it was apparently agreed that the application of the Scotchclad "was not totally finished for [AFFA's] final acceptance," that AFFA could maintain the bank guarantee "temporarily" but that Arme would be instructed in writing "to effect payment of our first two invoices for application charges." On 8 December 1977 AFFA wrote to Arme, enclosing copies of three "Bills pertinent to payments for deckcoding [sic] and supervision and inspection of the prepared surface. . . ." AFFA instructed Arme as follows:

> Please, in case no payments [of 3M's Bills] have been made for this work, act according to the contract between that (Armeh) company and the 3M company, and take the appropriate actions for the payments of 3M's Bills which have been delayed. Please inform this company, in writing, of the results of this matter.

No responsive action on the part of Arme appears in the record.

49. Shortly thereafter, however, AFFA appears to have instructed Arme to withhold any payment and not to release 3M Middle East's performance guarantees until the defects -- leakage and flammability -- were repaired.

50. The record shows that throughout the early part of 1978 the Parties continued to meet and correspond to try to reach a satisfactory resolution to the problems asserted. On 20 February 1978 3M Middle East proposed that AFFA inspect each "cell" or seating area in the stadium as final finishing and repair work was completed and provide its acceptance of the work. In the meantime, in February and March 1978, Nobal cleaned and patched 120 fire-damaged areas and cut out, patched and recoated several cracks in an attempt to repair the damage of which Arme complained.

51. On 13 May 1978, however, expressing its dissatisfaction with 3M Middle East's efforts to redress its complaints, AFFA instructed Arme to draw down the total value of the two bank guarantees which 3M Middle East had posted at the beginning of the Contract. The Bank of Tehran paid $703,949.60 to Arme on 29 May 1978 and an additional amount of $19,758 on 7 June 1978 for the account of 3M Middle East under the bank guarantees. The Parties agree that the amount drawn down was never returned to 3M Middle East.

52. On 4 August 1978 3M Middle East formally notified Arme that the work was completed. 3M Middle East requested that Arme:

> give us the written notice, as per [Article 8 of the Contract], informing us of your acceptance or setting out a list of objections to acceptance that you may have, indicating specifically where in your opinion 3M has failed to comply with the covenants under the abovementioned Contract.
>
> You are also required to immediately refund the monies you collected under the two bank guarantees issued by 3M in your favour which you unjustifiably retained and cashed, despite our numerous prior requests to release the bank guarantee No. 24/588 issued by the Bank of Tehran on November 3, 1976 [the Materials Guarantee].

AFFA did not accept the work, however, and the Parties met several times in an attempt to resolve the remaining issues as to disputes concerning defects in the application work, the last meeting being in Athens in November 1978. Further negotiations scheduled for December 1978 in Tehran were interrupted by revolutionary events in Iran.

53. In the fall of 1979 3M Middle East arranged with a Mr. Amir Jalinoos, Managing Director of Shabrang Company ("Shabrang"), a distributor of 3M products in Iran, to complete all remaining work under the Contract to the satisfaction of AFFA. Shabrang commenced the work in late

1979, and Mr. Jalinoos on 29 October 1979 telexed 3M Middle East stating that:

> I am sure you will be pleased to know that up to this date we have received signatures from all parties involved in acceptability and completion of 25 cells out of 36 and the balance will be finished in less than one week. Now [3M Middle East] can claim that complete job is done to complete satisfaction of consulting firm, contractors and ministry involved. As regard to payment of invoice and bank guarantee we are working hard on it.

Some time apparently soon thereafter representatives of the "Contractor" (3M Middle East), of the "Consulting Firm" (AFFA), and of the Ministry of Housing executed a worksheet or list showing that the "[r]epair of insulation" of all 36 "Cells according to specifications has been completed." Signature blocks for all 36 cells are signed by the AFFA representative on the worksheet. (Inexplicably, five blocks (Nos. 10-14) lack the 3M Middle East representative's signature, while one (No. 21) lacks that of the Ministry of Housing representative.)

54. On 15 December 1979 AFFA wrote to the Ministry of Housing concerning the completion of the repair work on the stadium. Among other subjects AFFA stated as follows:

> The sum of US Dollars 193,800 is shown in the work list which is for service fee on installation of insulating materials, according to article 3b-11 of 3M Company's contract, that we suggest to be paid directly by the Project Owner [Ministry of Housing] to the above mentioned Company. Please pay attention to the point that because previously there were some defects in the insulating work of the sitting cells and the delay of 3M Company in removing these defects caused that this consulting firm instruct [Arme] to hold the Bank Guarantee of [3M Middle East] in amount of Rials 50912829 [i.e., $723,707.60 converted at 70.35 rials per dollar] for insulating work. The sum was at the disposal of [Arme] and inspite of repeated requests of this consulting firm from the Project

> Owner as to what should be done with the amount, no instruction was received.
>
> Now that the above mentioned Company has removed the defects of insulating job, this sum should be returned to [3M Middle East] by [Arme]. For their purpose of assurance of payment of this sum, it is suggested that [Arme] gives a separate committment [sic] for this payment or equivalent to the amount beheld [sic] from Bank Guarantees of [Arme] so that after payment of the mentioned sum the held guarantee be released.

55. On 26 February 1980 Mr. Jalinoos of Shabrang wrote to 3M Middle East, enclosing AFFA's above-quoted letter and stating: "Please consider this letter as notification that project has been accepted by consulting firm [AFFA] in accordance with the contract terms."

56. On 5 April 1980 representatives of Arme, AFFA and 3M Middle East met at AFFA's offices in Tehran. In a procès verbal signed by the three companies appears the following language:

> In the presence of the undersigned, a meeting was held in the offices of the consulting firm [AFFA] on 16/1/1359 (5 April 1980) to review the status of payment of [Arme's] debts to [3M Middle East]. As a result it was agreed that if [Arme] had the amount receivable from its final work list of Azady Stadium . . . (after deducting all the debts to the Project Owner [Ministry of Housing]) up to the amount of debts to [3M Middle East] be paid directly to [3M Middle East] by the Project Owner for account of [Arme]. Such payments will be acceptable by [Arme].

On 9 April 1980 AFFA delivered to the Ministry of Housing the procès verbal requesting the Ministry of Housing to pay amounts owed Arme directly to 3M Middle East. In the cover letter AFFA also requested again that, with respect to the bank guarantees, the Ministry of Housing "please give instruction that at the time of [Ministry of Housing's] payment to [Arme] for [Arme's] work list and clearing their account, the above sum [rials 50,912,829] be deducted from their payment and be paid to [3M Middle East]." It is not

disputed that neither Arme nor the Ministry of Housing paid these amounts to 3M Middle East for the work performed at the stadium or for the amounts of the bank guarantees drawn down in 1978.

2. The Claimant's Position

57. The Claimant contends that Arme is liable for all outstanding amounts for services rendered under the Contract and the Ancillary Agreements. It argues that the work was completed, that all defects were ultimately remedied and that the project engineer, AFFA, fully approved and accepted the project as required under the Contract. Consequently, it submits, Arme also is liable to pay the Claimant the amounts drawn down under the two bank guarantees, and for the same reasons the counterclaims must be dismissed.

58. The Claimant emphasizes that the Contract states the certification of completion by AFFA is conclusive on Arme, "any statement by PURCHASER [Arme] to the contrary notwithstanding." The Claimant argues that AFFA's approval of the repair work and recommendation that Arme and the Ministry of Housing pay the full amounts due precludes Arme or the Ministry of Housing from now alleging that defects were in existence which detract from 3M Middle East's rights under the Contract. The Ministry of Housing has confirmed that AFFA's "determination [was] dispositive and binding on the parties under the contract." The Claimant contends that the validity of the Contract is not contested, nor is the validity of AFFA's request that the full amount remaining due under the Contract be paid. Accordingly, it contends that there is no excuse for withholding of further amounts due.

59. According to the Claimant a total amount of $412,582.27 remains outstanding on all invoices which have been submitted. The claimed amount includes the total value of the

invoices for the service price of the Contract i.e., $193,802; the fee for the supervision of the special surface preparation, amounting to $38,200; the entire cost of standby, amounting to rials 3,876,556 or, as converted, $55,379.36; and finally $125,200.91 based on the eleven Nobal Invoices. The original total amount of these Nobal Invoices was rials 21,455,631. As already noted (see paragraph 22, n. 1, supra), the Claimant concedes rectifications to two of these invoices reducing their total amount to rials 21,143,525. As finally pleaded the Claimant concedes that Arme has paid rials 12,379,461 of this amount.[2] Consequently, the Claimant submits that the remaining unpaid balance is rials 8,764,064 or, as converted, $125,200.91.

60. As to the letters of guarantee, the Claimant points to its and AFFA's letters requesting the return of the amounts called and argues that there is no legal justification for Arme's continued holding of those amounts after completion of the work and its acceptance by AFFA. It notes in particular that the bulk of the amount drawn down was in respect of the Materials Guarantee, in the amount of $652,914.60, which was provided as collateral for the letter of credit that Arme posted for purchase of the materials. Since all the materials were shipped, paid for in full by Arme, and installed, the Claimant argues that the Materials Guarantee should have been released when its purpose was served, and that in any case there was no justification for its being called and cashed. As to its performance the Claimant admits that the applied Scotchclad was guaranteed to perform according to specifications under all reasonable usage for a period of three years (Section 11), and that the Performance

---

[2] The Tribunal notes that in its early submissions the Claimant conceded a payment of rials 2,731,852 on account of one of these eleven invoices (Invoice No. 9). As the Claimant later explained, this concession was caused by an accounting error and this invoice thus remains in dispute.

Guarantee was available to secure its obligation to repair or replace any defective materials during that period. It states, however, that it received no notice of any such defects subsequent to AFFA's approval of the repair of all previously identified defects and before the expiration of the guarantee period, which at the latest was in December 1982. It thus argues that there is no justification for Arme's continued holding of the amount of the Performance Guarantee either.

61. As to Arme's counterclaim for the alleged costs of repairing defects, the Claimant argues that any defects apparent prior to December 1979 were repaired to AFFA's satisfaction. The Claimant points out that Arme has repeatedly asserted to the Tribunal that the defects of which it complained are not latent defects which arose after the certification of AFFA but rather are defects which were apparent from the time of the application. It asserts that there is no proof of any later occurring defects. The Claimant also argues that had any defect become apparent before December 1982 but after 19 January 1981 the counterclaim would be time barred in any case because of the preclusive jurisdictional effect of the CSD. In the Claimant's view any and all defects were corrected and the corrections were accepted as completed by AFFA. In any event it contends that its examinations had established that the alleged defects were caused by defects in the special surface preparations. Pursuant to Article 2, paragraph 2, of the Contract 3M Middle East's supervision of the special surface preparation "implies no warranty or guarantee by [3M Middle East]." Consequently it argues that the counterclaim must be dismissed.

62. As an alternative claim, the Claimant contends that the Ministry of Housing is independently liable for the total amount due to 3M Middle East under the Contract under the principle of unjust enrichment, to the extent that it

received the value of the work performed without having paid Arme. It also argues that it is liable on the bank guarantees, since it, through its agent AFFA, induced Arme to breach its contractual obligation in drawing down the bank guarantees without justification in 1978.

3. Arme's Position

63. Arme disputes the Claimant's allegations both as to the amounts originally due and payments already made. Arme alleges that it overpaid amounts due under the Contract and that these overpayments should be credited against other amounts due and outstanding. Arme concedes, however, that it drew down the bank guarantees, and agrees that the amounts which were drawn down must now be credited against the amounts it alleges the Claimant owes. Arme further contends that the Claimant is liable to it on several other grounds, but only one counterclaim has been quantified. Globally, Arme submits, it is the Claimant who is indebted to Arme.

64. Arme's first argument regarding the amounts due concern the Contract price. It contends that this price must be reduced because it was based on an estimated total area of 40,000 square meters, while in fact, according to its measurements, the total area to which Scotchclad was applied was only 31,469 square meters. Arme argues that therefore its total gross liability for the work done, before deductions for payments and defects, must be recalculated to take into account the fact that the area waterproofed was smaller than estimated in the Contract. By Arme's calculations, the revised amount should be $424,412.40 instead of the $539,480.60 stated in the Contract.

65. Although not clearly stated, Arme appears to contend that this argument also applies to the invoice for special

surface preparation in the amount of $38,200, which consequently should be lowered in the same proportion as the Contract price. This invoice is also disputed on the ground that the invoice was not submitted and that "it is not clear for what purpose was the said cost incurred."

66. Arme further contends that the work was never completed. Presumably, this would mean that Arme objects to payment of the final 20% of the Contract price, payable on final approval, although Arme does not so specify. It states that under Section 8 of the Contract final acceptance of the works could take place "only after the engineers have examined the works and shall have issued a certificate to that effect." Arme rejects the certificate that was issued by AFFA, which states that the work was completed and that payment should be made, as being "solely a work report, and is not related to the acceptance of work and its provisional delivery, let alone the final delivery of the Project." Arme also argues that even if AFFA's statement constitutes the final certificate, such a certificate is "of Consultative nature, and the person that was required to approve the work and to take its delivery is the Employer [Ministry of Housing]."

67. With respect to the Nobal Invoices Arme contends that three[3] of the remaining nine invoices[4] which the Claimant considers only partly paid were "rectified" by 3M Middle East after objection by Arme or AFFA, and that therefore the amounts outstanding are less than those alleged by the Claimant. Arme considers five invoices[5] fully paid when

---

[3]Invoices Nos. 9, 16 and 21.

[4]The Claimant has already conceded rectifications to Invoices Nos. 4/126 and 2 and the Parties agree these invoices are fully paid.

[5]Invoices Nos. 9, 21, 27, 35 and 42.

rectified (three[6] of which should be considered paid by the payments made on account of 3M Middle East to Nobal). (See paragraph 69, infra.) Arme concedes, however, that on four invoices[7] there is a balance due of rials 2,666,141 (or $38,087.73).

68. Arme further submits that it has already made payments in excess of the amounts it otherwise concedes are due the Claimant. It relies on extracts of what appear to be ledger sheets of an otherwise unidentified entity called "Armetessa partnership," and extracts from its accounting books, some of which are headed "Statement of Charges to 3M." It contends that "in aggregate" Arme paid rials "72,770,385 equivalent to $1,039,576.93 under documentary credits opened for importing the materials sent by 3M" and that "the difference in amounts was due to some of the costs related to post, insurance and other costs which have been ignored."[8]

69. Arme also alleges that it paid Nobal (and various other parties) rials 26,786,024 (which Arme converts to $383,395.40 at a rate of 69.86 rials/ dollar) for services. It argues that these payments should be considered as payments made on account of 3M Middle East pursuant to the Contract and the Ancillary Agreements.

70. Arme also claims that there were defects in the Claimant's work. The Scotchclad allegedly was improperly applied and this "has led to the fact that cracks and many big gaps

---

[6] Invoices Nos. 27, 35 and 42.

[7] Invoices Nos. 13, 14, 16 and 24. The Claimant's acknowledgement of an additional payment of rials 800,000 on account of Invoice 24 has been considered.

[8] The aggregate invoiced price for materials shipped by 3M Middle East is $637,277.93.

emerge on almost the entire space where it was applied. The usage has been made in such a manner that it has ultimately led to an extensive duplication of work." Arme argues that this is proven by the fact that "the performance has regularly been objected to by the Consulting Engineers [AFFA]." Arme rejects the Claimant's argument that the cracks are attributable to defects in the underlying concrete as "vain and unfair," and argues that the Claimant had the responsibility for preparing the necessary structural repair work and surface preparation and that any resulting defects are its obligation. In support of its claim of defects Arme submitted a series of photographs allegedly taken of the stadium in September 1982 which it says shows that the Scotchclad allows leakage of water. According to Arme "if preventive measures are not taken speedily, numerous dangers and irreparable damage are to be expected." Arme has stated that it "is forced to spend one million and five hundred thousand U.S. dollars . . . in order to rectify the damages caused and to repair the defects in the work of 3M." In support of its claim to damages Arme relies on "an estimate carried out by [Arme] and takes into account the increasing rate of world inflation from the year 1976 to the current year (1982). This work must be carried out as soon as possible." The record does not show whether Arme has in fact carried out the allegedly necessary repair work or what the ultimate cost of those repairs was.

71. Arme further alleges breach on the part of 3M Middle East of a contractual warranty for which 3M Middle East is liable in damages. Arme states that AFFA repeatedly objected to the quality of the materials used and their suitability for use in the stadium and argues that "Claimant's contention concerning the good quality of the material is absolutely non-factual and false, or it has, at least, not been proved to be true in case of that part of the materials which were used in the stadium in Tehran. The materials used are flammable, lack the required elasticity, and gets

cracked." In support of its contention that the Scotchclad is "easily flammable" Arme supplied the opinion of an expert of the Justice Administration Department of the Iranian Justice Ministry, Dr. Etemad Moghadam, dated 29 October 1986, in which he stated "the said membrane is flammable and to my opinion it may not be considered as a suitable material for coating the seating tiers of a large sports stadium."

72. Arme finally asserts that 3M Middle East's breaches have undermined Arme's professional reputation and prestige. These contentions have not been further specified or quantified, however.

73. On the basis of a summary (which does not in all respects correspond with other submissions) Arme argues that its total counterclaim is thus $1,352,406.80.

4. The Tribunal's Decision

74. The Tribunal finds it established that the Contract was validly entered into between the two Parties and that Arme requested and 3M Middle East provided certain extra services and materials pursuant to the pro forma invoice dated 11 August 1976 and the Ancillary Agreements.

75. As to the terms of the Contract, the Tribunal finds no merit in Arme's claim that the amounts specified in the Contract for materials and application should be reduced to conform to the alleged actual area on which the Scotchclad was actually applied. Arme does not allege that the Claimant breached the Contract and applied Scotchclad to a smaller area than that contemplated in the Contract. Rather it argues that the Contract price was related to and would vary with the actual area covered by Scotchclad. Although the Tribunal agrees with the Respondent that the Contract is not wholly unambiguous, the most reasonable interpretation

is that the Contract price was firm. In any event, Arme supplied no evidence as to the alleged actual measurements, making any modification factually unsupported, even were it otherwise justifiable. Accordingly, it is not appropriate either to reduce the Contract amount or the amount of the $38,200 invoice for supervision of the special surface preparation.

76. Arme's main defense, which at the same time is its ground for its counterclaim, concerns 3M Middle East's alleged defective performance. In response the Claimant argues that its performance was formally accepted pursuant to the Contract after all defects complained of had been rectified. The Tribunal finds that the letter issued by AFFA on 15 December 1979 is not the kind of "Acceptance Certificate" contemplated by the Contract. Nevertheless, as a statement by AFFA it is clearly dispositive as to the issue of whether the work to be performed under the Contract was ultimately completed to AFFA's satisfaction. Accordingly, the Tribunal finds that the full service price specified in the Contract is payable. AFFA's statement in the same letter that 3M Middle East had "removed the defects" furthermore disposes of Arme's claims based on defective materials or performance, as AFFA requested that Arme pay all amounts outstanding and return the proceeds of the guarantees without any reservation or reduction and without any statement of outstanding defects.

77. The Tribunal further finds no evidence supporting Arme's claim that it paid amounts in addition to those recognized by the Claimant. To the extent the additional payments for materials represent Arme's own additional expenses for insurance or shipping costs, they are not attributable to 3M Middle East. As to the alleged unrecognized payments for services the Tribunal notes that five of the evidenced payments, totalling rials 11,579,461 (or $165,420.87), are payments admittedly received by Nobal and

therefore not claimed by the Claimant. The further alleged payments total rials 15,206,563 ($217,236.61) and are described as having been made to Nobal or other third parties on 3M's account. Many of the payments were made to the order of a Mr. Farghchian, Mr. Zareef or Mr. Nasri in payment for "workshop expenses," "costs of repairs," payment of "salary to the workers of Arya Mehr stadium," "payment to the dismissed workers of the stadium," "the price of equipment and stadium expenses incurred." The Tribunal concludes that these payments "on account of 3M Company" refer in large part to payments of salaries to Arme's employees apparently working on the stadium. There is no reason to think that such expenses are attributable to 3M Middle East or that they relate to anything other than Arme's own work in preparing the site. Therefore the Tribunal can neither conclude that those payments constitute payments for the amounts here claimed nor that they should be set off against Arme's debts to 3M Middle East.

78. The Tribunal is satisfied that all invoices issued represent work performed and standby expenses legitimately incurred, and finds no evidence to question their existence or validity, or to justify recognition of any alleged "rectifications" reducing the amounts due beyond those conceded by the Claimant.

79. As to the counterclaims, Arme's claim for $1.5 million as the cost of repairing defects is a mere estimate unsupported by any substantiation. It does not appear that any repair work was in fact done and in any case there is no proof of the alleged damages. Particularly in light of the approval of all work and all repairs as of late 1979 by the project engineer, AFFA, the Tribunal must find that Arme has failed to advance any support for this claim.

80. As to the bank guarantees drawn down, Arme has provided no excuse for its action in calling the Materials Guarantee

after such time as the Parties had completed and fully paid the materials portion of the Contract. Consequently the Tribunal finds that Arme's call of this guarantee was wrongful. As to the Performance Guarantee, while the call was made in response to alleged defects and was thus not per se wrongful, it is clear that it should have been returned upon correction of the defects and approval of the project by AFFA. Arme has conceded that it must now credit the amount of the guarantees to the Claimant, although Arme proposes to subtract the amount of the guarantees from amounts it alleges are due it from the Claimant. The Tribunal, having rejected Arme's claims for excess payments or damages, decides that Arme must return the entire amount of the guarantees to the Claimant.

81. Accordingly, a total amount of $1,136,289.87 is awarded to the Claimant from Arme, composed of $193,802 for the service price of the Contract, $38,200 for the special surface preparation invoice, $55,379.36 for the standby invoices, $125,200.91 for the balance of Nobal invoices, and $723,707.60 for the drawn guarantees.

82. Given this determination, the Tribunal need not consider the Claimant's alternative claim against the Ministry of Housing. The Ministry of Housing's counterclaim as originally raised was identical to Arme's and is dismissed for the above reasons. Its purported new counterclaim, raised in its final Rebuttal Memorial, was previously dismissed as untimely filed. (See paragraph 4, supra.)

B. THE DIBA CLAIM

1. Factual Background

83. In 1975 3M Middle East shipped certain equipment known

as an MR-412 camera plate system to an Iranian trade exposition called the Tehran International Fair. In September 1976 Mr. Nabil Challah, who was then sales representative for 3M Middle East, entered into negotiations with Mr. F. Diba of Diba (which earlier in 1976 had been appointed a non-exclusive distributor of 3M brand camera plate systems for Iran) for the purchase of the camera plate system previously shipped to the fair. The camera plate system was sold and delivered to Diba and on 30 September 1976 3M Middle East issued Invoice No. 89854 to Diba for the sale in the amount of $10,235. For reasons which are not explained no payment was made on the invoice until late 1978. In November 1978 Diba informed 3M Middle East that it was unable to make payment at that time because the banks in Iran were closed, but requested that two credit notes in its favor be applied against the amount owing to the Claimant for the camera plate system. The credit notes are both dated 7 December 1978 and total $2,167.28. This amount was deducted from the total amount originally due for the camera plate system. It is not disputed that no additional payment or credit was made, leaving an amount of $8,067.72 outstanding.

2. The Claimant's Position

84. The Claimant argues that since it is agreed that the equipment was received by Diba, it is owed the remaining amount due of $8,067.72, as invoiced.

85. In response to Diba's defenses, further discussed below, the Claimant disputes that payment is due in any other currency than United States dollars with reference to the terms of the invoice. It also denies that a sale of chemicals was part of the transaction for the sale of the camera plate system. Finally it contends that Diba's

counterclaims must be rejected as being entirely unsubstantiated and "frivolous."

3. Diba's Position

86. Diba concedes that it purchased the camera plate system and that the equipment was delivered. Diba proposes two defenses, however, against its liability for further payment on the invoice, and has filed two counterclaims.

87. First, Diba alleges that, as was customary at the Tehran International Fair, the transaction was denominated in rials. It states that it "was always ready to make payment for the value in rial currency in Tehran, in conformity with the conditions of the transaction" and that since "the transaction took place in Iran . . . the payment should have been effected in Rials." Thus Diba argues that it is not required to pay any amount in dollars. Diba further contends, however, that its non-payment of the invoice was "due to the . . . Revolution, which is one of the obvious cases of 'Force Majeure,'" that therefore "the Respondent was rendered unable to pay the invoice." Specifically, Diba argues that regulations that were imposed at the time of the Revolution restricted "the transfer abroad of foreign exchange, which was formerly free."

88. Second, Diba denies liability to 3M Middle East in any currency. It states that after it purchased the camera plate system, it sold the system to National Iranian Oil Company ("NIOC") under a contract which required Diba to install the device and, apparently, oversee its operation for a one year period after installation. Necessary to the operation of the device is a chemical called "XL Developer - XL Activator." Diba alleges that following its sale of the camera plate system to NIOC Diba "corresponded with no avail with the Supplier [3M Middle East] requesting it to despatch

the aforementioned liquid." Diba argues that because 3M Middle East failed to supply the necessary chemicals for the operation of the system NIOC ultimately refused to pay Diba for it. As a result "the commercial prestige of the Respondent was impaired, and both material and immaterial losses were incurred by the Respondent." Diba claims that the amount of losses exceed the remaining amount due for the invoice, thus excusing it from further payments for the system.

89. Diba has asserted a counterclaim for the amount of damages it suffered allegedly because of 3M Middle East's failure to supply the necessary chemicals. The amount of the counterclaim is rials 200,000,000, which is (at 70 rials per dollar) equivalent to $2,857,145.85. Diba has also counterclaimed for an unspecified amount of "tax dues which [3M Middle East] is required to pay under the Act in force at the time of the sale of the camera plate system."

4. The Tribunal's Decision

90. The Parties agree that a contract was entered into in 1976 for the sale of a camera plate system valued at $10,235 and that the system was delivered. They also agree that certain credits should be taken into account leaving a balance of $8,067.72. The Tribunal finds that this balance is still due and owing by Diba to 3M Middle East.

91. Diba's first defense is that the transaction was denominated in rials and should have been paid in rials. This contention is unsubstantiated by any evidence and in fact is contradicted by the terms of the invoice, which is denominated in dollars. In any event, nothing in the record indicates that Diba at any time offered to pay the Claimant in rials. Diba further contends that it could not pay in dollars because of post-Revolution exchange controls. This

contention amounts to an invocation of force majeure but it does not explain why Diba waited until after the Revolution to try to pay an invoice issued in 1976. Furthermore, Diba has not sought to prove that the alleged force majeure conditions created a permanent impossibility which could excuse its performance and not simply defer it. Thus there is no defense based on the currency of the transactions.

92. Diba's main defense, and the basis of one of its counterclaims, is that 3M Middle East allegedly failed to supply certain necessary chemicals to Diba. The Tribunal finds this contention entirely unsubstantiated. There is no indication in the record that any sale of chemicals was part of the transaction for the sale of the camera plate system, and Diba has provided no evidence of its purported subsequent requests that the chemical be supplied. Accordingly, this defense is also denied, and the Tribunal determines that Diba owes the Claimant the amount of $8,067.72 for the remaining balance.

93. It necessarily follows from the foregoing that the counterclaim for damages based on the alleged failure to deliver chemicals must be dismissed as entirely unsubstantiated. The second asserted counterclaim, for alleged taxes, is also entirely unsubstantiated by any evidence or allegation and must also be rejected.

C. THE POLYACRYL CLAIM

1. Factual Background

94. The Respondent to this claim, Polyacryl, was a joint venture between an American Company, E.I. Du Pont de Nemours and Company ("Du Pont") and certain Iranian interests. Du Pont entered into an agreement with Polyacryl by which Du Pont procured goods for Polyacryl in the United States.

Between 14 August 1978 and 26 May 1979 the Claimant sold various goods to Polyacryl through Du Pont and issued a series of 39 invoices totalling $30,100.91 for various items. The invoices are all marked "charge to Polyacryl Iran Corp" and all but two list Polyacryl's billing address as "c/o EI Du Pont de Nemours" in Wilmington, Delaware. The invoices also all show "Polyacryl Iran Corp." under the heading "consignee or ship to," and give an address in North Bergen, New Jersey, or Jamaica, New York. The Parties agree that no payment was ever received for these invoices.

2. The Claimant's Position

95. The Claimant alleges that Du Pont was purchasing agent for Polyacryl and that therefore orders received from it are attributable to Polyacryl and invoices issued to it are payable by Polyacryl. The Claimant contends that the purchase orders were placed by Du Pont by letter, telex or telephone, and that once a purchase order was received a pro forma invoice was sent to Polyacryl's freight forwarder, Schenkers International Forwarders ("Schenkers"), in accordance with Polyacryl's printed instructions. Upon approval of the pro forma invoice the order would be shipped to Polyacryl at Schenkers' warehouse in North Bergen, New Jersey. Thereupon the invoices were generated and, again as per Polyacryl's instructions, sent to Du Pont for payment.

96. According to the Claimant, neither Polyacryl, Du Pont nor Schenkers ever objected to the mode of delivery or suggested that any of the documents provided were inadequate, and no party ever complained that they had not received a shipment for which a purchase order had been placed. In response to Polyacryl's defense that some of the items shipped were not received by it in Iran, the Claimant argues that because delivery terms were FOB, and because Polyacryl's instructions specified that Polyacryl was

responsible for insurance from the United States to Iran, the Claimant fully delivered the goods upon shipment to the freight forwarders. The Claimant relies on documents which include the thirty-nine invoices, the shipping instructions given to the freight forwarders and, in respect of seven of the invoices in a total amount of $3,183.10, relevant shipments documents. The Claimant contends that "[b]ecause these shipments were made many years ago, 3M's files do not contain air bills or bills of lading for all of the orders placed by and shipped to Polyacryl." The Claimant further argues that under 3M's ". . . standard business operating procedures, an invoice for payment would never be generated until after the ordered goods had been delivered for shipment and a bill of lading or air bill had been received by the export office [of 3M]." Having thus fulfilled its responsibilities the Claimant argues that it is irrelevant to its right to payment whether the goods were actually received by Polyacryl in Iran. Because no payments have been made on the invoices the Claimant claims the amount of $30,100.91 from Polyacryl.

3. Polyacryl's Position

97. Polyacryl raises several defenses to payment of the invoices. It argues first that "a number of invoices attached to the statement of claim has never been received by [Polyacryl]," and that "the major part of items and products alleged by the Claimant not only has not been received by [Polyacryl], but has never arrived into Iran."

98. Further, Polyacryl argues that, while Du Pont was a "procurement agent for Polyacryl," Du Pont lacked the "capacity to create obligation binding on [Polyacryl]; rather, Dupont itself was a party to contracts with the U.S. suppliers." Polyacryl also states that Du Pont was not "a simple commercial agent for Polyacryl but purchased the

goods for it directly in line with the requirements and paid their price and, on the other hand, was obligated before Polyacryl. Despite the insertion of Polyacryl['s] name in the invoices, it essentially had no direct transaction with the sellers and was only a party to an obligation in respect to DuPont." Polyacryl argues that the Claimant had always received payment directly from Du Pont, and that it has no right now to refer directly to Polyacryl. Polyacryl says that "the purpose of the accepted onerous obligations in the contract [i.e., the agency contract between Polyacryl and Du Pont] was to bind Dupont before the sellers which consequently meant Polyacryl's clearance from any obligation." Polyacryl therefore argues that any claim on the invoices must be brought directly against Du Pont and not against Polyacryl.

4. The Tribunal's Decision

99. It is clear from the record that, as Polyacryl has conceded, Du Pont ordered the goods referred to in the submitted invoices as Polyacryl's fully disclosed purchasing agent. The Tribunal is satisfied on the basis of the invoices and the explanation of the Claimant's normal business practices, as illustrated by purchase orders and other documents submitted, that the goods as described by the Claimant were ordered by Polyacryl. It also appears that invoices showing the amounts due were duly issued to Du Pont. The Tribunal is unable to accept Polyacryl's argument that Du Pont, rather than Polyacryl, is the only party liable for the sales. It is clear, even from Polyacryl's own explanation of the relationship with Du Pont, that Du Pont was Polyacryl's agent in the United States with the power to bind Polyacryl. While it is conceivable that under some circumstances Du Pont might also be liable, there is no

question that as Du Pont's fully disclosed principal Polyacryl is primarily and directly liable.

100. The Tribunal further finds that the evidence submitted establishes that the Claimant fulfilled its responsibilities by delivering the goods according to Polyacryl's shipping instructions with respect to seven invoices in the total amount of $3,183.10. As regards the remaining thirty-two invoices, the Tribunal finds that the Claimant has not evidenced that the goods covered by these invoices actually were delivered to the freight forwarders. In view of the foregoing the Tribunal decides that Polyacryl is obligated to pay to the Claimant the total amount of the seven invoices, i.e., $3,183.10 and consequently the other parts of this Claim is rejected.

IV. INTEREST AND COSTS

A. INTEREST

101. The Claimant seeks interest at the rate of 12 percent on all amounts awarded by the Tribunal. In the absence of any contractual provisions for payment of interest, the Tribunal finds it proper to fix the interest rate at 10 percent pursuant to the principles and guidelines established by the Tribunal in McCollough & Company, Inc. and Ministry of Post, Telegraph and Telephone, Award No. 225-89-3 (22 April 1986). Interest will be calculated from the dates that the claim arose, to the date of notification to the escrow agent, as follows:

(a) The Arme Claim:

(i) On the amounts due under the Contract, $412,582.67, interest shall run from 15 December 1979,

i.e., the date of the final acceptance of the work by AFFA, as requested by the Claimant;

(ii) on the amount of the Materials Guarantee, $652,914.60, interest shall run from 29 May 1978, i.e., the date on which the Materials Guarantee proceeds were paid to Arme;

(iii) on the amount of the Performance Guarantee, $70,793, interest shall run from 15 December 1979, i.e., the date on which the works were accepted and the funds should have been released.

(b) The Diba Claim: On the outstanding balance of the invoice, $8,067.72, interest shall run from 31 October 1976, i.e., one month after the issuance of the invoice.

(c) The Polyacryl Claim: On the outstanding balance of the invoices found due, $3,183.10, interest shall begin on 31 January 1979, i.e., thirty days after the approximate mean of the dates of issuance of the invoices at issue.

B. COSTS

102. The Claimant alleges that under the Tribunal Rules a prevailing party is entitled to its non-legal and legal costs. The Claimant has submitted evidence showing that it has paid legal fees of $141,679.20 and that it has borne other costs totalling $31,170.55.

103. The Tribunal notes that the Claimant alleges that there is special justification for the Claimant to prevail on its claim for costs in this Case. It argues that it has, in good faith, incurred substantial extra expenses while

negotiating three settlement agreements which have failed to be ratified by the relevant Governmental authorities. The Claimant further appears to allege that the Respondents have deliberately sought to prolong the proceedings in bad faith in order to delay the payment of the valid claims in this Case. In support the Claimant relies on a letter dated 6 October 1986, signed by "a former director of Arme Company" "Mr. Hushang Nahid Al-Mobarakeh," addressed to "Mr. Eshragh, Iranian Agent to the Iran-United States Claims Tribunal, the Hague," which was appended to its Rebuttal Memorial.

104. With reference to this letter the Claimant states that:

> The letter, while fully consistent with Claimant's positions as to both the merits of the Arme Claim and the Tribunal's jurisdiction over that claim as against Arme, is completely unnecessary to Claimant's case on those issues and is submitted solely in rebuttal of Respondents' continuing pretense, implicit in their submission of memorials, that their defense in these proceedings has or ever has had any purpose other than to delay justice to and impose additional costs upon Claimant.

105. The Tribunal notes that, both at the Hearing and in a rebuttal memorial filed with the Tribunal, the Agent of the Government of the Islamic Republic of Iran objected to the Tribunal's consideration of the letter and stated that no such letter had been received by Mr. Eshragh and that he denied its authenticity.

106. The Tribunal cannot, however, find support for the Claimant's allegation of improprieties in the Respondents' way of defending their Case. The Tribunal does not consider that the letter of 6 October 1986 proves the Claimant's contentions, as its evidentiary value is impaired by Mr. Eshragh's explicit denials of its authenticity.

107. In the circumstances of this Case, however, the Tribunal determines that it is appropriate to obligate Arme to

compensate the Claimant for its costs of arbitration in the amount of U.S.$35,000.

V. AWARD

108. For the foregoing reasons

THE TRIBUNAL AWARDS AS FOLLOWS:

a. The Respondent ARME CONSTRUCTION COMPANY is obligated to pay the Claimant MINNESOTA MINING AND MANUFACTURING CORPORATION:

1. The amount of Four hundred twelve thousand five hundred eighty-two United States dollars and sixty-seven cents (U.S.$412,582.67) plus simple interest at the rate of ten percent (10%) per annum (365-day basis) from 15 December 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

2. the amount of Six hundred fifty-two thousand nine hundred and fourteen United States dollars and sixty cents (U.S.$652,914.60) plus simple interest at the rate of ten percent (10%) per annum (365-day basis) from 29 May 1978 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

3. the amount of Seventy thousand seven hundred and ninety-three United States dollars (U.S.$70,793) plus simple interest at the rate of ten percent (10%) per annum (365-day basis) from 15 December 1979 up to and including the date on which the

Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

4. the amount of Thirty-five thousand United States dollars (U.S.$35,000) as costs of arbitration.

Accordingly, the alternative Claim against the Ministry of Housing and Urban Development is dismissed.

b. Respondent ABOL-HASSAN DIBA & CO. LTD. is obligated to pay the Claimant MINNESOTA MINING AND MANUFACTURING CORPORATION the amount of Eight thousand sixty-seven United States dollars and seventy-two cents (U.S.$8,067.72) plus simple interest at the rate of ten percent (10%) per annum (365-day basis) from 31 October 1976 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

c. The Respondent POLYACRYL IRAN CORPORATION is obligated to pay the Claimant MINNESOTA MINING AND MANUFACTURING CORPORATION the amount of Three thousand one hundred and eighty-three United States dollars and ten cents (U.S.$3,183.10) plus simple interest at the rate of ten percent (10%) per annum (365-day basis) from 31 January 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

d. All of the above obligations shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

e. All counterclaims are dismissed.

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

Dated, The Hague
18 December 1987

Michel Virally
Chairman
Chamber Three

In the name of God

Charles N. Brower
Joining fully in the Award, although I would have preferred that the Tribunal award Claimant its full costs of arbitration, i.e., $172,849.75, considering that (1) Claimant has prevailed on the great bulk of its claims; (2) all counterclaims have been dismissed; and (3), in addition, the fact that the claim against Respondent Arme Construction Company has been settled three times, subject to approval of the Government of the Islamic Republic of Iran, which was withheld, suggests that said Respondent's continued defense of this case was dilatory, as has been confirmed in detail by the letter of 2 October 1986 by Mr. Hushang Nahid Al-Mabarakeh, who previously had signed the Statement of Defense and Rejoinder of Arme Construction Company (which was received by Claimant's counsel but receipt of which is denied by the Agent of the Islamic Republic of Iran, to whom it appears to have been addressed).

Parviz Ansari Moin
Dissenting and Concurring Opinion