AD HOC ARBITRATION

SAPPHIRE INTERNATIONAL PETROLEUMS LTD. V. NATIONAL IRANIAN OIL COMPANY

ARBITRAL AWARD

---

15 March 1963

Tribunal:
Pierre Cavin (Sole arbitrator)

Voir le document sur jusmundi.com

JUS MUNDI

Table of Contents

Arbitral Award

The Facts

I.

1. On June 16, 1958, the National Iranian Oil Co., Ltd. (hereinafter called 'NIOC') and Sapphire Petroleums Ltd. (hereinafter called 'Sapphire'), a company registered in the province of Ontario, Canada, made an agreement in Teheran. The agreement was signed by the Chairman of the Board of Directors of NIOC, Mr. Entezam, and by the Vice-President and Attorney-in-fact of Sapphire, Mr. Spiegelmann. Before concluding this agreement, Sapphire had completed a detailed questionnaire concerning their technical and financial capabilities, their capital structure and their organization, in accordance with the Iranian Petroleum Law of July 31, 1957. Their qualifications had been considered sufficient by NIOC, as Mr. Entezam himself confirmed in his letter of February 8, 1958.

2. The preamble to the agreement sets out that NIOC (described in the agreement as the 'first party') wish to expand the production and exportation of Iranian Oil and thus to increase the resources of Iran. For their part Sapphire (described in the agreement as the 'second party') are regarded as having the technical competence, the financial ability and the organization necessary for the accomplishment of the operations laid down in the contract. In addition, the parties agree to carry out the agreement in a spirit of good faith and reciprocal good will.

3. Under Article 2 of the agreement the parties become partners in a joint structure relationship in which they will participate in equal shares, subject to any stipulations to the contrary. The said partnership does not constitute an independent legal person under the Iranian Petroleum Law.
An area described in an annex to the agreement is exclusively allotted to them so that they may embark upon the operations laid down in the agreement (Article 3). To do this the parties will set up, in accordance with Article 5 of the contract, a company called the Iranian Canada Oil Company (hereinafter called 'IRCAN'). This Company, which will be a joint stock company and non-profit corporation, should be set up and registered within 60 days following the date of ratification of the agreement by the Iranian Government (the 'effective date'). It will carry out the operations laid down by the agreement for and on behalf of the two parties. However, in so far as prospecting is concerned it will act only as Sapphire's agent.

4. The agreement distinguishes two periods: (1) for prospecting, in which, in accordance with Article 10, para. 5, *in fine,* Sapphire will act through IRCAN and will be responsible for the 'full, exclusive and effective management and control of all the exploratory operations, including exploration drilling; and (2) for the working, extraction and sale of oil, in which IRCAN will act as the agent of both parties, who will each be responsible for an equal share of the expenses necessary for carrying out the operations laid down in the agreement (Article 2, para 3; Article 5, chapters 2 and 3).

5. Under Article 6 of the agreement each of the parties will subscribe to half of the share capital of IRCAN. This principle of equal participation is also to hold good for the composition of the Board of Directors, half of whom will be appointed by each party, the Chairman being a NIOC director and the Vice-Chairman and the General Manager being Sapphire directors. The initial capital of IRCAN is fixed at 750,000 rials, of which each of the parties will subscribe half as well as half of any future increase in the capital (Article 8).
Article 10 of the agreement defines the operations which IRCAN has the power and right to undertake as agent of both parties, or, where the agreement so provides, as agent of Sapphire alone. These operations all concern the production and transport of oil in the concession area, including prospecting, drilling, production and storing of oil, its transport to refineries and its delivery. IRCAN will have the right to build any installations that may be needed. However, for the acquisition of land, the creation of islands, the construction of bridges, the establishment of railway, telephone and telegraph lines, and of radio and air links in Iran, the written authorization of the Iranian Government will first be necessary. This authorization cannot, however, be unreasonably withheld. In addition, IRCAN and/or Sapphire may engage any subcontractors necessary for the execution of the prospecting operations provided for in the contract (Article 11).

6. Under Article 10 *in fine,*

   the parties hereto, acting through IRCAN jointly, shall determine and have full exclusive and effective management and control of all the operations authorized hereunder subject to the provisions of this Agreement, except exploratory operations, including exploration drilling, as to which operations Second Party, acting through IRCAN, shall, subject to the provisions of Article 12, determine and have full, exclusive and effective management and control.'

   In accordance with Article 12, Sapphire, who will act through IRCAN, will be bound by the following obligations during the period of prospecting:

   —to use all its efforts in prospecting the concession area;

   —to prepare a plan of its operations in consultation with NIOC and to execute it with diligence and at its own expense;

   —to submit to NIOC detailed reports on the progress of the work, as well as a final and complete report;

   —to allow NIOC's representatives to inspect their work at any time, in so far as this is possible;

   —to bear the whole expense of prospecting, including NIOC's share as well as its own, in the event that the prospecting operations fail to reveal the existence of commercially workable oil reserves.

7. In the event of an oil field being discovered, the parties, acting through IRCAN, bind themselves to work it to the maximum according to the most modern techniques (Article 13). Article 15 of the agreement determines the moment at which the prospecting work should be regarded as terminated.
The moment that an oil field is discovered which is capable of commercial working (Article 15, para.

5, defines an oil field capable of commercial working), the parties will be jointly responsible for any subsequent expenses necessary for the development and working of the field. All the expenses incurred up till then for prospecting will automatically be reimbursed by the 'joint structure' to Sapphire, through the medium of IRCAN.

8. In carrying out this obligation to reimburse, the 'joint structure' will credit the account of Sapphire with the value of the expenses incurred by them in prospecting, on the basis of accounts which Sapphire should submit to IRCAN within two months of each four months' period. IRCAN will have the right to audit and check the accuracy of these accounts and to reclaim any vouchers. If at the end of 45 days from the date of the submission of these accounts to IRCAN they have raised no objection, the accounts will become final.
Under Article 15, para. 12, 50 per cent. of the sums paid to Sapphire as reimbursement for their prospecting expenses will be paid by Sapphire to NIOC.

   In addition, the agreement provides for the net profits to be divided equally between NIOC and Sapphire, followed by a tax deduction by the Iranian State on the income at a maximum rate of 50 per cent. In this way Sapphire will receive 25 per cent. of the net profit, while NIOC and the Iranian State will receive 75 per cent. (Articles 24 and 31).

   On the other hand, it is convenient to recall that if no oil field is discovered, Sapphire alone will pay for all the expenses of prospecting, in accordance with Article 12 above.

9. In addition, Article 16 of the agreement provides that prospecting should start no later than six months after the effective date of the agreement, while Sapphire has a maximum period of two years from the effective date within which to begin drilling at least one well within the concession area. In the event of Sapphire failing to carry out these obligations within the period laid down, NIOC will have the right to cancel the contract six months after the expiry of the said period. In this event, Sapphire will be liable to pay NIOC an indemnity of $350,000, except in the case of *force majeure.*

10. By Article 17 to 20 the agreement sets out the conditions under which IRCAN, as agent for both parties or, where the contract so provides, for Sapphire alone, will be entitled to make use of or acquire government or private land, and will be able to obtain water rights, rights of passage and other easements, as well as the construction materials which they will need.
Articles 21 *et seq.* of the contract regulate the relations between the parties during the period of working, and deal with the allocation of oil between them, its sale, and the currency to be used by them.

    By Article 30 Sapphire undertake to invest directly or through IRCAN a minimum sum of $18,000,000 during twelve years from the effective date of the agreement. $8,000,000 is to be invested during the first four years, and at the end of this period Sapphire will be able to discontinue its search for oil and to give up the concession, provided that the above sum has been invested.

    Articles 31 to 35 of the agreement deal with questions of tax and customs duties for equipment and installations which have to be imported into Iran.

11. By Article 36 Sapphire may at any time assign the whole or part of its rights and obligations under the agreement to another company, provided that it controls or is controlled by this other company or that it is a company controlled by the said other company.
Article 37 of the agreement provides for the case of *force majeure* which may prevent Sapphire from carrying out its obligations or from exercising its rights. Assuming such *force majeure,* Sapphire will not be considered as in breach of contract for failing to carry out its obligations, and the time-limit set by the contract will be extended by a period equivalent to the duration of the *force majeure.* This provision also lays down that the term *force majeure* should be defined in accordance with the principles of international law.

12. Under Article 38, para. 1, of the agreement the parties undertake to carry out the provisions of the contract in accordance with the principles of good faith and good will and to respect the spirit as well as the letter of the agreement.
In addition, by Article 38, para. 3, it is provided that no general or special statutory enactment, no administrative measure or decree of any kind, made either by the Government or by any governmental authority in Iran (central or local), including NIOC, can cancel the agreement or affect or change its provisions, or prevent or hinder its performance. No cancellation, amendment or modification can take place except with the agreement of the two parties.

13. Article 39 of the agreement provides as follows:
1. If any dispute arises out of the execution or interpretation of this Agreement, the Parties may agree that the matter shall be referred to a mixed Conciliation Committee composed of four members, two nominated by each Party, whose duty shall be to seek a friendly solution. The Conciliation Committee after having heard the representatives of the Parties, shall give a ruling within three months from the date on which the dispute was referred to it. The ruling, in order to be binding, must be unanimous.

2. If the Parties do not agree upon the reference of a dispute to a Conciliation Committee, or if a dispute is referred to the said Committee but not settled, the sole method of determining it shall be by arbitration in accordance with Article 41.'

Article 40 of the contract provides that in the event of a dispute concerning technical or accountancy questions the parties may agree to refer it to an expert or a board of three experts.

14. Article 41, referred to above, reads as follows:
1. If the Parties do not agree that a dispute shall be referred to an expert or experts under Article 40 or if they do so agree but the appointments provided for are not made or a decision is not given within the time specified for the purpose, or if in the circumstances set out in paragraph 4 of Article 40 either of the Parties seeks the determination of a question of law, each of the Parties shall appoint an arbitrator, and the two arbitrators before proceeding to arbitration shall appoint an umpire who shall be the President of the Arbitration Board. If the two arbitrators cannot within four months of the institution of proceedings agree on the person of the umpire, the latter shall, if the Parties do not otherwise agree, be appointed, at the request of either Party, by the President of the Swiss Federal Tribunal.

2. If one of the Parties does not appoint its arbitrator or does not advise the other Party of the appointment made by it within two months of the institution of the proceedings, the other Party shall have the right to apply to the President of the Swiss Federal Tribunal to appoint a sole arbitrator.

3. If for any reason whatsoever the appointment of a sole arbitrator or an umpire is not made in accordance with paragraph 1, then, unless the Parties shall have otherwise agreed in writing, the said appointment shall be made at the request of either Party by the president or equal judge of the highest court of any of the following nations in the order stated: Denmark, Sweden, Brazil.

4. The appointment of an umpire or sole arbitrator under paragraph 1 shall be within the complete discretion of the person authorized to make it, and the exercise of his discretion may not be questioned by either Party. The person so appointed should not be closely connected with nor have been in the public service of, nor be a national of, Iran or Canada.

5. The umpire or the sole arbitrator (as the case may be) shall notify his acceptance of the nomination within thirty days of receiving notice of his nomination. Failing such notification, it shall be assumed that he has refused the nomination and a new appointment shall be made in accordance with the same procedure.

6. If the arbitration is referred to an Arbitration Board the award may be given by a majority. The Parties shall comply in good faith with the award of the Arbitration Board or the Sole Arbitrator (as the case may be).

7. The place and procedure of arbitration shall be determined by the Parties. In case of failure to reach agreement, such place and procedure shall be determined by the expert, the third expert, the umpire or the sole arbitrator (as the case may be).

8. The Parties shall extend to the expert or experts or the Arbitration Board or the sole arbitrator all facilities (including access to the petroleum operations) for obtaining any information required for the proper determination of the dispute. The absence or default of any Party to an arbitration shall not be permitted to prevent or hinder the arbitration procedure in any or all of its stages.

9. Pending the issue of a decision or award, the operations or activities which have given rise to the arbitration need not be discontinued. In case the decision or award recognizes that the complaint was justified, provision may be made therein for such reparation as may appropriately be made in favour of the complainant.

10. The costs of an arbitration shall be awarded at the entire discretion of the expert or experts or the Arbitration Board or the sole arbitrator (as the case may be).

11. If for any reason an expert, member of an Arbitration Board or sole arbitrator after having accepted the functions entrusted to him is unable or unwilling to enter upon or to complete the determination of a dispute, then, unless the Parties otherwise agree, either Party may request the President of the Swiss Federal Tribunal to decide whether the original appointment is to be treated as at an end. If he so decides he shall request the person or persons who made the original appointment to appoint a substitute within such time as he shall specify, and if within the time so specified no substitute has been appointed, or if the original appointment was made by him, he shall himself appoint a substitute. If the President of the Swiss Federal Tribunal for any reason

whatsoever does not perform his functions they shall devolve on one of the other persons referred to in paragraph 3 of this Article in the order therein provided.

12. Wherever appropriate, decisions and awards hereunder shall specify a time for compliance therewith.

13. Either Party may, within fifteen days of the date of the communication of the decision or award to the Parties, request the expert or experts or the Arbitration Board or the sole arbitrator (as the case may be) who gave the original decision or award, to interpret the same. Such a request shall not affect the validity of the decision or award. Any such interpretation shall be given within one month of the date on which it was requested and the execution of the decision or award shall be suspended until the interpretation is given or the expiry of the said month, whichever first occurs.'

15. Finally, it should be mentioned that, under Article 44 of the contract, in case of any divergence between the English and the Iranian texts of the agreement, the English version shall prevail.

II.

The payment of the indemnity of $350,000, provided for in Article 43, para. 2, of the agreement, was guaranteed by the creation of a bank guarantee, in accordance with the following letter, which was sent by Sapphire to NIOC on June 16, 1958, and was accepted and countersigned by the latter:
'Gentlemen :

This letter has reference to paragraph 2 of Article 43 of the Agreement dated June... 1958, between National Iranian Oil Company and Sapphire Petroleums Ltd. (hereinafter referred to as "Sapphire"). Such paragraph creates an obligation on the part of Sapphire to pay a penalty of $350,000 in the event of the occurrence of certain conditions. Our further agreements relating to such matter are as follows:

1. In order to secure the payment of said penalty, it is agreed that:
(*a*) Sapphire will furnish to NIOC, prior to the expiry of the Second Letter of Guarantee in the amount of $157,500, a third Letter of Guarantee in the sum of $U.S.350,000.00, or its equivalent in other currencies acceptable to Bank Meili Iran. The said letter shall be referred to as the Third Letter of Guarantee. It shall be in a form satisfactory to NIOC and shall extend for a period of two years and eight months from the effective date of the Agreement, unless sooner released pursuant to the provisions of paragraph 2 of this letter.

(*b*) Simultaneously with the delivery of the Third Letter of Guarantee, the Letter of Guarantee in the amount of $157,500.00 shall be released.

2. The amount of the Third Letter of Guarantee shall be reducible every six months in the following proportions:
(a) Fifty per cent. of all sums spent after the effective date of the Agreement by Sapphire in

accordance with Article 30, paragraph 1, of the Agreement.

(*b*) One hundred per cent. of the cost price to Sapphire of all equipment and machinery brought to or purchased in Iran for implementing the Agreement.

Such reductions shall be made only upon the submission to NIOC of verified statements of expense or purchase documents for equipment and machinery.

3. Reductions as provided in the preceding paragraph 2 which may be made in the amount of the Third Letter of Guarantee, shall not in any way affect or reduce the liability of Sapphire to pay the penalty of $350,000 agreed to in paragraph 2 of Article 43, provided that the conditions for its payment are present.
If you agree that the foregoing correctly represents our agreement with respect to such matters, please signify your assent in the manner provided below and return to us the enclosed duplicate of this letter.

This letter shall be deemed to be dated as of the effective date of our Agreement.

Sincerely yours...'

III.

1. According to the terms of the agreement made with NIOC, Sapphire undertook to prospect two pieces of territory of a total area of 3,000 square kilometres, in the district of Makran in the South East of Iran, between the villages of Bandar Abbas and Jask on the Gulf of Oman. The report of the Radar Exploration Company of Toronto which was made in pursuance of Sapphire's prospecting, describes this region as desolate, almost inaccessible and sparsely populated. It is a country of mountains and deserts. Because of the heat, it is possible to work there only in winter, and even in the winter access is impossible during certain periods because of the rains, which turn the whole coastal plain into a sea of mud. There is therefore only a very short period during which it is possible to gain access to this area.

2. In accordance with the Iranian Petroleum Law of July 31, 1957, the agreement was ratified by the Shah of Iran on July 23, 1958, the effective date, under Article 1, para. 1, of the contract. However, NIOC had first told Sapphire that the effective date was August 4, 1958, according to a telegram of August 9, 1958, confirmed by letter of the same day. They corrected their mistake on August 17 following, explaining that they had been orally advised of the date of August 4, and that they had been officially told by the Prime Minister that the Shah had in fact already ratified the agreement on July 23, 1958.
By a telegram of August 22, 1958, Sapphire asked NIOC for an extension to September 15 of the time-limit for registering their Company at Teheran. NIOC granted this extension by telegram of August 25 following.

3. By an instrument dated August 25, 1958, which was in accordance with the provisions of Article 36

of the agreement, Sapphire assigned its rights and obligations to Sapphire International Petroleums Limited (hereinafter called 'Sapphire International'), whose total share capital was held by Sapphire. This Company, which also had its headquarters at Toronto, had practically the same officers as Sapphire and conducted its business in the name of one or other of the two Companies and often without indicating which.
On September 3, 1958, Sapphire and Sapphire International submitted their application for registration in Teheran. From September 12 to 20, 1958, Mr. Spiegelmann, Vice-President of Sapphire, made a trip to Teheran and met the representatives of NIOC on September 14 in order to register the two Companies. On September 18, 1958, he paid NIOC $3,500 as registration tax for the two Companies, Sapphire and Sapphire International. However, the Certificate of Registration of Sapphire International, which is in the file, is dated October 20, 1958.

4. By Article 5 of the agreement, the parties undertook to register IRCAN in Teheran within 60 days from the date when the agreement became binding, *i.e.* by September 23, 1958. According to Sapphire International this registration could only take place after the two Companies, Sapphire and Sapphire International, had themselves been registered. In October 1958, Mr. Tippit, the legal adviser to Sapphire International and their authorized agent, travelled to Teheran to complete the necessary steps for setting up IRCAN. Mr. Goldhar, president of the Board of Directors of Sapphire International, had in addition written to NIOC to tell them of his arrival on October 16, 1958. On November 10, 1958, Sapphire International sent a cheque for $5,000 to NIOC, as payment for their 50 per cent. share of the share capital of IRCAN.

5. Mr. Goldhar informed NIOC, in his letter of October 16, 1958, that Mr. Spiegelmann was at that time in England, trying to negotiate a contract for the interpretation of NIOC's photo-geological material, for new photographs to be taken, for the dispatch of an expedition to the concession area in order to make a more detailed survey of the region, and possibly to embark upon a gravimetric examination. Mr. Goldhar stated that as soon as a contract was negotiated and drawn up, he would send a copy of it to NIOC.
By a telegram dated November 7, 1958, Mr. Spiegelmann advised NIOC of the arrival in Teheran of a Mr. Hatton, from the firm of Hunting Technical Services Limited, of London, who had come to study the available geological photographs and to give his advice on the steps which should be taken. He also told of the arrival in Teheran of two representatives of Sapphire International, Messrs. Johnson and Duxbury, the first of whom was responsible for the organization of an expedition to the concession areas, while the second had authority to settle all legal questions arising over the registration of IRCAN.

   Mr. Spiegelmann confirmed this telegram by a letter of November 10, 1958, in which he made it clear that Sapphire International had asked the firm of Hunting Services Limited to study the photo-geological documents available at the technical department of NIOC and to draw up a preliminary geological report on the concession. He also confirmed that Sapphire International had appointed Mr. Jack Duxbury as Vice-President with the special responsibility of supervising the operations in Iran, and that they had appointed Mr. Johnson as Geological Adviser to Sapphire International to prepare all technical aspects of the exploration programme. Mr. Duxbury remained in Teheran from November 14, 1958, until June 20, 1959, and from November 8, 1959, to December 20, 1960.

6. Mr. Hatton was sent to Iran by Hunting Technical Services Limited, and started the requisite photo-

geological survey, from November 8 to 22, 1958, in collaboration with Mr. Naficy, NIOC's geological manager. He made a report, dated December 1958, which Sapphire International sent to NIOC on March 10, 1959.
By a letter of November 22, 1958, Mr. Duxbury gave further information about the activities of Sapphire International in Iran. In particular, he pointed out that Hatton, the geologist from Hunting Technical Services Limited, had finished his work. He added that Sapphire International were now going to start a gravimetric survey of the concession area and that the organization of an expedition to the area was now completed, and the necessary material and equipment had been ordered. He also stated that he was waiting for the documents needed for the registration of IRCAN, which were in NIOC's possession, and that he hoped that the said Company could be formed without any further delay. Finally, he said that he had found premises for the Company's offices.

In fact Sapphire took the lease of a building in Teheran by an agreement dated November 23, 1958, for a period of two years. Similarly, in November they contacted the Radar Exploration Corporation, of Toronto, and instructed them to start a radio-gravimetric survey of the concession area which was the object of the agreement. This expedition, which left Teheran on January 5, 1959, was away for several months and finally produced a report on July 29, 1959, which Sapphire International sent to NIOC and whose receipt the latter acknowledged on November 22, 1959.

7. On December 9, 1958, Messrs. Goldhar, Duxbury and Spiegelmann, as well as Mr. Rafii, the technical manager of operations in Iran, met the representatives of NIOC in Iran in order to form IRCAN. The registration of this Company in Teheran did not, however, take place until February 19, 1959: Sapphire International submit that this delay was entirely caused by the fact that NIOC had not chosen the four members of the Board of Directors whom it was its duty to appoint.
By a letter of December 24, 1958, Mr. Rafii, Field Manager of Sapphire International, sent NIOC a summary of Sapphire's recent activities. He mentioned that Mr. Duxbury was actively engaged in organizing the expedition planned for the concession area, and that Mr. Johnson, Geologist and Adviser to Sapphire International, had had several interviews with the exploration department of NIOC during his visit to Teheran from November 11 to 21, 1958, and that after an exchange of views between the parties he had finally told NIOC that he intended to organize a gravimetric survey of the concession. Mr. Rafii also made it clear that Mr. Johnson would be returning to Teheran frequently and that he would be available to discuss his technical programme with NIOC.

Mr. Rafii added finally:

With regard to the reference made to Article 12 of the Agreement in your above quoted letter, we are in agreement that the Second Party will prepare the planning of their operations in consultation with the First Party. But in the same article it is stipulated that the Second Party should act through IRCAN for the above submission. We are still awaiting the incorporation of IRCAN and the nomination of your directors.

'It is understood, that we shall be ready to submit and discuss with you any plans relating to our impending operations at any time, through IRCAN. However, at the present stage we shall be glad to supply you with information regarding our gravimetric expedition to the South before the crew leaves Teheran, and arrange a meeting at your convenience.'

NIOC replied to this letter on December 31, 1958:

We thank you for your letter No. FMR/AS-114 dated December 24, 1958, and wish to make the following comments:

1. Referring to para. II of your letter, we would like to bring to your notice that Mr. Johnson's meetings with the staff of Exploration and Production Department were merely courtesy calls of an informal nature, during which no consultations were held.

2. Your arguments in connection with Articles 10 and 12 of the Agreement do not in any way alter our views as expressed in our letter No. 1802/164 K of December 22, 1958, and we have to reiterate that your exploration programmes will not be acceptable and the related expenditure will not be considered as fulfilment of your obligation as laid down in paragraph 1 of Article 30 unless your plan of operation is drawn up in consultation with NIOC.'

8. By letter of December 27, 1958, Mr. Rafii asked NIOC for the help of the Gendarmerie for the gravimetric expedition. On December 29, 1958, he again wrote to NIOC, to give them the names of the people who were members of the expedition. On the following January 4, he asked NIOC for help in setting up radio-telephone communications with the concession, in the area of Makran.
The said expedition left on January 6, 1959, for Bandar Abbas, and Sapphire International told NIOC of its departure by letter of January 7, 1959.

By letters of February 8 and 14, 1959, Sapphire International informed NIOC of the arrival of three geologists, who were due to contact the prospecting department of NIOC in order to study the aerial photographs and maps of the concession area which was being prospected. Sapphire International had in fact also instructed the French Petroleum Institute to start a geological study of the concession.

9. On February 14, a meeting of the Board of Directors of IRCAN was held in Teheran. It is clear from the Minutes that this was the second meeting of the Board. First, the appointment of Mr. Rafii as a Director of IRCAN was approved. Then, at the request of one of the members of the Board, Mr. Duxbury made a report on the activities already started as well as on those planned. In particular he mentioned that the geological survey of the concession had been entrusted to the French Petroleum Institute, whose geologists had arrived in Teheran and were due to leave for the South on the following February 16—in fact this expedition remained there from February 25 to March 23, 1959. The President of the Board, Mr. Farman Farmaian, asked that the Board should be kept informed of the plan of operations, of the estimated budget and of the expenses incurred. Mr. Duxbury raised the point that in view of the nature of the work undertaken it was difficult to estimate the cost. Another member of the Board, Mr. Farjam, pointed out that only an approximate budget was required.
It should be mentioned in this connection that the concession obtained by Sapphire was a concession on dry land, and it was not therefore possible—as Mr. Spiegelmann and the geological expert testified at the arbitral hearing on October 18 and 19, 1962—to estimate a budget before the results of the gravimetric survey then taking place were known. Until it was known if the territory contained any gravimetric anomalies it was not possible for the technicians to decide what programme to follow or to forecast if a seismic exploration would be needed. Mr. Spiegelmann made it clear, when he gave evidence, that he had raised this point during his conversations with

the manager of NIOC.

10. On February 19, 1959, IRCAN was entered in the Companies' Register in Teheran. The share capital of 750,000 Rials was divided equally between Sapphire International and NIOC, in accordance with Article 4 of the agreement. The object of IRCAN, as defined in Article 4 of its statutes, was to act as agent for NIOC and Sapphire International in carrying out all the operations laid down in the agreement.
On February 25, 1959, Sapphire International sent NIOC its research programme. This programme, which had been started at the beginning of December with the hiring of the firm of Hunting Technical Services Limited, was based on the conclusions of the report of Mr. Hatton, and forecast that the surveying of the territory would be completed before any seismic tests or drilling was embarked upon. In particular it suggested a much more thorough geological study of the concession, a gravimetric survey and finally a complete study by the French Petroleum Institute.

11. On March 5, 1959, Mr. Farman Farmaian, of NIOC, in his capacity as President of the Board of Directors of IRCAN, wrote the following letter to Mr. Rafii, a Director of IRCAN :
'Dear Sir,

At the Second Board Meeting on Saturday, February 14, 1959, a copy [of the minutes] of which was handed to you, the question of Article 23 of the statute and the responsibility of the Board of Directors in conducting the affairs of the Company were brought up and it was suggested that any points in need of clarification should be set down in a note for your perusal and necessary action.

The following are the points which I have come across so far, and it is imperative that steps be taken as soon as possible and brought to the attention of the Board of Directors:

1. According to para. (*b*) of Article 12 of the Agreement IRCAN should prepare the plan of its operations in consultation with NIOC. As regards the operations so far carried out, such as the photo-geological survey (by Hunting Technical Services Limited), gravimetric prospecting (by Radar Exploration Company) and general geological survey (by Institut Français du Pétrole), apparently no consultation has been had with NIOC and their sanction was not obtained. Therefore a full report of the operations so far carried out should be prepared and after sanction of the Board should be sent to NIOC and their approval and concurrence sought. This in my view is absolutely essential. If NIOC'S approval is not obtained they would be within their rights not to accept the expenditures so far made as part of the obligations to be carried out by Sapphire International Petroleums as provided by Article 30 of the Agreement. Such a report, with full maps and data and conclusions reached by experts, should be made available and submitted to the Board.

2. Where and how are the full records of all technical operations kept, as provided by para. 2 of Article 13 of the Agreement? Are they available for perusal of Directors and NIOC?

3. The cost of the operations and the budget of the present organization of IRCAN should be prepared and sanctioned by the Board and an up-to-date statement be sent for NIOC’s records. This to be followed by periodical statements in the future.

4. The employment of foreign personnel as pet the provisions of para. 3 of Article 13 of the

Agreement is to be minimized. It is therefore necessary that all such employment be sanctioned by the Board. A schedule of the personnel so far engaged should be prepared and submitted to the Board for approval. The regulations governing all engagements (foreign or Iranian) and the schedule of salaries should also be submitted.

5. All contracts and transactions so far entered into are to be fully reported to the Board and copies of the relevant contracts are to be put at the disposal of each member for study and comments and eventually brought to the Board for ratification.

Yours truly....'

12. By letter of March 7, 1959, Sapphire International gave NIOC a list of the names of eight people of non-Iranian nationality in its service in Iran. On the following March 10, Sapphire International sent Mr. Farman Farmaian the report of Hunting Technical Services Limited, with a request that it should be submitted to the Board of Directors of IRCAN and discussed at their next meeting.
On March 15, 1959, Sapphire International informed NIOC of the arrival of Mr. Johnson in Teheran on March 16, saying that he would be available during his stay to give NIOC any information on the gravimetric expedition for whose technical organization he was responsible.

By letter of March 19, 1959, Sapphire International sent NIOC a report on the work carried out up till that date, pointing out that they would appreciate any suggestions concerning the report, which set out in detail all the work completed since the beginning of November 1958, and in particular gave the daily programme of the gravimetric expedition from February 1 to 28, 1959.

On March 31, 1959, Mr. Johnson again sent NIOC a report on the activities carried out to that date.

13. Mr. Spiegelmann spent from April 4 to 9, 1959, in Teheran. On April 7 he had an interview with the NIOC representatives among whom was Mr. Naficy, whom he had gone to see to ask why NIOC would not co-operate with Sapphire but insisted on obstructing them. On the one hand, they were always asking him for information, but while the gravimetric survey was still in progress it was only possible to give details which were of no interest until they had been collated and interpreted in the final report. On the other hand, Mr. Naficy continually wrote to him saying that NIOC would refuse to pay their share of the expenses incurred. No understanding had resulted from this interview.
On April 18, 1959, Mr. Goldhar, President of the Board of Directors of Sapphire International, sent a telegram to Mr. Entezam, President of the Board of Directors of NIOC, to say that the attitude and behaviour of the latter amounted to a breach of the agreement, but that he was waiting for the report which Mr. Rafii was due to send on the interviews with NIOC, before taking whatever steps were necessary. On May 1, 1959, he suggested to Mr. Entezam a meeting in Paris or in London for the middle of May. Mr. Entezam replied on May 3 to say that he could not see him in Europe, but he thought it would be convenient, however, for Mr. Goldhar to attend the meeting of the Board of Directors of IRCAN which had been fixed for the following May 12. The Board had not had another meeting for several months, contrary to its statutes. Any discussion which might help could take place at this meeting of the Board.

In his reply, dated May, 8 1959, Mr. Goldhar said that the disagreement between the parties resulted from what had been said and done in breach of their contract. They should therefore be examined directly by the representatives of NIOC and of Sapphire International. He again suggested a meeting in Paris or in London about June 1, and said that none of the Sapphire International members of the Board of Directors of IRCAN would attend the meeting of May 12, 1959, except Mr. Rafii, who had been appointed the Company's sole representative with instructions only to submit the statements of expenses and not to give any undertakings for Sapphire International on the other points on the agenda, while the difficulties between the parties were still unresolved. Mr. Entezam sent him a telegram on the following May 10, saying that he was disappointed with the telegram he had received and that he refused to come to Europe, since any discussion should take place in Teheran.

14. On May 12, 1959, Sapphire International sent NIOC two reports on the expenses incurred from the effective date of the contract until March 31, 1959, which reports were audited and signed by the firm of Abrams, Caplan & Co., of Toronto. The total amount of these expenses was $302,545.25, and Sapphire International asked NIOC to reduce the third letter of guarantee for $175,041.65, in accordance with the agreement and the letter of guarantee signed by the two parties on June 16, 1958.
On the same day the Board of Directors of IRCAN met in Teheran. The Minutes of this meeting read as follows:

Minutes of Third Board Meeting of Iran-Canada Oil Company Held at 14.30 hrs. on Tuesday, May 12, 1959 at IRCAN Office—Teheran.

Present: Mr. Farman Farmaian

S. Torabi

A. H. Farjam

H. Mina (by proxy)

M. Goldhar (by proxy)

E. Mokhateb Rafii.

The agenda having previously been communicated, the Chairman questioned Mr. Rafii regarding item 1 of the agenda, *viz.,* Report of operations of the company to the end of April 1959.

Mr. Rafii stated that according to instructions received from Toronto he had been directed to attend and to submit only the statement of accounts received from Toronto for the consideration of the Board. Mr. Rafii then submitted a single photostat copy of each of the following documents:

1. Statement of Expenditure for the period July 23, 1958, to March 31, 1959.

2. Statement of Expenditures applicable to the reduction of the third letter of guarantee, etc.

The Chairman expressed his regret at the absence of other members of the Board and at the resignation of Mr. J. Tippit whose replacement had not yet been nominated. The Chairman also

regretted that, in spite of the fact that the agenda had been communicated over a month before, no action had been taken by the Managing Director on such agenda.

At this stage the statements submitted by Mr. Rafii were examined by all present and the Chairman asked whether there were any questions.

Mr. Farjam referred to the brief nature of the statements, which contained no details of any of the items whatsoever.' He added that in spite of the very concise form of the expenditure statements, these would normally consist of two parts: (i) the exploratory operations; (ii) other expenditures. In respect of (i), in accordance with Article 12, para. (*b*), the plan of operations should have been prepared in consultation with First Party through the agency of IRCAN. To this date no plans had been submitted for approval of the Board of IRCAN. Therefore, such expenses could not be accepted for consideration without such formal consultation taking place. In respect to (ii) above, Mr. Farjam suggested that Sapphire be asked to submit details of expenditure for scrutiny by the Board of IRCAN.

Mr. Rafii replied that the operations started prior to the incorporation of IRCAN and therefore there was no question of submitting the plan of operations to the Board.

The Chairman reiterated Mr. Farjam's statement that since the date of incorporation of IRCAN, which was before March 31 (the end of the period of statement of expenditure), unfortunately no reports of the past operations nor plans of any future operation had been submitted to this Board.

There being no other comments the Chairman asked Mr. Rafii to communicate the above to the notice of the parties concerned.

Mr. Rafii stated that the plan of operations was formally dispatched to NIOC on February 25, 1959, for consultation. NIOC required additional information which had been referred to Toronto.'

15. At the arbitral hearing of October 18/19, 1962, Mr. Spiegel-mann gave evidence that, although the statement of expenses presented by Sapphire International was sketchy, nearly all the bills were in Teheran and NIOC could look at them. Furthermore, they sent a Chartered Accountant, Mr. Shahsavary, to audit them at the end of 1959-beginning of 1960, but nevertheless rejected all the accounts en bloc, without disputing the bills or the exact figures.
On May 22, 1959, Mr. Leach, Sapphire International's Accountant in Toronto, wrote to Mr. Rafii to ask him what details NIOC still wanted. Mr. Rafii wrote to NIOC to find out, but never received a reply.

Finally, by a letter of June 20, 1959, signed by Farkhan, NIOC acknowledged the receipt of Sapphire International's letter of May 5, 1959, as well as the two statements of expenses, and made the following points:

1. In accordance with the provisions of Article 12 (1) (*b*) of the Agreement between the NIOC and Sapphire Petroleums Ltd. it is the obligation of the Second Party to prepare the plan of its operations in consultation with the First Party. So far, this obligation, in spite of repeated requests, has not been carried out.

2. Article 5 (2) of the Agreement provides that "IRCAN acting as agent for both parties... or as agent only of Second Party, as the case may be, shall perform and carry out all operations required or permitted, and the parties... shall pay all the costs and expenses required by the terms of the Agreement through the agency of IRCAN". The Minutes of the Board Meeting of IRCAN dated May 12, 1959, a copy of which is herewith enclosed, indicates that the said Board is still awaiting further information in respect of the Statements of Expenditure in question. So the statements are not, as yet, in their final form to receive NIOC's consideration.

3. A detailed progress report as provided for by Article 12 (*c*) is not as yet forwarded so as to enable us to form an opinion in respect of the work done.

In view of the above, while recording our objections to the statements of expenditures in question, we regret to inform you that in these circumstances we are unable to allow the respective amount to be reduced from the Third Letter of Guarantee as requested by you.'

16. Sapphire International then made approaches to the Shah and to Mr. Entezam, President of the Board of Directors of NIOC, in order to find a solution to the difference which had arisen between the parties. At the hearing before the arbitrator, Mr. Spiegel-mann pointed out that in view of NIOC's refusal to consider the expenses incurred by Sapphire International, the latter could not continue to invest without hope of being refunded. Furthermore, Mr. Rafii had told him that this question must be resolved immediately; this resulted in Sapphire International's request to the Shah to find out whether there was really only a difference of interpretation between the parties or whether NIOC were looking for a way to make Sapphire International go, in which case the latter would claim the repayment of its expenses.
Sapphire International therefore sent the following letter to the Shah, signed by Goldhar, the President of the Board of Directors of Sapphire International, and dated July 9, 1959:

During our initial meetings with the National Iranian Oil Company, we took the precaution of repeatedly pointing out that we were a small company and that this was our first venture outside of North America. In return, NIOC assured us that, although a small company, we would receive the same sincere co-operation and professional treatment afforded companies of major size also active within Iran. Because of this undertaking, we entered into the contract and one of its most important conditions is that the terms and provisions thereof be carried out in accordance with the principles of mutual good will and good faith, the whole as set out in Article 38, para. 1, of the contract.

Inasmuch as the effective date of the contract was July 23, 1958, it was necessary that we commence operations on or before January 23, 1959. In fact, we started operations in November 1958, although the Iran Canada Oil Company, which was to act as the agent for the Second Party, had not yet been incorporated, due to a delay incurred by NIOC in the nomination of its Directors. The first General Assembly of IRCAN was not called until January 14, 1959, and the First Board Meeting of IRCAN according to the announcement in the official Iranian *Gazette* did not take place until March 9, 1959. Notwithstanding the foregoing, and in order to expedite the performance of operations authorized under Article 11 of the contract, we proceeded with our work and it was well under way by that time.

In support of our position, it can be seen from the following that our efforts to consult with and

inform NIOC of our continuous actions were consistent and in line with our Agreement obligations.

(*a*) By letter of November 10, 1958, we advised the National Iranian Oil Company of the official commencement of our operations in the contract area.

(*b*) By early November 1958, Hunting Technical Services Limited, of London, England, employed by us to carry out a preliminary survey, had commenced their work in the contract area. This work was undertaken after consultation and with the co-operation and assistance of the technical staff of NIOC in Teheran.

(*c*) From November 11, 1958, to November 21, 1958, consultations were held with the Exploration Department of NIOC regarding the carrying out of gravimetric work in the contract area. These consultations were entered into, on our behalf, by the chief geophysicist of Radar Explorations Limited, of Toronto, Canada, another firm of exploration specialists employed by us to enhance the development and progress of our work.

(*d*) By letter of November 22, 1958, we submitted to NIOC the preliminary Plan of Operations, together with a Progress Report covering the period to date.

(*e*) On December 9, 1958, the writer met personally with Mr. A. Entezam, Chairman of the Board of NIOC in Teheran, and in a friendly atmosphere assured him of the early start of our field operations.

(*f*) By letter of December 24, 1958, we suggested a meeting with the Exploration Department of NIOC before our technical crew departed for the contract area. This suggestion was not acknowledged.

(*g*) Under date of February 14, 1958, a further Progress Report was submitted to the Second Board Meeting of IRCAN by one of our Directors.

(*h*) On February 14, 1958, also, a consultation was held with the Exploration Department of NIOC by the geologists from l'Institut Français du Petrole, Paris, a third organization whose specialized services we had employed in the interests of our exploration and development program. This consultation was held immediately prior to our technicians' departure for the field in the contract area.

(*i*) On February 25, 1959, we submitted a further Plan of Operations to the Exploration Department of NIOC, supported by full technical data.

(*j*) Under date of March 10, 1959, we submitted to IRCAN the technical report of Hunting Technical Services Limited.

(*k*) Under dates of March 19, March 31, and April 1, 1959, we submitted further Progress Reports to the Exploration Department of NIOC.

(*l*) With letter of May 12, 1959, we submitted to the Third Board Meeting of IRCAN, for the usual transmission to NIOC, "verified" statements of our expenditures.

Throughout this time, of course, as can be evidenced by the above-mentioned, we have carried out our obligations under the contract in the true spirit thereof, with the utmost good faith and diligence. For example, our exploration program was undertaken almost immediately and well in advance of the minimum time requirement. Also, our gravity program got under way without delay

and, at this time, is almost complete, in spite of adverse climatic conditions. In carrying out our technical programs, we did not hesitate to employ technical staff of the highest calibre available, as is shown above, namely: Hunting Technical Services Limited, of London, Radar Explorations Limited, of Toronto, and l'Institut Français du Pétrole, of Paris. We maintained a resident staff in Teheran, and our duly accredited representative, Mr. V. E. Spiegelmann, who had signed the contract on our behalf, made repeated trips from Canada to Teheran.

We have now reached a position, however, where we feel that we have no alternative but to place before Your Majesty, for your consideration, certain attitudes which we have encountered in our dealings with the National Iranian Oil Company through its exploration department and, in particular, with Mr. F. Nacify and Mr. Farman Farmaian, all of whom have exhibited a marked tendency to overlook requests by us which are vital to the satisfactory progress of our work in Iran.

When our requests were not answered, we sent our Mr. Spiegelmann to Teheran in March 1959, to meet NIOC officials for the purpose of discussing these matters as well as the further carrying out of our program. We were shocked and surprised to learn that instead of being met in a spirit of mutual good will and good faith, his reception by Messrs. Nacify and Farmaian was most embarrassing and discourteous. Following our Mr. Spiegelmann's return, in an effort to carry on in the spirit of the contract and to achieve mutual and amicable understanding, the writer cabled the Chairman of the Board of NIOC on May 1, 1959, suggesting a meeting between them as senior officials of the parties involved, and indicated either London or Paris. When this suggestion was refused, a further cable dated May 8, 1959, was sent emphasizing the desirability of such a meeting, but again this suggestion was turned down. A countersuggestion that the writer travel the entire distance to Teheran for discussions on a more junior level with IRCAN, rather than directly with NIOC did not receive our consent as we earnestly believe that the major responsibility for endeavouring to reach an amicable understanding lies with NIOC.

Further to the above disturbing factors, we are now in receipt of a letter from the Exploration Department of NIOC under date of June 20, 1959, wherein they state their refusal of the reduction of the Third Letter of Guarantee to which we are entitled in accordance with the final paragraph of item 2 of the Letter Agreement of June 16, 1958, by our submission to NIOC of "verified statements of expenditures". As is noted on page 3 of this letter, this "verified" information was submitted on May 12, 1959, to NIOC and to the Chairman of the Board of IRCAN.

Our "verified" statements of expenditures show that, within five months from the start of operations, we have already invested in this venture almost three-quarters of a million dollars. The record will also show that we have, on our part, shown goodwill and good faith in respect to the letter as well as the spirit of the contract, and up to now we have not intimated to anyone that there is a difference of opinion between NIOC and ourselves. Despite this, however, we are now informed that Mr. Farman Farmaian, the Chairman of IRCAN and an official of the NIOC, stated to the press on June 23, 1959, that NIOC was dissatisfied with the progress of the work and that the matter was now being examined by NIOC. This press release can only serve one purpose, namely, to prejudice our company and make it most difficult to carry on operations in Iran.

We believe Your Majesty will find it abundantly clear from the foregoing that we have carried out the terms and provisions of our agreement in accordance with the principles of mutual good will and good faith, and that we have respected the spirit as well as the letter of our contract with NIOC. We feel that NIOC, as a result of the actions referred to herein, including, without limiting the

generality of the foregoing, their refusal to release the funds under Letter Agreement dated June 16, 1958, which we have requested in accordance with its terms, their lack of co-operation, their many evidences of lack of good will and good faith and their refusal to respect the spirit as well as the letter of our agreement, has committed very serious breaches of our contract with them, and makes it almost impossible for us to carry on our operations in Iran.

'In view of this, and in order to obviate the protracted proceedings as set out in our contract, and because it would be most difficult and almost impossible to carry on in the present atmosphere, we hereby respectfully solicit the indulgence of Your Majesty in giving fair and just consideration to this request that we be permitted the refund of our losses and the full release of our Letter of Guarantee.'

17. Sapphire International also sent a letter to Mr. Entezam, whose contents were substantially the same as the above and in which they insisted upon an immediate reduction of the third letter guarantee. Furthermore, Sapphire International concluded as follows :
In view of the foregoing, you will see that we have carried out the terms and provisions of our agreement with you in accordance with the principles of mutual good will and good faith, and that we have respected the spirit as well as the letter of our contract, and we sincerely hoped that the same would be done by NIOC. This, however, does not seem to be possible at the present time in view of a recent press release dated June 23, 1959, wherein Mr. Farman Farmaian, the Chairman of IRCAN and an official of the NIOC, stated that NIOC was dissatisfied with the progress of the work and the matter was now being examined by NIOC. This press release can only serve one purpose, namely to prejudice our company and make it most difficult to carry on operations in Iran. We feel that you will agree the atmosphere presently existing is such that it is practically impossible for the agreement to be carried out with the principles of good will and good faith and with the spirit as well as the letter of the contract being respected. We sincerely believe that the only way that NIOC can show that it intends to carry out its obligations as provided in Article 38, para. 1, is to consent to the immediate reduction of the Third Letter of Guarantee as requested by us...."

On September 5, 1959, the Prime Minister of the Iranian Government replied to Sapphire International that their complaints had been carefully examined in a spirit of fairness and justice and that it had been established that Sapphire International had not respected or performed its obligations, and as a result NIOC were entitled to refuse the reduction of the letter of guarantee. In addition, he referred Sapphire International to NIOC for the settlement of this dispute.

It should be mentioned that during this period, despite the difficulties arising between the parties, Sapphire International were continuously doing work on the concession in addition to the expeditions mentioned, and they continued until June when the heat prevented them carrying on. Mr. Duxbury remained in Iran, most of the time in the prospecting area. Sapphire International also had an office in Teheran, where Mr. Rafii was in charge of the administrative personnel.

18. By a letter of November 22, 1959, signed by Farman Farmaian, President of the Board of Directors of IRCAN, NIOC sent Mr. Spiegelmann an acknowledgement of receipt of the gravimetric report made by the Radar Exploration Cp. and the report of the French Petroleum Institute, which Sapphire International had sent him. NIOC stated that they had submitted these reports to their

exploration department.
On November 24, an unofficial meeting of the Board of Directors of IRCAN was held, to discuss the resumption by the Company of its activities. The Minutes of this meeting state that it could not be official, since certain Directors had resigned and the appointment of their successors required certain formalities. Sapphire International have claimed that their four representatives had all resigned during the dispute between the parties and that they had decided to appoint them once more in an effort at conciliation. Present at this meeting were Messrs. Farman Farmaian, Spiegelmann, Torabi and Farjam.

After discussions, the following decisions were reached:

1. Mr. Spiegelmann agreed that Sapphire International Petroleum Ltd. will appoint forthwith by power of attorney their representative to attend the Extraordinary Meeting of the Company for nomination and approval of the new directors appointed by Sapphire.

2. New Sapphire-appointed directors of IRCAN who are not able to attend every meeting of the board will appoint proxies.

3. Sapphire International Petroleums Ltd. will submit to the Chairman of IRCAN any details of expenditure (relating to statements submitted) which may be available in Teheran for the benefit of those of the directors who wish to see such details. Sapphire will provide where possible additional information requested by the directors of IRCAN.

4. Next official board meeting of IRCAN will be within sixty days at which Mr. Spiegelmann promised to be present and to submit plans of future operations and an estimate of expenditure involved.

5. Sapphire will be sending forthwith technicians to the area of operations for investigation of the terrain and other information that is required prior to resuming operations. Chairman of the board promised all necessary assistance for facilitating the work of such technicians.

6. Report of past operations was submitted to the board for approval and for consideration by NIOC (IRCAN directors will follow up to obtain decision).'

19. By a letter of November 24, 1959, Sapphire International told IRCAN that the detailed accounts required at the meeting mentioned above were available in their offices in Teheran, where any director interested could consult them. On December 2, Mr. Spiegelmann also wrote to Mr. Farman Farmaian, President of the Board of Directors of IRCAN, to say that immediate steps had been taken to carry out the undertakings given at the meeting of November 24, 1959.
The study of the gravimetric report made by the Radar Exploration Cp. had shown some interesting anomalies, of which Sapphire International wished to make a seismic study. They then reckoned to start drilling. But this operation needed considerable material, and its arrival would have to be organized straightaway. This task would have to be completed immediately, and a team of technicians, who arrived in Teheran on January 16, 1960, left for Joste and Bandar Abbas to carry it out in accordance with the decision taken at the meeting of November 24, 1960. Mr. Rafii informed NIOC of this by a letter dated January 27, 1960. But they replied as follows on February 4:

'... This Company has not been aware of the arrival of the said technicians and their trip to the South and in this respect also the NIOC has not been consulted for the program of operations. Therefore the expenditure relating to this recent operation, as those of the previous operations which have been made without consultation with the NIOC, can not be accepted as your obligation laid down in para. 1 of Article 30 of the contract.'

Sapphire International sent a reply on the same day and referred to the arrangement made at the meeting of November 24, 1959, and to their letter of January 27, 1960. NIOC nevertheless adhered to their point of view and in a letter of April 16, 1960, they re-affirmed that they could not accept any work undertaken without prior consultation, nor any expenses incurred for the team of technicians in charge of starting the drilling programme, and once more repeated that they had not been warned of the arrival of the said technicians nor consulted about it.

During the arbitral hearing, Mr. Spiegelmann gave evidence that the letter from NIOC of February 4, 1960, had been a shattering blow for Sapphire International, since it restarted all the previous uncertainties. Mr. Spiegelmann travelled to Teheran and had an interview with the representatives of NIOC, which was wholly unsuccessful. Sapphire International then decided to take up a very firm stand and not to continue its work so long as NIOC persisted in its attitude. The last effective work which they completed was the dispatch of an expedition to study the preliminary organization needed for drilling operations.

It is necessary to point out, however, that Sapphire International did not make any specific mention of their change of attitude to NIOC. No clear and definite decision was taken, since they hoped that in spite of everything they could still find a solution to this dispute. They considered, however, that they could not risk signing a drilling contract without knowing whether NIOC would maintain their attitude. The drilling work should in fact have been entrusted to a specialist organization, and its cost could amount to one to three million dollars. Therefore, Sapphire International were waiting for NIOC's next move—as the latter were perfectly well aware, in their opinion.

20. On July 24, 1960, NIOC sent Sapphire International the following letter:
Sirs,

With reference to Article 16, Section 2, of the Agreement between the National Iranian Oil Company and Sapphire Petroleums Ltd., we regret to notify you that the drilling obligation undertaken by you has not so far been fulfilled.'

On October 8, 1960, Sapphire International once more sent NIOC a statement of expenses for the period from July 23, 1958 (the effective date) to June 30, 1960. They pointed out that the total amount should be deducted from the third letter of guarantee and that it now amounted to $350,651.65 and was thus $651.65 greater than the value of the said letter.

On January 24, 1961, NIOC repudiated the contract by the following letter:

Dear Sirs,

Following our notice No. 8611/164K dated July 24, 1960, and owing to the fact that you have failed to carry out and fulfil your drilling obligation undertaken under Section (2) of Article 16 of the

Agreement between the National Iranian Oil Company and Sapphire Petroleums Ltd., we regret to inform you that we are obliged to terminate the above-mentioned Agreement in accordance with Section 2 of Article 43, with effect from January 24, 1961.

Therefore, the said Agreement is terminated as from January 24, 1961, and in view of the above we have asked Bank Meili Iran to pay the National Iranian Oil Company the sum of $350,000.00 being the amount of the Sapphire Petroleums Ltd.'s Third Letter of Guarantee, which has been given to secure the payment of the penalty mentioned in Section 2 of Article 43 of the Agreement.

At this occasion we wish to emphasize that the steps taken shall in no way jeopardize or prejudice any other rights which may be exercised by NIOC or other remedies we are entitled to under the provisions of the Agreement.'

NIOC succeeded in cashing the amount of the said letter of guarantee for $350,000 on January 24, 1961, despite the formal opposition of Sapphire International.

IV.

Sapphire International have filed as documentary evidence an expert report dated September 1, 1962, which was made by Mr. Willis G. Meyer, a geologist from Dallas (Texas) and a specialist in questions of prospecting and appraisals of oil concessions. Mr. Meyer was also heard as an expert witness during the arbitral hearing on October 18/19, 1962.
The following is based on his report and his evidence:

Mr. Meyer has tried to determine the value of the right to extract oil, which was granted to Sapphire by the agreement of June 16, 1958, in the areas defined by the agreement. For this he has based himself partly on the geological and geophysical reports specially made for Sapphire and, partly, on the geological publications devoted to Iran and the Middle East in general. From this enormous literature, written in several languages, there emerges a complete similarity of view concerning the general geological characteristics of this area regarding the chances of finding oil.

The areas granted to Sapphire under the concession had never been drilled, and should therefore be considered as unworked and unexplored. In addition, the geology of the undersoil should be deduced from the geology of the surface of the concession, from a geophysical survey of the terrain and from the generally known structure of the Middle East. Such a method gives certain results, but definite information can nevertheless only be obtained by drilling.

All oilfields in the world, with very few exceptions, show certain common geological characteristics, which are considered essential for the accumulation of oil and gas reserves. In his report the expert lists these characteristics, which are four in number:

1. a continuation of sedimentary strata;

2. a marine origin for at least part of these sedimentary rocks;

3. the presence of porous gaps in one or several porous or permeable strata, known as ‘reservoir rocks’;

4. the presence of oil traps, either structural traps, stratigraphic traps, or combination traps, which collect and retain on their surface the oil which flows from the reservoir rock and crosses the porous strata.

The expert then analyses the geology of the concession areas and states that there is a very high probability that the above characteristics exist in these areas. He also stresses other features common to the Sapphire concessions and an oil-bearing area in the United States, namely the area of the Gulf of Mexico, in which several thousand oil fields have been discovered, of which the largest has already produced 42,000,000 cubic metres of oil.

Mr. Meyer also points out that there are cases where drilling has not shown any important quantity of oil despite the presence of these four geological characteristics. It is not therefore possible to state as a fact that the areas granted to Sapphire under the concessions contain any reserves of commercially workable oil. Nevertheless, in view of all these elements the expert considers that there is a very strong likelihood that there is oil and he mentions that other geologists and other oil companies are of the same opinion. Thus he has found several documents, particularly ones published by NIOC, which indicate that the conditions in this region are favourable. Mr. Alfred M. Stahmer has published an article in *World Petroleums,* vol. 23, No. 6, p. 24, in which he describes ‘Eight Promising Areas Chosen by the Iran Oil Corporation for Prospecting’. Moreover, one of these includes the areas granted to Sapphire under the concessions.

Regarding the determination of the value of the concessions in question and the rights granted to Sapphire, the expert observes that the method applicable to concessions where oil has been discovered cannot be used here, since the area concerned must in fact be regarded as unworked and unexplored. There is nevertheless a valid and widely accepted basis for determining the value of rights to extract oil or gas in concessions which have not been worked and where the existence of petrol has not been established, when the concession is in an area where such rights are frequently the object of sale transactions. The procedure in those cases is the following:

1. A search into the records of all sales of property in the area which are within a reasonable vicinity of the concession in question.

2. A comparison of these properties, taking into account the geological conditions, which may vary from one area to another, as well as any market conditions which may have altered meanwhile.

In the present case, the concessions which must be appraised are not situated in an area where rights of extraction are often the object of sale transactions. The usual method described above cannot therefore be applied.

In those circumstances, it is best to compare the geological conditions of the concessions in question with those of areas which produce important quantities of oil, then to proceed by way of arbitration or negotiation keeping in view the relevant geological features which are at hand; the expert cannot give more than a general idea by showing the sort of amounts which could reasonably be expected in future net income, if the concession were exploited.

Considering the geological structure of Sapphire's concession and in view of the production capacity of other areas of the world, the maximum reserve of oil which can be taken into consideration in appraising the value of the concession is about 25,000,000 cubic metres of oil. According to the terms of

the agreement made with NIOC, Sapphire's share would be about 12,500,000 cubic metres. If the price for a cubic metre is considered to be $9, the gross revenue of Sapphire is $112,000,000. It is best to deduct from this amount $20,000,000 for the share of the expenses for prospecting, exploitation and production which Sapphire must pay. The income which Sapphire would receive would then be $92,000,000, from which it would be necessary to deduct the taxes due to the Iranian Government, totalling 50 per cent. of this amount, which leaves them a net income of $ *46,000,000.*

At the other extreme, a maximum loss of $ *8, 000,000* can reasonably be estimated in the event that no oil is found. This in fact represents the sum which had to be paid by Sapphire during the first four years, under the terms of the agreement.

The expert adds that profits greater than $46,000,000 or losses more than $8,000,000 are possible, but in view of the information at hand there is no reason for exceeding these limits in appraising the rights of Sapphire."

Procedure

1. By a letter of September 28, 1960, Sapphire Petroleums Ltd. notified NIOC that, in view of the dispute between the parties, they considered it futile to resort to the optional conciliation procedure laid down in Article 39 of the agreement. They requested an immediate arbitration, and appointed as their arbitrator the Denver lawyer, Mr. Tippit, and invited NIOC to appoint their arbitrator in accordance with Article 41 of the agreement.
   By a letter of November 21, 1960, NIOC refused to do this, on the pretext, *inter alia,* that Sapphire Petroleums Ltd. had assigned their rights to Sapphire International Petroleums Ltd. and only this latter company, and not Sapphire Petroleums Ltd., was qualified to take advantage of the contract and in particular of the arbitral clause.

   By letter of January 10, 1961, Sapphire International requested the President of the Swiss Federal Court to apply Article 41 of the agreement, and to appoint a sole arbitrator to settle the dispute between them and NIOC.

2. By an order dated January 12, 1961, the President of the Swiss Federal Court made the following decision:
   'In accordance with Article 41, letter 2, of the agreement of the parties of June 16, 1958, Federal Judge Pierre Cavin, of Lausanne, is hereby chosen as sole arbitrator.' (Translation.)

   This order, of which a copy is attached to the original of the present arbitral award, states in its conclusions that the conditions required by Article 41 of the agreement for the appointment of a sole arbitrator were satisfied.

   The chosen arbitrator accepted his appointment in a letter of January 12, 1961.

3. By a decision given on March 17, 1961, the President of the Swiss Federal Court rejected a request by NIOC that the order made on January 12, 1961, be revoked and Sapphire International's request

for the appointment of a sole arbitrator be rejected. This decision, which is also attached to the original of the present arbitral award, rejects the arguments invoked by the petitioner and in particular the argument that it is Sapphire and not Sapphire International who sent NIOC the letter of September 28, 1960.

4. On January 17, 1961, Sapphire International requested that the arbitrator should make an interim order forbidding NIOC to exercise the rights conferred on them by the letter of credit signed by the Irving Trust Company. By an order dated January 19, 1961, the arbitrator rejected this request.

5. The parties failed to inform the arbitrator, within the timelimit given to them, of any agreement fixing the place of the arbitration and the arbitral procedure. The arbitrator therefore applied Article 41 (7) of the contract, and by order of June 13, 1961:
—fixed the place of the arbitration in Lausanne, Canton de Vaud, Switzerland; and

—decided upon the rules to be applied to the proceedings before the arbitrator. A copy of this order is attached to the original of the arbitral award.

6. An order made by the arbitrator on June 13, 1961, was sent to the parties. By a letter of August 2, 1961, NIOC sent the arbitrator an acknowledgement of its receipt, but said that they disputed the jurisdiction of the arbitrator, whose appointment they regarded as tainted with nullity.

7. On October 11, 1961, in accordance with the time-limit given by the arbitrator, Sapphire International lodged the plaintiff's memorial, entitled 'Memorial Number 3', together with 78 documents and a request for the hearing of witnesses; in the memorial the claims made against NIOC were as follows:
1. To decide that the encashment by NIOC of the contractual penalty of $350,000 was unauthorized in law and to sentence them to restore this sum to Sapphire with interest at 5 per cent. from January 24, 1961.

2. To sentence NIOC to indemnify Sapphire for all other damage suffered by them and to refund to them with interest at 5 per cent. from the date of the institution of the present proceedings, namely September 28, 1960—

(*a*) The expenses incurred in making the agreement of June 16, 1958, amounting to $165,175

(*b*) The expenses of registering the Canadian Companies in the Companies Register at Teheran, amounting to $3,500

(*c*) The sum of $5,000, which was subscribed by Sapphire to the capital of the Iran Canada Oil Company

(*d*) The cost of all the work done by Sapphire in performance of the agreement of June 16, 1958, from the start of the agreement, on July 23, 1958, until January 24, 1961, the day when the letter of guarantee was cashed by NIOC, amounting to $1,018,932 ($1,027,432 less $3,500 and $5,000 mentioned above under (*b*) and (*c*))

(*e*) The amount of the loss of profit estimated at $5,000,000.

‘3. To sentence NIOC to pay the whole amount of the fees and costs of the arbitration, including the lawyers’ fees, the expert witnesses’ fees and every other expense concerning the settlement of the dispute. (Translation.)’

8. A copy of this memorial was sent to NIOC, giving them a time-limit expiring on January 31, 1962, in which to lodge a defence memorial.
By letter of November 1, 1961, NIOC acknowledged the receipt of the memorial, but stated that they refused to accept the document, which they did not, however, return to the arbitrator. They maintained this attitude in a letter of December 5, 1961, in which they once more claimed that the appointment of the arbitrator was a nullity. They produced no defence memorial within the timelimit fixed.

9. At the request of the plaintiff, a time-limit was fixed for both parties to lodge an additional memorial. On receiving notice of this, the defendant informed the arbitrator, in a letter of February 24, 1962, that they considered his appointment as null.
The plaintiff lodged an additional memorial within the timelimit given, entitled ‘Memorial Number 4’, of which a copy was sent by the arbitrator to the defendant.

10. By an order dated July 16, 1962, the arbitrator summoned the parties to appear before him in Lausanne at the Federal Court Building on October 17, 1962, at 9 o'clock. By an order dated August 2, 1962, the arbitrator informed the parties that this hearing had been postponed until October 18 at the same time and place.
By letters of August 13 and 28, 1962, NIOC once more alleged the nullity of the arbitrator’s appointment by the President of the Federal Court, and again refused to consider the arbitrator’s communications, which they returned to him.

11. The arbitral hearing took place on Thursday, October 18, 1962, at 9 o’clock in the Federal Court Building in Lausanne. The hearing was resumed on October 19.
The plaintiff appeared through its duly authorized legal representatives, Maître Habicht and Maître Jean-Flavien Lalive from Geneva.

The defendants did not appear either personally or through their representatives, although they had been duly served and had received the arbitrator’s summons, as was shown by their letters to the arbitrator of August 13 and 28, 1962.

The arbitrator proceeded to hear the case, at which the following persons gave evidence, each having first taken an oath to speak the truth:

1. Mr. Victor Spiegelmann, under-Director in charge of Sapphire International’s business in Iran,

2. Mr. John Tippit, Attorney from Denver (Colorado),

3. Mr. Cecil Smith, Attorney from Dallas (Texas),

4. Mr. Walter Brudno, Attorney from Dallas (Texas),

5. Mr. Willis Meyer, Geologist from Dallas (Texas).

The plaintiff put in evidence an expert report by the geologist Meyer and a legal opinion by the Attorneys Brudno and Smith.

Maître Lalive and Maître Habicht then gave oral argument for the plaintiff. The Minutes of this hearing are attached to the original of the arbitral award.

12. By decisions given on July 26, 1961, February 15, 1962, and September 3, 1962, the President of the Civil Court of the district of Lausanne, the place where the arbitration took place, extended, by 200 days each time, the time-limit for lodging the arbitral award in the Court office, a limit which was laid down by Article 508 of the Code of Civil Procedure for the Canton of Vaud. The time-limit thus runs out on March 23, 1963."

The Question at Issue

In accordance with Article 513 of the Code of Civil Procedure of Vaud, the arbitrator finds that the question at issue is determined by the heads of claim set out by the plaintiff in their plaintiff's memorial, which was lodged on June 11, 1961. The allegation which is thus made consists of a claim for damages based on the failure by NIOC to perform the obligations which they had contracted in the agreement of June 16, 1958, a claim which is denied by NIOC.
These claims are put forward within the framework of the arbitration clause contained in Article 39 of the above agreement, under which in default of conciliation the only means of settling any difference concerning the interpretation or performance of the contract is arbitration, under the procedure laid down in Article 41 of the agreement. This article further provides in para. 9 that if the arbitral decision finds that the claim is well founded, the plaintiff can then be awarded appropriate reparation in the form of damages.

The question at issue then is the following:

1. Should NIOC be sentenced to refund to Sapphire the amount of the penalty clause of $350,000 which they had cashed with interest at 5 per cent. from January 24, 1961, by declaring that the said encashment was unauthorized in law?

2. Should NIOC be sentenced to indemnify Sapphire for all other damage suffered by them and to refund to them, with interest at 5 per cent. from the date of the institution of the present proceedings, namely from September 28, 1960:

(*a*) the expenses incurred in making the agreement of June 16, 1958, amounting to $165,175;

(*b*) the expenses of registering the Canadian companies in the Companies Register at Teheran, amounting to $3,500;

(*c*) the sum of $5,000 which was subscribed by Sapphire to the capital of the Iran Canada Oil Company;

(*d*) the cost of all the work done by Sapphire in performance of the agreement of June 16, 1958, from the start of the agreement on July 23, 1958, until January 24, 1961, the date when the letter of guarantee was cashed by NIOC, amounting to $1,018,932 ($1,027,432 less $3,500 and $5,000 mentioned above under (*b*) and (*c*));

(*e*) the amount of the loss of profit estimated at $5,000,000? "3. Should NIOC be sentenced to pay the costs of the arbitration?

In Law

"A. Jurisdiction of the Arbitrator

1. The jurisdiction of the undersigned arbitrator is based on Articles 39 and 41 of the agreement made on June 16, 1958, between NIOC and Sapphire, an agreement whose rights and obligations had been taken over by Sapphire International from Sapphire.
According to these provisions, the parties have agreed, in default of the optional conciliation under Article 39, para. 1, to resort to arbitration as the sole means of settling any difference which might arise between them concerning the interpretation and performance of the said agreement. According to Article 49, para. 9, the arbitrator has power to award damages.

   The validity and extent of this arbitration clause, as well as the fact that it is an arbitration clause, are neither open to question nor in dispute. Furthermore, it is not open to question nor in dispute that the present dispute concerns the interpretation and performance of the agreement and that it is a proper occasion for arbitration in accordance with Article 39 of the agreement. Finally, Sapphire International are qualified to take advantage of the arbitral clause, since they have succeeded to all the rights and obligations of Sapphire, with the express agreement of NIOC and in accordance with Article 36 of the agreement.

   All this was impliedly recognized by NIOC in its request of February 5, 1961, to the President of the Federal Court, in which it made known that it had already appointed its arbitrator on January 10, 1961. In addition, in a letter to Sapphire International dated March 27, 1961, NIOC expressly declared that it had agreed to arbitration, and chose its arbitrator. By alleging to the President of the Federal Court that Sapphire International were alone qualified to take advantage of the arbitral clause and by informing the latter company that they had chosen their arbitrator, NIOC have expressly recognized that the transfer of the agreement to Sapphire International included also the transfer of the arbitral clause.

2. What NIOC disputed, on the other hand, was the correctness of the decision by which the President of the Federal Court had appointed the undersigned as sole arbitrator. On the ground that the notice of September 28, 1960, came from Sapphire and not from Sapphire International, they maintained that the time-limit of two months laid down by Article 41, para. 2, of the agreement could not be

said to start running as a result of this notice, since Sapphire International alone were qualified to send such a notice and to take advantage of the arbitral clause.
But the decision given on January 12, 1961, by the President of the Federal Court, in his capacity as such, is a judicial decision. According to the case-law, such a decision is a final judgment (Cantonal Court of Vaud, in *Journal des Tribunaux,* Lausanne, 1928, III p. 48). The jurisdiction of this Judge results from an extension of his forum agreed upon by the parties and accepted by the Swiss Federal jurisdiction (*cf.* decision of the President of the Federal Court published in *Recueil Officiel of* Federal Court Decisions, vol. 88, 1962, I, p. 104). By entrusting a judicial authority with the responsibility of choosing a sole arbitrator under conditions determined by their agreement, the parties necessarily clothed this authority with the power to make a preliminary examination and decision as to whether the conditions laid down for this appointment had been satisfied. It is an established rule in practice that the judge with jurisdiction to appoint arbitrators is also competent to examine first of all whether the conditions for an appointment have been satisfied (Cantonal Court of Vaud, *Journal des Tribunaux,* 1926, III, p. 63; above-cited decision of the President of the Federal Court; Stein-Jonas *Kommentar zur Zivilprozessordnung,* 17th ed. (Tübingen 1956), vol. II, No. 3, *ad* para. 1029). The decision thus reached is a judicial decision, or a judgment, and has the full force of *res judicata,* unless the law allows an appeal to a superior jurisdiction which is not the case here (Stein-Jonas, *op. cit.*; Von Staff, *Das Schiedsgerichts-erfahren nach dem heutigen deutschen Recht* (Berlin 1926), p. 138; Baumbach-Schwaab, *Schiedsgerichtsbarkeit,* 2nd ed. (Munich and Berlin, 1960), p. 110).

While it is generally accepted in doctrine and case-law that the arbitrator can decide his own jurisdiction in matters concerning the validity of the arbitration deed and the extent of his judicial knowledge, provided these questions have not been previously settled in the law courts, there is no authority for saying that he can revise a judicial decision which has the force of *res judicata,* concerning the appointment of an arbitrator.

Therefore the undersigned arbitrator has no power to review the order given on January 12, 1961, by the President of the Federal Court. This order concerning the appointment of a sole arbitrator has the force of *res judicata.*

This is in accordance with the wishes of the parties, who charged a judicial authority with the appointment, under certain conditions, of a sole arbitrator. Since this authority has given a decision which has the force of *res judicata,* the defendant is bound to fail in his claim to re-open this decision and by contesting its validity to maintain that the appointment of the arbitrator is null.

The President of the Federal Court was acting in conformity with these rules, and in accordance with the established practice, when in his decisions of January 12, and March 17, 1961, he made a preliminary investigation to see whether the conditions laid down by Article 41 of the contract for the appointment of a sole arbitrator had been satisfied.

In addition, it was not to the arbitrator that NIOC made their application of February 5, claiming exemption from his jurisdiction by a declinatory plea under the arbitral procedure; it was to the President of the Federal Court that they applied, claiming a reconsideration by a plea of 'revision' of the Order of January 12, in order to annul it, and setting out the grounds on which they considered that the conditions required for the appointment of a sole arbitrator had not been fulfilled.

3. Thus, the undersigned arbitrator has received his authority as a result of a binding judicial decision,

whose correctness it is not for him to question, and since he is bound by the acceptance of his appointment which he gave, he is also bound to decide the merits of the plaintiff's claim.

B. The Law Applicable

(a) Procedural Law.—

1. Article 39 of the agreement provides that, if the optional conciliation procedure is not used, the only way of settling any difference concerning the interpretation or performance of the agreement is arbitration of the kind set out in Article 41 of the agreement.
The parties have thus unequivocally shown their mutual desire to use arbitration in order to obtain a decision which will settle once and for all their possible differences concerning the interpretation and performance of the agreement, including claims for damages (Article 41, para. 9 *in fine).* They have shown an intention to obtain a judgment and not simply an advisory opinion which would bind them only by way of agreement.

   The fact that the arbitration thus set up has a jurisdictional character is further evidenced by the existence of a preliminary and optional conciliation procedure. It is confirmed by Article 41, which sets out in very precise terms the way in which a truly judicial procedure should be carried out. The clause carefully determines the procedure for appointing an arbitral board or, in default thereof, a sole arbitrator. It provides for the organisation by the parties, or by the arbitrator if they default, of an arbitral *procedure,* and binds the parties to collaborate and to facilitate the taking of evidence; it also provides that the default of one of the parties 'shall not be permitted to prevent or hinder the arbitration procedure in any or all of its stages'; it settles the question of fees and expenses, and even provides for a procedure to interpret the award. Finally, the clause provides for the determination of a seat for the arbitration, which is a necessary element in the activity of any judicial authority.

   The judicial authority thus conferred upon the arbitrator necessarily implies that the arbitration should be governed by a law of procedure, and that it should be subject to the supervision of a State authority, such as the judicial sovereignty of a State *(cf.* Sauser-Hall, 'International Arbitration in Private Law', in *Annuaire de l'Institut de Droit International* (Geneva), 1952, vol. I, pp. 541, 572 *et seq.).*

   Authority is to be found, in doctrine and case law, which gives the parties the right to make a free choice of the law of procedure to be applied to the arbitration, as for example, the State to whose judicial sovereignty the arbitration is submitted, or in other words 'the location' of the arbitration *(cf.* Klein, 'Autonomy of the Will and Arbitration', *Revue critique de Droit International Prive,* 1958, pp. 256 *et seq.:* Sauser-Hall, *loc. cit.* p. 530, esp. p. 593, Resolution of the Institute of International Law, Article 1).

   In the present case the parties agreed to leave the arbitrator free to determine the seat of the arbitration, if they failed to agree it themselves. Thus by agreeing beforehand to whatever seat was fixed by the arbitrator, who would make his choice under express delegation from the parties, they

committed themselves to accept the law of procedure which results from his choice. In this case it is the law of Vaud, since the seat of the arbitration has been fixed at Lausanne.

Even if this interpretation of the parties' intention is wrong, the rule is that, in default of agreement by the parties, the arbitration is submitted to the judicial sovereignty of the seat of the arbitration at the place where the case is heard (Sauser-Hall *loc. cit.* pp. 541, 565 *et seq.;* above-mentioned Resolution, Articles 8, 9, 10, 12, pp. 596 to 598; the Protocol concerning Arbitral Clauses of September 24, 1923, Article 2; Federal Court, *Recueil Officiel,* 57, I, 295). Thus, in the present case, Lausanne is at the same time the headquarters of the judicial authority which has jurisdiction to appoint the arbitrator, the seat of the arbitration, the domicile of the sole arbitrator, and the place where all the arbitration procedure up to and including judgment has taken place.

The present arbitration, then, is governed by the law of procedure of Vaud and is subject to the judicial sovereignty of Vaud.

Therefore, as far as procedure is concerned, it is subject to the binding rules of the Code of Civil Procedure of Vaud of November 20, 1911, and in particular to the 8th Title of this Code.

2. The case has been heard in accordance with the rules prescribed by the Order of June 13, 1961, in which the arbitrator laid down the arbitral procedure, as he was entitled to do under Article 41, para. 7, of the agreement if the parties failed to agree upon the procedure to follow, and in accordance with Article 511 of the Code of Civil Procedure of Vaud.
Article 1 of the above Order laid down that the Federal Law of Civil Procedure of December 4, 1947, was applicable where there was no contrary provision in the Order.

The defendant NIOC has refused to co-operate in the procedure and has deliberately made default. Article 41, para. 8, of the agreement lays down that the absence or default of one party should not be an obstacle to the arbitral proceedings in any of their stages. Accordingly, despite the default of the defendant, the arbitrator has proceeded to hear the case and to give judgment on the merits.

According to Article 15 of the arbitrator's Order, which is in accordance with Article 12 of the Federal Law of Civil Procedure, the default of one party and the omission of a procedural step simply means that the case proceeds without the step which had been omitted. By virtue of Article 3 of the Federal Law of Civil Procedure, the judge cannot base his judgment on facts other than those which have been alleged during the case. As a result, the present award is based upon the facts pleaded by the plaintiff, who alone has taken part in the procedure. But in applying these rules, the arbitrator has accepted only those facts which have been satisfactorily proved to him during the procedure.

(*b*) *Substantive Law.—*

1. Since the arbitration has its seat in Switzerland, Swiss Private International Law might be applicable, as the *lex fori,* for determining the substantive law applicable to the interpretation and performance of the agreement. However, in the view of some eminent specialists in Private

International Law, since the arbitrator has been invested with his powers as a result of the common intention of the parties he is not bound by the rules of conflict in force at the forum of the arbitration. Contrary to a State judge, who is bound to conform to the conflict law rules of the State in whose name he metes out justice, the arbitrator is not bound by such rules. He must look for the common intention of the parties, and use the connecting factors generally used in doctrine and in case law and must disregard national peculiarities (Batiffol, *Revue de l'Arbitrage,* 1957, P. 111; Carabiber, *L'Arbitrage international de Droit privé* (Paris 1960), pp. 50, 92). This consideration carries particular weight in the present case, since, in view of the fact that they have not directly agreed upon the seat of the arbitration and instead have only determined which authority should appoint the umpire or the sole arbitrator, the parties cannot be presumed to have agreed upon the choice of a conflict rule by their common choice of the form of the arbitration.

It is not, however, necessary to decide this question, since the application of the law of the forum leads to the same result. According to Swiss case law and doctrine it is in fact the intention of the parties, express or implied, which primarily determines the law applicable in questions of contract (*cf.* Schönenberger Jäggi, *Kommentar,* Nos. 198-203, 243-246). It is only when there is no such manifestation of intention that the judge determines the law applicable according to the objective tests laid down by case law.

For these reasons, since the agreement contains no express choice of law, the arbitrator will determine which system of law should best be applied according to the evidence of the parties' intention and in particular the evidence to be found in the contract.

2. Since the contract was concluded in Teheran and was due to be performed for the most part in Iran, the *lex loci contractus* and the *lex loci executionis* both point to the application of Iranian law. However, though these two connecting factors, and particularly the second, are important, they are not necessarily decisive.

It must be remembered that the present agreement is fundamentally different from the usual commercial contract envisaged by the traditional rules of Private International Law. In the first place, it binds on the one hand a national company or corporation whose dominant status is that of a public corporation, and on the other hand a foreign commercial company, which has a foreign civil status. Again, the objects of the agreement are not the usual commercial operations. On the contrary, its aim is to grant Sapphire the long term exploitation of natural resources on Iranian territory, and this exploitation involves an obligation to make important investments and to establish permanent installations. It creates rights which are not merely 'contractual' but are concessions giving Sapphire, for the time being, possession and, to a certain extent, control over the territory. These concessions give the contract a particular character, which lies partly in public law and partly in private law. Finally, the contract involves special tax arrangements for the foreign company, which are evidence of its public character. This public character is further evidenced by the need for ratification by the Iranian Government.

Under the present agreement, the foreign company was bringing financial and technical assistance to Iran, which involved it in investments, responsibilities, and considerable risks. It therefore seems natural that they should be protected against any legislative changes which might alter the character of the contract, and that they should be assured of some legal security. This could not be guaranteed to them by the outright application of Iranian law, which it is within the power of the

Iranian State to change.

The result of these considerations is to reduce the likelihood of Iranian Civil Law being applied to the interpretation and performance of the agreements.

Such considerations are reinforced by the following factors which are contained in the contract, and which provide valuable pointers to the law applicable:

(i) The agreement contains an arbitration clause entrusting the task of arbitrating any possible dispute to an arbitrator chosen by the President of the Supreme Court of Switzerland, Denmark, Sweden, or Brazil.

Now in doctrine and in case law, an arbitral clause is generally regarded as 'one of the most frequent and most significant indications of what the parties considered to be the nature of their operation, by which the contract is connected to the legal system of the country thus chosen' (Batiffol, *Traité élémentaire de droit international privé,* 3rd ed. (Paris, 1959), No. 595, p. 648, as well as the different French and foreign cases cited in the note; Dicey, *Conflict of Laws,* 7th ed. (London, 1958), p. 731; Lord McNair, 'The General Principles of Law Recognized by Civilized Nations', in *B.Y.,* 33 (1957). P. 1, at p. 6).

Undoubtedly the localizing value of this connecting factor should not be overestimated (Cheshire, *Private International Law,* 6th ed. (Oxford, 1961), p. 226), particularly, as in this case, when the country where the arbitration takes place has no connection with the other elements of the agreement (Batiffol, *op. cit.* p. 649).

It is not feasible in the present case to imply an intention by the parties to submit to the substantive law of the forum of the arbitration, a forum which they did not know of at the time they concluded the agreement. However, if no positive implication can be made from the arbitral clause, it is possible to find there a negative intention, namely to reject the exclusive application of Iranian law. If in fact the parties had intended to submit their agreement to Iranian law and if the only significance of the arbitral clause was to deprive the Iranian authorities of jurisdiction in case of any dispute, the authors of the agreement—whom one must suppose were competent lawyers—would almost certainly not have failed to negative, by an express provision, any significance which such an arbitral clause normally carried as a connecting factor according to general doctrine.

(ii) Article 38 of the agreement, which confirms an intention already expressed in the preamble, provides that the parties undertake to carry out its provisions according to the principles of good faith and good will, and to respect the spirit as well as the letter of the agreement.

It has been held in several arbitral awards concerning similar legal relations to those binding the parties in the present case *(Lena Goldfields Arbitration: Cornell Law Quarterly,* 1950, p. 42; *Petroleum Developments Limited* v. *Ruler of Abu Dhabi: I.C.L.Q.,* 1952, p. 42; *Ruler of Qatar* v. *International Marine Oil Company Limited*), it such a clause is scarcely compatible with the strict application the internal law of a particular country. It much more often calls the application of general principles of law, based upon reason upon the common practice of civilized countries, as was expressly recognized by the above-cited authorities. These authorities are proved of by Lord McNair, former President of the International Court of Justice *(loc. cit.).*

In fact, in ordinary law, the judge who decides a dispute concerning the interpretation or

performance of a contract normally differs to the complementary rules contained in the positive law applicable to the contract. On the other hand, a reference to rules of and faith, together with the absence of any reference to a national system of law, leads the judge to determine, according to the spirit the agreement, what meaning he can reasonably give to a provision the agreement which is in dispute. It is therefore perfectly legitimate to find in such a clause evidence of the intention of the parties to apply the strict rules of a particular system but, rather, to upon the rules of law, based upon reason, which are common to civilized nations. These rules are enshrined in Article 38 of the constitute of the International Court of Justice as a source of law, and numerous decisions of international tribunals have made use of them and clarified them. Their application is particularly justified in the consent contract, which was concluded between a State organ and a foreign company, and depends upon public law in certain of its aspects. This contract has therefore a quasi-international character which releases it from the sovereignty of a particular legal system, and it differs fundamentally from an ordinary commercial contract. It should be mentioned that the question of the law applicable did not altogether escape the draughtsman of the agreement—see paragraph (iv) below; and the absence of any reference to a national item of law can only confirm this conclusion.

Furthermore, according to the precedents cited above and to the conclusions reached by McNair, to which he refers, the arbitrator is important evidence in Article 38, para. 1, of the agreement of the parties' intention to exclude the application of Iranian law and *a tiori* any other national law, and to submit, so far as concerns the interpretation and performance of their agreement, to the general principles of law based upon the practice common to civilized countries.

(iii) This conclusion is supported in the present case by Article of the agreement, which concerns *force majeure.* Paragraph 2 of article provides that '*force majeure'* as used in the agreement could be defined according to the principles of international law. is characteristic that, in the only clause of their agreement which defines a contractual notion by a reference to a particular judicial system, the parties should have referred not to Iranian law—which, however, recognizes this notion (Article 229 of the Civil Code, according to Aghababian, *Legislation iranienne actuelle,* Paris, 1951) —nor to the law of any other nation, but that they appeal to the general principles of international law, which they expressly state to be applicable.

If this provision is read with Article 38, which it immediately precedes, it can reasonably be regarded as having a wider application than simply referring to *force majeure.* It is possible to find in it further evidence of the intention of the parties to submit the interpretation and performance of their agreement to the general principles of law. This is the conclusion which is drawn by Ramazani in a strongly argued article (in *I.C.L.Q.,* 1962, p. 503) regarding the agreement made between NIOC and the Pan-American Petroleum Corporation in 1958, an agreement which had a similar object and which contains clauses identical with those in the present agreement.

(iv) Finally, the present contract is the last of several agreements made by NIOC which have the same object. First of all there is the agreement of October 1954, made with the International Oil Consortium. Article 41 of this agreement is identical with Article 38 of the present contract. In its Article 44 it contains clauses relating to arbitration which are in substance identical with those in the Sapphire contract. The difference between this contract and the other agreement is that the agreement made with the Consortium expressly lays down, in its Article 46, the law applicable as follows:

'In view of the diverse nationalities of the parties to this Agreement, it shall be governed by and interpreted and applied in accordance with the principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals.'

A similar clause appears in the agreement made betwen NIOC and the company Agip Mineraria in July 1957.

Undoubtedly, as Carabiber *(op. cit.* p. 49) points out, the wording of this provision was discussed at length at the time of the conclusion of the contract in 1954. The difficulties which the Iranian Treasury were undergoing and the necessity to put an end to a situation which was likely to become rapidly worse may have influenced the Iranian Government in adopting this clause. But it does not alter the fact that the parties to this agreement recognized that this was a legitimate means of guaranteeing the foreign companies against the unilateral decisions of Iran, which would automatically be applied if Iranian law had been declared applicable.

Furthermore the particular circumstances existing at the time of the 1954 agreement were no longer applicable for the agreement made with Agip in 1957, and yet this agreement, as has been seen, retained this clause.

It is true that there is no such provision in the present agreement, nor in the one made in 1958 with the Pan-American Petroleum Corporation. But the essential character of all these contracts is the same; they all have the same object and the same character, as is evidenced by the complete similarity of several of their clauses, particularly those dealing with performance and arbitration. By virtue of the principle of good faith, NIOC cannot claim that the absence of an express provision regarding the law applicable should be interpreted as a denial of a principle contained in previous agreements which had the same object. The requirements of a guarantee by the foreign company are the same; therefore, according to reason and good faith, the same solution should be adopted as NIOC formally agreed to with more powerful partners. If then, in the present contract, NIOC had intended to cast aside a principle which is recognized in the previous agreements and to refuse Sapphire a guarantee which they had previously conceded as legitimate, it must be presumed that the draughtsman of the contract would have expressly shown this intention.

3. It is quite clear from the above that the parties intended to exclude the application of Iranian law. But they have not chosen another positive legal system, and this omission is on all the evidence deliberate. All the connecting factors cited above point to the fact that the parties therefore intended to submit the interpretation and performance of their contract to the principles of law generally recognized by civilized nations, to which Article 37 of the agreement refers, this being the only clause which contains an express reference to an applicable law.
The arbitrator will therefore apply these principles, by following, when necessary, the decisions taken by international tribunals. He points out that, this being so, he has no intention of deciding the case according to 'equity', like an '*amiable compositeur*'. On the contrary, he will try to disentangle the *rules of positive law,* common to civilized nations, such as are formulated in their statutes or are generally recognized in practice. With regard to each rule of law to be applied, he will show first its character as a rule of positive law, and then its generality. This solution, moreover, is the one

advocated for such contracts by the following recognized authorities: McNair, *loc. cit.,* and Jessup, *Transnational Law* (Yale, 1956).

Such a solution seems particularly suitable for giving the guarantees of protection which are indispensable for foreign companies, since these companies undergo very considerable risks in bringing financial and technical aid to countries in the process of development. It is in the interest of both parties to such agreements that any disputes between them should be settled according to the general principles universally recognized and should not be subject to the particular rules of national laws, which are very often, unsuitable for solving problems concerning the rights of the State where the contract is being carried out, and which are always subject to changes by this State and are often unknown or not fully known to one of the contracting parties.

Finally, these being contracts *sui generis* which cannot be classified among the contracts specially regulated by the codes, only the general rules concerning performance or lack of performance of a contract can usefully be applied. This is one of the most unified areas of law, where the differences are of secondary importance.

C. The Merits

1. The validity of the contract of June 16, 1958, is not in dispute. The dispute between the parties concerns solely the interpretation and performance of this contract.
The arbitrator is satisfied that the plaintiff, Sapphire International, fulfilled its obligations under the contract regarding the prospecting works at least until February 1960. A preliminary field reconnaissance made by an English company, followed in January 1959 by a radio-gravimetric survey entrusted to a Canadian company, and then a general geological survey by the French Petroleum Institute took place well before the expiry of the time-limit of six months from the effective date which was laid down by Article 16 of the agreement. In January 1960, the team of technicians whom it had been decided to send at the meeting of the Board of Directors of IRCAN on the previous November 24, were on the site. Despite unfavourable climatic conditions, the gravimetric programme had been carried out on time and the plaintiffs were in the middle of organizing the seismic research and the preliminary arrangements for drilling.

   In addition, in December 1958, Sapphire International had opened an administrative office in Teheran.

2. According to Article 10 of the agreement, during the period of prospecting Sapphire were to be responsible, through the agency of IRCAN, for ‘the full exclusive and effective management and control’ of operations. However, this clause is subject to Article 12, which binds Sapphire in particular:
(*a*) To prepare the plan of operations in consultation with NIOC;

   (b) To submit to NIOC detailed reports on the progress of the work.

   NIOC claimed that these clauses should be interpreted so that Sapphire were bound to obtain their

consent for every operation, and that they would be free to grant or refuse their consent. Failing such consent, NIOC would be entitled to refuse to take into consideration the expenses incurred.

This allegation is clearly contrary to the letter and the spirit of the above-mentioned clauses.

Article 10, paragraph 5, of the agreement lays down the principle that it is Sapphire, acting through IRCAN, who is responsible for the 'effective, complete and absolute' organization and control of the prospecting operations. The reference to Article 12 contained in Article 10 cannot reasonably be understood to deprive Article 10, paragraph 5, of its substance, which would have been the case if every operation had to be preceded by NIOC's consent, as the latter submitted. Furthermore, the word 'consultation' could not by itself and independent of its context authorize such a conclusion: all it implied was a duty to inform and an obligation to seek the views of the partner, but not an obligation to obtain his consent.

The defendant's interpretation is also contrary to the general character of the contract: since Sapphire were responsible for all the prospecting operations at their own expense and risk, it naturally follows that they should have exclusive control in the same way that they had complete responsibility. The reference to Article 12 cannot then have the effect of depriving Sapphire of the complete and effective management of the prospecting work, which they are recognized as having in the clearest possible way by Article 10 and which is perfectly natural as a result of the exclusive responsibility which they have undertaken.

The only obligation falling upon Sapphire under Article 12, paragraph 1 (*b*), was, therefore, to inform NIOC of their activity and to see what their views were, without however being bound by them.

3. The following recital of the facts shows that the plaintiff fulfilled this obligation.
By the letter of November 10, 1958, they told NIOC about the start of their work. The preliminary surveys of the site entrusted to Hunting Technical Services Limited had been undertaken after consultation with NIOC and to a certain extent with their assistance. Again, in November 1958, consultation took place concerning the gravimetric research. By letter of November 22, 1958, Mr. Duxbury gave NIOC a detailed account of the state of the work and projects of the plaintiff. On December 24, 1958, Mr. Rafii, the plaintiff's field manager, again made a report on the operations in progress. He told them of the impending return to Teheran of Mr. Johnson, who would be available to go through the technical programme with NIOC. The defendant had been immediately told of the departure of the gravimetric expedition for Bandar Abbas on January 6, 1959. On February 8 and 14, 1959, the plaintiff informed NIOC of the arrival of sone geologists who were to contact the technical services of the defendant : these technicians consulted NIOC before leaving for the field. On February 14, at a meeting of the Board of Directors of IRCAN, Mr. Duxbury presented a report on all operations started or planned. On February 25, Sapphire International submitted their research programme to NIOC. On March 10, they sent the report of Hunting Technical Services Limited. On March 19, a detailed report was again sent and it was pointed out that the plaintiff would appreciate any suggestions that NIOC might make. A new report was again sent on March 31. On May 12, two reports on the expenses audited by an accountant, were sent to NIOC.

It cannot therefore be seriously disputed that, since the beginning of operations and before the

formation and setting up of IRCAN, the plaintiff had clearly fulfilled its obligation to consult NIOC, who were regularly and scrupulously kept up to date about any operations planned or already underway, and who had every opportunity for forming their views.

But, from the end of 1958, NIOC started claiming, first impliedly in a letter of December 31 and then expressly in a letter of March 5, 1959, that their co-operation and in particular the reduction of the letter of credit depended on their prior consent to every operation. They pointed out that any work which had not had this consent would not be taken into consideration. This claim was clearly contrary to the spirit and the letter of the agreement.

So far as concerns the complaint of not having consulted NIOC, particularly regarding the work entrusted to Hunting Technical Services Corporation, the gravimetric exploration and the geological survey by the French Petroleum Institute, a complaint which was contained amongst others in the letter of March 5, 1959, there is no doubt that it is contrary to the facts.

4. The letter of March 5 also reproaches Sapphire International for not having submitted their plan of operations to the Board of Directors of IRCAN. These complaints are to be taken up again and amplified by the NIOC representatives on the Board of Directors of IRCAN on May 12, 1959.
According to Article 5 of the agreement, Sapphire acts through the agency of IRCAN. It seems from this clause that the plans should have been drawn up by IRCAN and first of all approved by the Board of Directors of this Company, on which Sapphire International and NIOC were equally represented. Undoubtedly Article 11 of the agreement allows Sapphire to conclude contracts with sub-contractors directly, and by virtue of Article 30 of the agreement they could incur expenses for the prospecting work directly without going through IRCAN. But this is dealing with performance. According to the contract, decisions of principle, particularly those concerning plans, should be taken through the agency of IRCAN, and this meant their adoption by the Board of Directors of that company.

   However, the complaints contained in the letter of March 5, 1959, are equally without foundation. IRCAN was not formed until February 19, 1959, and there is no evidence to suggest that the delay in forming this company was due to the plaintiff. The prospecting campaign for 1958-59 had been prepared and started well before the formation of IRCAN. All the same, at the meeting of the Board of Directors of IRCAN of February 14, 1959, before the registration of the company, the members of the Board agreed on what reports to submit to the Board, if one can judge from the minutes of the meeting.

5. These unjustified complaints, together with the excessive allegations and very premature reproaches about the management of IRCAN contained in the letter of March 5, 1959, as well as the extremely disagreeable tone of this letter and the threat to withhold recognition of the expenses, are incompatible with a spirit of ‘good will’, by which the parties were supposed to be actuated according to their agreement.
While the plaintiff had all along faithfully carried out its obligations, the defendant made baseless complaints and appeared to be committed to an entirely negative attitude.

   Therefore the defendant is undeniably to blame for the crisis in the relations between the parties

from that time on, a crisis which could not be averted despite the attempts made by Mr. Spiegelmann in Teheran at the beginning of April 1959. This crisis reached its culmination when on June 20, 1959, NIOC wrote refusing to reduce the amount of the letter of guarantee. Undoubtedly one of their reasons for doing this, namely the lack of detail in the statements of expense, was relevant. But, when they were invited by Mr. Rafii to clarify their requests on this point, NIOC never replied.

6. It must, however, be stated that at this period neither party used the complaints formulated by each of them as a pretext for rescinding the contract. NIOC were content with a negative attitude. The plaintiff, on the other hand, continued to carry out its prospecting programme and insisted on keeping NIOC informed of its operations.
The facts recited above are not therefore directly relevant to the question at issue. They must, however, be set out and qualified since they are significant when it comes to speaking about the effect of the following facts.

7. After Sapphire International's appeal to the Shah and Mr. Entezam in July 1959, an effort was made to patch things up, and it seemed to succeed. At the unofficial meeting of the Board of Directors of IRCAN on November 24, 1959, an agreement was reached which provided: (*a*) that Sapphire International should submit to the President of the Board of Directors of IRCAN all the details of the accounts already presented; (*b*) that within 60 days there should be another meeting of the Board of Directors of IRCAN at which Mr. Spiegelmann should submit the programme of future operations and an estimated budget of expenses; (*c*) that Sapphire International should immediately send technicians into the field to start an analysis of the terrain. It was stated that a report on the operations already undertaken had been submitted for the approval of the Board of Directors of IRCAN and for examination by NIOC. The radio-gravimetric report and that of the French Petroleum Institute had been forwarded to NIOC.

By the letter of November 24, 1959, Sapphire International informed IRCAN that the detailed accounts were available for the Directors of IRCAN at the office of the company. NIOC had them examined by one of their accountants, Mr. Shahsavary.

Mr. Rafii informed NIOC by a letter of January 27, 1960, that a team of technicians, who had arrived in Teheran on January 16, had arrived in the field on January 20, but NIOC made it known by their letter of February 4, 1960, that, since they had not been consulted on the drawing up of the programme of operations, they refused to take into consideration the expenses thus incurred, as those ‘of the previous operations which have been made without consultation with the NIOC’. Although Sapphire International in a letter of the same day referred to the agreement of November 24, in particular submitting that the task of the technicians was to prepare a drilling programme which should be submitted to NIOC once it had been drawn up, the defendant continued in its attitude. In addition, they waited until the following April 16 before replying to the letter of February 4. Meanwhile, nothing had come of a personal intervention in Teheran undertaken by Mr. Spiegelmann.

This behaviour of the defendant is in flagrant breach of the contract between the parties as well as of the agreement made on November 24, 1959. It was just as ill-considered for NIOC to maintain that they had not been consulted on the despatch of the technicians, since it was precisely because

of the agreement of November 24 that Sapphire International were bound to send technicians into the prospecting area in order to collect all the information needed for continuing operations. It is in fact true, as Sapphire International maintained in their letters of December 2, 1959, and January 27, 1960, that the despatch of this team amounted to performance of the agreement, and the plaintiff informed NIOC of it. Thus, far from having not been consulted on this operation, NIOC had in fact formally agreed to it and might even be said to have required it.

NIOC's wilful refusal to take into consideration the expenses relating to this operation is incompatible with the clear obligations which they had undertaken.

Similarly, they were acting contrary to the letter and spirit of the contract and of the agreement of November 24, 1959, by their repeated refusal to take into consideration previous expenses, on the ground, which has already been refuted above, that they had not been consulted. The expenses undertaken by the plaintiff were quite considerable. NIOC had had ample time to check the detailed accounts. They were bound under the contract to reduce the letter of guarantee within the agreed time-limit. It would be conceivable for them to have presented their observations or to have asked for an explanation of some of the figures which had been worked out. However, the arbitrator cannot accept their rejection of these accounts on the sole ground of an alleged absence of consultation, a ground which is so patently untrue. In the same way they were deliberately breaking their obligation, which was long over-due, to reduce the letter of guarantee, and they did so despite their undertakings and despite the repeated requests of their partner.

The only part of the agreement of November 24, 1959, which had not then been carried out is the meeting within 60 days of the Board of Directors of IRCAN, at which the plans and the budgets relating to the prospecting and drilling should have been presented. But NIOC did not rely on this delay in any of its correspondence. Besides, it was the duty of the President of this Board, who was a representative of NIOC, to call the meeting. Finally, it seems highly likely that the plans could only be put into operation on the basis of the survey which the team of technicians were carrying out in the field.

It is equally convenient to mention the time which NIOC took to reply to the last letter of their partner: it was not until April 16 that they answered Sapphire International's letter, which had been sent to them on the same day that the latter had received NIOC'S letter of February 4. Such negligence was not called for in view of the rapid and important decisions which the plaintiff had to take.

Thus what had already happened in the spring of 1959 was happening again: while Sapphire International faithfully carried out its obligations, the defendant deliberately broke its own, by hiding behind reasons which it must have known were without validity, and was once again taking up a wholly negative attitude and failing to perform duties which were clearly defined in the agreement of the parties. Such an attitude is a further breach of the obligations undertaken by NIOC, since the parties had expressly agreed to carry out their contract according to the rules of good faith and in a spirit of good will.

The arbitrator therefore finds that it has been duly established that the defendant deliberately refused to carry out certain of its obligations and that this failure is a breach of contract.

Moreover, it is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule *pacta sunt servanda*

is the basis of every contractual relationship. Moreover, it is contained in the laws of both parties to the dispute, in Article 219 of the Iranian Civil Code as well as in Canadian law.

8. It remains to examine whether, as is submitted by the plaintiff, this breach of certain of its obligations by NIOC resulted in the plaintiff being released from its own obligations as well as giving rise to damages, as is claimed by Sapphire International.
There is a general rule of private law to be found in positive systems of law, which says that a failure by one party to a synallagmatic contract to perform its obligations in breach of contract releases the other party from its obligations and gives rise to a right to pecuniary compensation in the form of damages. Although the methods of applying this principle differ, particularly with regard to judicial techniques and the formalities required for the implementing of this right, this rule is a general rule, and constitutes a general principle of law recognized by civilized nations.

It is a rule to be found in Continental law. It is contained in Article 1184 of the French Civil Code, according to which 'in every synallagmatic contract there is an implied term releasing one party from the contract in the event of the other fading to satisfy his obligations' (translation). In such a case the partner has the choice 'of compelling the other (party) to perform the agreement when this is possible, or of demanding release from the contract with damages' (translation). According to the cases, which are supported by doctrine, it is the judge's task to consider whether in all the circumstances the failure to perform is sufficiently serious for him to allow the other party to be released. A deliberate fadure to perform, made with full knowledge of the facts, is sufficient justification for release even if no damage can be shown, and the debtor in default cannot submit that the breach could quite easily have been remedied. (*Cf.* Esmein, in *Le Traité pratique de droit civil français,* by Planiol and Ripert, vol. VI, *Obligations,* 2nd ed. (Paris, 1952), Nos. 430, 431, and the case law there cited.) This rule is the same in German law. By virtue of paragraph 326 of the German Civil Code, the failure by one party to perform its obligations allows the other party to stop performance and to demand full damages (*cf.* Lehmann, in *Lehrbuch des Burgerlichen Rechts,* of Enneccerus, Kip and Wolff, vol. 2, 14th ed. (Tübingen, 1954), pp. 213 *et seq.*). It is unnecessary to go on giving examples, since nearly all Continental legislation in this field has been inspired by French or German law.

As far as Anglo-Saxon law is concerned, it is admitted that there is a breach of contract whenever it is impossible to put forward any valid excuse for the failure to perform one or several contractual obligations. According to the Common Law, the breach of contract by one of the parties releases the other from the performance of its obligations provided the respective obligations of the parties constitute 'mutually conditional promises'. Moreover, the synallagmatic character of the contract is presumed in bilateral contracts. An anticipatory breach of contract is sufficient if the attitude of one partner gives the other sufficient reason for considering that the first will not carry out his obligations: the second party is then released from performance. A party who is released from performance as a result of the breach of contract by his partner is entitled under the common law to damages, whose effect is to put the injured party in the same position that he would have been in if the contract had been carried out in the manner provided for by the parties at the time of its conclusion (*cf.* Stephen's *Commentaries on the Laws of England,* vol. III by Cheshire, Allen & Fifoot, translated by Mitcheli (Paris, 1931), pp. 208 *et seq.*; Williston, *Contracts*, revised ed., section 1288, and 3rd ed., section 699; *Restatement of the Law of Contracts,* published by the American Law

Institute, sections 314, 315; Arminjon, Nolde and Wolff, *Traité de droit compare,* vol. III (Paris, 1951), Nos. 827, 828, 830).

These principles are no more than the expression of a logical requirement, which explains why they are generally recognized. However different the judicial techniques employed may be, however divergent may be the theoretical explanations given by doctrine, one point is certain : this principle is explained by the interdependence of the obligations contained in the same contract. It would be illogical and contrary to the most elementary notions of equity if one party could obtain satisfaction while the other suffered a loss. Whether the notion of the reciprocal effect of obligations, of the equal value of obligations, or of the implied condition is relied on, it is impossible to escape the essential and elementary conclusion that one of the parties must not benefit from the performance of the contract by his partner while evading his own obligations. The disregarding of the contractual law by one of the parties releases the other from its undertakings *(cf.* Josserand, *Cours de droit civil positif français,* 2nd ed., vol. II (Paris, 1933), p. 194).

It is necessary therefore to regard the rules set out above as rules of positive law generally recognized by civilized nations. They are the inescapable and logical consequence of the principle of good faith, to which the parties intended to submit the performance of their agreement.

In addition, these rules are well known both in Canadian law, which follows the Common Law, and in Iranian law. Though the Iranian Civil Code does not appear to contain this principle in a general form like French or German law, it does however expressly provide for its application to the main synallagmatic contracts, such as sale, hire, and farming tenancies (Articles 402 *et seq.,* 492 and 534 of the Iranian Civil Code). Such a principle can therefore be regarded as common to the national laws of both parties to the contract.

The principle set out above cannot be cast aside by reason of the fact that the present contract contains elements which have their origin in administrative law, since it concerns a territorial concession. Rules of public law, which might possibly differ from civil law, could only be taken into consideration if the Iranian State had relied upon its sovereign rights and had taken steps of a public law nature likely to endanger the performance of the contract. This is not the case. All the same, the respect for rights acquired under concessions is only one aspect of the respect for acquired rights, which is undoubtedly one of the general principles of law recognized by international tribunals *(cf.* McNair, *loc. cit.,* p. 16, and the several decisions of international tribunals cited by him).

9. The application of the above rules to the present case calls for the following considerations :
Without doubt NIOC had carried out one of its principal obligations in allowing Sapphire International access to the concession area. But this was not NIOC's only obligation; under the contract they were bound to collaborate closely with their partner and to give Sapphire the benefit of their views, which could be useful in view of their experience and the documentary information at the disposal of this Iranian State organ concerning the exploration of oil resources in the area of the Persian Gulf ; they were also bound to start verifying the statements of expense and consequently to reduce the guarantees which had been given within the agreed time-limits.

These obligations were not without importance for Sapphire International. The material support of NIOC was likely to facilitate their work and to obviate the expense of blind experimentation.

The reduction of the letter of credit allowed the Canadian Company to extricate resources worth a considerable amount.

In addition, and this is decisive, where a foreign company agreed to take considerable risks it was a necessary condition of their activity that they should receive the proper and close collaboration of the State organ, NIOC. At a time when they were about to undertake extremely expensive drilling operations, it would be unreasonable to require them to take on the risk of considerable investments when the attitude of their partner afforded them reasonable grounds for thinking that the latter would continue to neglect its obligations.

The dispute between the parties in the spring of 1959 had already given the plaintiff serious and legitimate doubts about NIOC's intention to perform the contract. These doubts can be seen in the letters sent to the Shah and Mr. Entezam. Similarly, the agreement of November 24, 1959, was especially important, since it appeared to have regulated everything and to have cast aside all obstacles to the necessary co-operation of the parties. Therefore, particularly at the beginning of 1960, the start of the drilling operations necessarily depended upon the loyal performance by NIOC of their contractual obligations and, in particular, the steps agreed upon on November 24, 1959. It is reasonable to consider that the effect which NIOC gave to the agreement of November 24, 1959, was a decisive test for Sapphire International of NIOC's real intention to carry out the agreement. However, far from carrying out the measures which had been agreed in a loyal manner and with good will, NIOC soon took up once more the attitude which in the spring of 1959 had led to the crisis which the agreement of November 24, 1959, was intended to resolve. By their clearly unjustified grievances and refusal to reduce the guarantee they once more showed, though much more clearly this time, their intention to refuse to collaborate loyally. This behaviour was likely to convince the plaintiff that NIOC intended to avoid the contract by continuous and systematic obstruction, but without wishing to be the first to denounce it. The defendant's behaviour was thus likely to destroy any confidence their partner had in NIOC's actual intention to carry out the contract. In these circumstances, NIOC could not reasonably or in good faith require that Sapphire International should still be bound to proceed to prospecting or to undertake the costly operations of drilling in such precarious conditions.

For these reasons, the arbitrator is of the opinion that the deliberate failure by the defendant to carry out its obligations in breach of contract, having particular regard to the circumstances in which this refusal to perform was made, justifies the plaintiff in not performing the contract. Since the plaintiff was entitled to consider that its partner's attitude meant that it would continue to refuse to perform, the plaintiff was released from further performance.

10. Undoubtedly, while stopping the prospecting operations Sapphire International failed to inform NIOC expressly that they intended to repudiate the contract. Now there are certain systems of law which require such a declaration to be made immediately, or even lay down that a period of grace must first be fixed (Paragraph 326 of the German Civil Code, Articles 107 to 109 of the Swiss Federal Code of Obligations). But these rules are intended solely to prevent the creditor from putting off his decision and speculating to the detriment of the debtor. Both statute and case law limit the application of them in this sense. However, in the present case, apart from the fact that the plaintiff had several times requested NIOC to release the guarantee, requests which amounted to formal notices to perform or '*mises en demeure*', and apart from the fact that the contract contained

provisions for this release, NIOC's continued refusal to carry out the contract made any notice to perform superfluous. The failure by the plaintiff to make formal declaration of termination cannot have caused the defendant any damage, nor even have caused it any doubt. There is therefore no need to examine whether such rules, which are peculiar to certain systems of law only—French law ignores them, as do the Anglo-Saxon systems—should in principle be applied. For the defendant to invoke them would be incompatible with the principles of good faith and, for this reason alone, [they] could not possibly be taken into consideration.

11. The termination of a contract as a result of breaches by the defendant means that the plaintiff has a right to damages, in accordance with the rules enunciated in paragraph 8 above.
According to the generally held view, the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion. They should be the natural consequence of the breach (Articles 1149 and 1150 of the French Civil Code : Esmein-Radouant-Gabolde, *op cit.,* vol. VII, No. 855; Lehmann, *loc cit.* para. 14, VI, p. 59; for Anglo-Saxon law see the references in paragraph 8 above). This rule is simply a direct deduction from the principle *pacta sunt servanda,* since its only effect is to substitute a pecuniary obligation for the obligation which was promised but not performed. It is therefore natural that the creditor should thereby be given full compensation. This compensation includes the loss suffered *(damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost *(lucrum cessans),* for example the net profit which the contract would have produced. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals *(cf.* Hauriou, 'Les dommages indirects dans les arbitrages internationaux', in *Revue générale de droit international public,* vol. 31 (1925), pp. 203 *et seq.,* in particular pp. 211 *et seq.,* and the various precedents cited in this study).

The claims of the plaintiff will be examined on the basis of this principle.

12. The first claim of the plaintiff is to order NIOC to refund to Sapphire International the sum of $U.S.350,000, the amount of the letter of credit cashed by NIOC on January 24, 1961.
Having been released from their obligations as a result of the failure of their partner to carry out the contract in breach of it Sapphire International were also freed from the obligation imposed by Article 16 of the agreement to start drilling within two years of the effective date. Therefore NIOC cannot claim payment of the penalty laid down by Article 43, para. 2, of the contract in the event of this obligation not being carried out. They must refund this sum with interest at the usual rate of 5 per cent. per annum from the date of being enriched, that is from January 24, 1961.

13. The claim under heading 2 (*a*) is for the payment of compensation for 'the expenses incurred' in the conclusion of the agreement of June 16, 1958, amounting to $U.S.165,175.

This claim cannot be allowed by way of positive damages *(Erfüllungsinteresse),* as is claimed by the plaintiff. Their claim should put Sapphire International in the same pecuniary position as they would have been in if the contract had been performed. But the repayment of the expenses incurred in concluding the contract would tend to put them in the position they would be in if the contract had never been concluded (negative damages). As opposed to the expenses incurred in

performing the contract, the expenses of concluding it do not result from the contract, which they have preceded. This is well illustrated by the fact that if at the very last moment the contract had not been concluded or had not been ratified by the Iranian political authorities, the plaintiff would not have been able to put forward any claim under this head. Undoubtedly, the plaintiff was justified in hoping to recover the expenses of making the contract out of the profit which they were expecting. But this is an element included in the compensation for loss of profit.

Adding positive and negative damages together is a contradiction, and cannot be allowed.

14. The items 2 (*b*), (*c*) and (*d*) of the claim are for payment of the following compensation :

(*b*) The registration fees of the Canadian Companies in Teheran amounting to $U.S.3,500.

(*c*) The share in the capital of IRCAN subscribed by the plaintiff, amounting to $U.S.5,000.

(d) The cost of the prospecting work carried out by Sapphire International, amounting to $U.S.1,018,932.

These are expenses incurred in performing the contract, in other words the loss sustained by the plaintiff in carrying out the contract. They are entitled to them in principle. They cannot, however, claim them beyond the end of June 1960, the date by which they had clearly given up performing their obligations.

The arbitrator is quite satisfied from the statement of expenses verified by the Chartered Accountants Abrams, Caplan, Stekel and Zweig of Toronto, and from the certificate signed by these four experts, that up to the end of June 1960 the total amount of these expenses reached $U.S.651,474.82, including the cost of registering the companies in Teheran. A further sum of $U.S.5,000 should be added for the share in the capital of IRCAN, whose return to the plaintiff has not been established, whatever this amount should have been. A deduction of $U.S.5,600 must be made from this total for the sale of installations. The total sum therefore which should be awarded to the plaintiff under this head is $U.S.650,874.

15. Under item 2 (*e*), the plaintiff claims the payment of $U.S.5,000,000 for 'loss of profit'. Once the principle on which such an award is based is recognized in law, the determination of the amount of compensation becomes a question of fact to be evaluated by the arbitrator.

(*a*) Since the question concerns the concession of an area which has not yet been prospected and where therefore the presence of oil-bearing beds in commercially workable quantities was and still is today uncertain, the existence of damage is not without doubt. No one today can affirm that the operation would have been profitable, and no one can deny it. But if the existence of damage is uncertain, it is nevertheless clear that the plaintiff had an opportunity to discover oil, an opportunity which both parties regarded as very favourable. Does the loss of this opportunity give the right to compensation?

It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage,

it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.

Thus the French courts have awarded damages for 'loss of opportunity' when the victim had lost the opportunity of making a profit as a result of what someone else had done. Although in such cases the existence of damage is uncertain, case law has looked at the position at the time when the opportunity was lost and has accepted that this opportunity itself has a value whose loss gives rise to compensation. (*Cf.* Esmein, *loc. cit.,* vol. VI, No. 452, 2; Savatier, *Traité de la responsabilité civile en droit français,* vol. II, 2nd ed. (Paris, 1951), No. 461; Mazeaud and Tunc, *Traité théorique et pratique de la responsabilité civile,* 5th ed. (Paris, 1957), No. 219; and the cases cited by these authors. Similarly, an English decision: *Chaplin* v. *Hicks* [1911] 2 K.B. 786.) A particularly rich source of information on this subject is the American case law, in which several decisions deal with the determination of compensation for loss of land or unprospected mining or oil concessions. In such cases, there is no need to prove the success of the search ; it is sufficient to establish a reasonable probability of success. This fact alone gives the land or the concession a market value, which the courts estimate by considering the following factors: transactions relating to neighbouring territories, the appraisal of experts, and especially geologists, concerning the probability of profit, and the comparison with neighbouring areas. *(Cf. Montana Railway* v. *Warren,* U.S. Supreme Court, 1890; *Philipps* v. *United States,* 243 F.2d. 1, 9th Circuit, 1957; *Eagle Lake Improvement* v. *United States,* 141 F.2d 562, 5th Circuit, 1944).

(*b*) In the present case the plaintiff has put in evidence an expert report by G. Meyer, a geologist from Dallas in the state of Texas, who is a specialist in the prospecting and appraisal of oil-bearing concessions. Mr. Meyer was also heard by the arbitrator.

It emerges from his report, which is summarized in the part of the judgment headed 'Facts', and from his verbal explanations that it is highly likely that the geological characteristics common to every oil-bearing territory are to be found in the territory granted to Sapphire under the concession, which is situated in a region very rich in oil. The geological conditions of this territory make it possible to affirm that there is a very strong chance, but not a certainty, that deposits of commercially workable oil exist in the concession area. The expert supported his evidence by reference to similar conclusions formulated by other geologists and other oil companies (in particular: Stahmer, in *World Petroleum,* June 23, 1952 ; Fohs, in *Bulletin of American Association of Petroleum Geologists,* 31 (1947), II, p. 137; an unpublished report of NIOC entitled 'Geology of districts', III and IV, documents which were put in evidence before the arbitrator). Finally, the expert mentioned that the surveys which Sapphire International had started were likely to confirm these conclusions.

Undoubtedly, as the expert Meyer has also stressed, such an appraisal is not free from uncertainty. But it is difficult to see what other proof could reasonably have been required of the plaintiff.

Another factor to be considered is that NIOC, who certainly have an extensive documentation available and possess great experience, would not have made a concession of an area where they did not think that there was a serious chance of discovering oil. It is reasonable to suppose that they would not have required a minimum investment of $U.S.8,000,000 from a company if they did not think that these investments had a serious possibility of being turned to a profit, of which they and the Iranian Government would take the largest share.

Moreover, in the arbitrator's judgement the plaintiff has satisfied the legal requirement of proof by

showing a sufficient probability of the success of the prospecting undertaken, if they had been able to carry it through to a finish. The plaintiff can therefore claim compensation for 'loss of profit'.

(*c*) So far as the amount of this compensation is concerned, it cannot be established exactly. It is the arbitrator's task to decide it *ex aequo et bono* by considering all the circumstances.

While he refuses to give anything more than a rough estimate, which shows the simple order of magnitude, the expert Meyer considers that the maximum workable reserve would be 25,000,000 cubic metres, which means that, if everything goes as well as possible for the plaintiff, they would receive a net income of $U.S.46,000,000. On the other hand, in case of failure, the minimum loss Sapphire would suffer would be the investment of $U.S.8,ooo,ooo which they had undertaken in the contract, and to this should be added certain expenses of the company in addition to the investments provided for in the contract.

All the same, however useful they may be, the preceding appraisals do not take into account all the risks inherent in an operation in a desolate region, to which it is difficult to gain access and which has an unfavourable climate, nor the troubles—such as wars, disturbances, economic crises or slumps in prices—which could affect the operation during the several decades—25 years at least under the contract—during which the agreement was to last. Another plausible consideration is that, now that they are released from the present contract, the plaintiff company can employ its resources, its organization and its strength in other profitable activities which it could probably not have kept on hand at the same time as the prospecting and exploration of the concession areas, which required investments and important personal obligations.

Finally, the judge is given a wide discretion when he has to decide *ex aequo et bono* the compensation for damage whose extent and existence are not certain even though a sufficient probability has been established, and when his assessment rests upon conjecture.

Therefore, in the arbitrator's judgement it is reasonable and equitable to fix the amount of compensation for loss of profit at $U.S.2,000,000.

16. The total amount of compensation for the expenses incurred and for the loss of profit which the plaintiff claims under heading 2 of their claims should therefore be fixed, according to the assessment of the arbitrator, at U.S. Dollars 2,650,874.
This compensation has fallen due and immediate payment of it should be made by the defendant. It carries interest at the usual rate of 5 per cent. per annum from the date of the first step taken in the arbitration procedure, that is from September 28, 1960, the date when NIOC were asked to choose their arbitrator.

D. Costs and Expenses

1. Under Article 41, paragraph 10, of the contract, the parties left to 'the entire discretion of the... arbitrator' the taxation of the costs and expenses of the arbitration procedure.

2. Since the defendant has lost his case, and the plaintiff's claim has been accepted in principle, though reduced in amount, and since the exaggeration of the plaintiff's claims has not had any bearing upon the scope of the hearing of the case, the arbitrator has decided that the costs and expenses of the arbitral procedure should be entirely borne by the defendant.

3. The arbitrator has fixed the costs of the arbitration at 40,000 Swiss Francs, which includes the arbitrator's out-of-pocket expenses and the fees of the arbitrator and his secretary—a lawyer whom the arbitrator appointed to assist him.

4. Regarding the expenses, it is necessary to bear in mind the importance and complexity of the case in fixing the fees of the advocates, the travelling expenses of the plaintiff, as well as the high costs which the plaintiff incurred in producing the necessary evidence by which to satisfy the duty to collaborate in the procedure to which Article 41, paragraph 8, of the agreement binds the parties.

5. In view of Article 41, paragraph 10, above, and Article 513, paragraph 3, of the Code of Civil Procedure of Vaud, the arbitrator has by virtue of his discretionary power taxed the plaintiff's costs at 280,000 Swiss francs. To this figure should be added 40,000 Swiss francs for the cost of the arbitration, for which the plaintiff has made an advance payment.

E. Notification of the Arbitral Award

1. The present arbitral award will be communicated to the parties in accordance with the binding rule of Article 515 of the Code of Civil Procedure of Vaud, by deposit of the judgment with the Clerk of the Court of the forum, in the present case the Civil Court of the District of Lausanne. In accordance with Article 515, paragraph 2, of the Code of Civil Procedure of Vaud, the Clerk of the Court will inform the parties of this deposit.

2. Furthermore, in accordance with Article 13 of his Order of June 13, 1961, the arbitrator will send a copy of the award directly and simultaneously to each party. According to the case law (Cantonal Court of Vaud, *Journal de Tribunaux,* 1949, III, p. 2), this communication is of a private nature, and only the deposit with the Clerk of the Court and notice of the deposit in accordance with Article 515 of the Code of Civil Procedure of Vaud constitute official notification.

3. For these reasons, the sole arbitrator makes the following arbitral award:

   I. The National Iranian Oil Company in Teheran should immediately pay Sapphire International Petroleums Limited of Toronto the sum of *three hundred and fifty thousand United States Dollars* ($550,000), the said sum carrying interest at the rate of five per cent. per annum from January 24, 1961.

II. The National Iranian Oil Company should immediately pay Sapphire International Petroleums Limited of Toronto the sum of *two million six hundred and fifty thousand eight hundred and seventy four United States Dollars* ($ *2,650,874*) as damages for failure to perform the agreement of June 16, 1958, this sum carrying interest at the rate of five per cent. per annum from September 28, 1960.

III. The costs and fees of the arbitration have been fixed at 40,000 Swiss francs.

IV. The National Iranian Oil Company of Teheran is sentenced to pay Sapphire International Petroleum Limited of Toronto: (1) the costs of the arbitration amounting to forty thousand Swiss francs (Fr.S.40,000); (2) the costs and expenses of the plaintiff in the arbitration procedure, which have been fixed at two hundred and eighty thousand Swiss francs (Fr.S.280,000).

V. The present arbitration award shall be deposited within ten days of its date with the Clerk of the Civil Court of Lausanne and shall be communicated directly and simultaneously in one copy by registered post to each of the parties.

VI. The following documents shall be attached to the original of the present arbitration award hereby deposited with the Clerk of the Civil Court of the District of Lausanne:

(*a*) the agreement made between the parties, dated June 16, 1958, which contains the arbitration clause, including a French translation of Articles 39 and 41;

(*b*) the Order of the President of the Federal Court of January 12, 1961, including a French translation of the enactment provisions of this Order;

(*c*) the Order of the President of the Federal Court of March 17, 1961, including a French translation of the enactment provisions of this Order;

(*d*) the Order of the Arbitrator of June 13, 1961;

(*e*) the minutes of the hearings of October 18 and 19, 1962."